



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

Job Number: 208207595

Documents (100)

1. [C.A. Westel de Venez. v. American Tel. & Tel. Co., 1993 U.S. Dist. LEXIS 16857](#)

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:
Oct 01, 1991 to Dec 31, 2022

2. [Union Carbide Corp. v. Florida Power & Light Co., 1993 U.S. Dist. LEXIS 21203](#)

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:
Oct 01, 1991 to Dec 31, 2022

3. [Virtual Maintenance v. Prime Computer, 11 F.3d 660](#)

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:
Oct 01, 1991 to Dec 31, 2022

4. [Ashmore v. Northeast Petroleum Div., 843 F. Supp. 759](#)

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:
Oct 01, 1991 to Dec 31, 2022

5. [R.W. Int'l Corp. v. Welch Food, 13 F.3d 478](#)

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:
Oct 01, 1991 to Dec 31, 2022

6. [Stamatakis Indus. v. Beatrice Foods Co., 1994 U.S. Dist. LEXIS 550](#)

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:
Oct 01, 1991 to Dec 31, 2022

7. [Balaklaw v. Lovell, 14 F.3d 793](#)

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:
Oct 01, 1991 to Dec 31, 2022

8. [Davis v. Southern Bell Tel. & Tel. Co., 1994 U.S. Dist. LEXIS 13257](#)

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:
Oct 01, 1991 to Dec 31, 2022

9. [Appraisers Coalition v. Appraisal Inst., 845 F. Supp. 592](#)

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:
Oct 01, 1991 to Dec 31, 2022

10. [MCM Partners v. Boscarino, 1994 U.S. Dist. LEXIS 1824](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:



Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022
11. <u>Kabealo v. Huntington Nat'l Bank, 17 F.3d 822</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: Oct 01, 1991 to Dec 31, 2022
12. <u>TEC Cogeneration v. Florida Power & Light Co., 1994 U.S. Dist. LEXIS 6313</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: Oct 01, 1991 to Dec 31, 2022
13. <u>Crown Homes, Inc. v. Landes, 22 Cal. App. 4th 1273</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: Oct 01, 1991 to Dec 31, 2022
14. <u>Phoenix Elec. Co. v. Nat'l Elec. Contrs. Ass'n, 867 F. Supp. 925</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: Oct 01, 1991 to Dec 31, 2022
15. <u>Sessions Tank Liners v. Joor Mfg., 17 F.3d 295</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: Oct 01, 1991 to Dec 31, 2022

16. [New Orleans Pelicans Baseball, Inc. v. National Ass'n of Professional Baseball Leagues, Inc., 1994 U.S. Dist. LEXIS 21468](#)

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:
Oct 01, 1991 to Dec 31, 2022

17. [Centennial Sch. Dist. v. Independence Blue Cross, 1994 U.S. Dist. LEXIS 2098](#)

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:
Oct 01, 1991 to Dec 31, 2022

18. [Massachusetts Sch. of Law v. ABA, 846 F. Supp. 374](#)

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:
Oct 01, 1991 to Dec 31, 2022

19. [Sebastian Int'l, Inc. v. Longs Drug Stores Corp., 1994 U.S. Dist. LEXIS 6632](#)

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:
Oct 01, 1991 to Dec 31, 2022

20. [Advanced Health-Care Servs. v. Giles Memorial Hosp., 846 F. Supp. 488](#)

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:
Oct 01, 1991 to Dec 31, 2022



21. [Hudson Motors Partnership v. Crest Leasing Enters., 845 F. Supp. 969](#)

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:
Oct 01, 1991 to Dec 31, 2022

22. [Servicetrends v. Siemens Medical Sys., 870 F. Supp. 1042](#)

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:
Oct 01, 1991 to Dec 31, 2022

23. [Carlson & Erickson Builders v. Lampert Yards, 183 Wis. 2d 220](#)

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:
Oct 01, 1991 to Dec 31, 2022

24. [THK Am., Inc. v. NSK, Ltd., 157 F.R.D. 660](#)

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:
Oct 01, 1991 to Dec 31, 2022

25. [Segura v. Abbott Labs., 873 S.W.2d 399](#)

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:
Oct 01, 1991 to Dec 31, 2022

26. [Caribe Bmw v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745](#)

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:
Oct 01, 1991 to Dec 31, 2022

27. [Bell Atl. Business Sys. Servs. v. Hitachi Data Sys. Corp., 849 F. Supp. 702](#)

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:
Oct 01, 1991 to Dec 31, 2022

28. [Bieter Co. v. Blomquist, 848 F. Supp. 1446](#)

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:
Oct 01, 1991 to Dec 31, 2022

29. [Automotive Prods. PLC v. Tilton Eng'g, Inc., 855 F. Supp. 1101](#)

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:
Oct 01, 1991 to Dec 31, 2022

30. [Blackburn v. Sweeney, 850 F. Supp. 758](#)

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:
Oct 01, 1991 to Dec 31, 2022

31. [Mfrs. Life Ins. Co. v. Superior Court, 23 Cal. App. 4th 1629](#)

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:
Oct 01, 1991 to Dec 31, 2022

32. [In re Belmac Corp. Sec. Litig., 1994 U.S. Dist. LEXIS 21584](#)

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:
Oct 01, 1991 to Dec 31, 2022

33. [Schueller v. Norman, 1994 U.S. Dist. LEXIS 20969](#)

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:
Oct 01, 1991 to Dec 31, 2022

34. [Oki Distrib. v. Amana Refrigeration, Inc., 850 F. Supp. 637](#)

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:
Oct 01, 1991 to Dec 31, 2022

35. [American Agric. Movement v. Board of Trade, 848 F. Supp. 814](#)

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:
Oct 01, 1991 to Dec 31, 2022

36. [Ehredt Underground v. Commonwealth Edison Co., 848 F. Supp. 797](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Narrowed by



Cases

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

37. [Panache Broad. v. Richardson Elecs., 1994 U.S. Dist. LEXIS 4830](#)

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:
Oct 01, 1991 to Dec 31, 2022

38. [Thompson Everett, Inc. v. National Cable Advertising, L.P., 850 F. Supp. 470](#)

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:
Oct 01, 1991 to Dec 31, 2022

39. [State ex rel. Fisher v. Louis Trauth Dairy, 856 F. Supp. 1229](#)

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:
Oct 01, 1991 to Dec 31, 2022

40. [Seabury Management v. Professional Golfers' Ass'n of Am., 878 F. Supp. 771](#)

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:
Oct 01, 1991 to Dec 31, 2022

41. [Yeager's Fuel v. Pennsylvania Power & Light Co., 22 F.3d 1260](#)

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:
Oct 01, 1991 to Dec 31, 2022



42. [Breaux Bros. Farms v. Teche Sugar Co., 21 F.3d 83](#)

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:
Oct 01, 1991 to Dec 31, 2022

43. [Lee v. Life Ins. Co. of N. Am., 23 F.3d 14](#)

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:
Oct 01, 1991 to Dec 31, 2022

44. [Protectoseal Co. v. Barancik, 23 F.3d 1184](#)

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:
Oct 01, 1991 to Dec 31, 2022

45. [ACQUAIRE v. BEVERAGE, INC., 24 F.3d 401](#)

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:
Oct 01, 1991 to Dec 31, 2022

46. [Pastore v. Bell Tel. Co., 24 F.3d 508](#)

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:
Oct 01, 1991 to Dec 31, 2022

47. [DU-BRO FOODS INC. -against- ARON STREIT INC., et al., 1994 N.Y. Misc. LEXIS 762](#)

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:
Oct 01, 1991 to Dec 31, 2022

48. [Maui Trucking v. Operating Eng'r's Local Union No. 3, 37 F.3d 436](#)

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:
Oct 01, 1991 to Dec 31, 2022

49. [Hairston v. Pacific-10 Conference, 893 F. Supp. 1485](#)

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:
Oct 01, 1991 to Dec 31, 2022

50. [Petrocco v. Dover Gen. Hosp. & Med. Ctr., 273 N.J. Super. 501](#)

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:
Oct 01, 1991 to Dec 31, 2022

51. [In re Brand Name Prescription Drugs Antitrust Litig., 1994 U.S. Dist. LEXIS 7146](#)

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:
Oct 01, 1991 to Dec 31, 2022

52. [Massachusetts Sch. of Law v. American Bar Ass'n, 853 F. Supp. 843](#)

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:
Oct 01, 1991 to Dec 31, 2022

53. [Roth v. Rhodes, 25 Cal. App. 4th 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:
Oct 01, 1991 to Dec 31, 2022

54. [K.M.B. Warehouse Distrib. v. Walker Mfg. Co., 1994 U.S. Dist. LEXIS 7253](#)

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:
Oct 01, 1991 to Dec 31, 2022

55. [Nghiem v. NEC Elec., 25 F.3d 1437](#)

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:
Oct 01, 1991 to Dec 31, 2022

56. [Sullivan v. Tagliabue, 25 F.3d 43](#)

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:
Oct 01, 1991 to Dec 31, 2022

57. [Heisen v. Pacific Coast Bldg. Prods., 1994 U.S. App. LEXIS 14332](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Narrowed by



Cases

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

58. [Phoenix Bit & Tool v. Texaco, 879 S.W.2d 277](#)

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:
Oct 01, 1991 to Dec 31, 2022

59. [Advo, Inc. v. Philadelphia Newspapers, 854 F. Supp. 367](#)

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:
Oct 01, 1991 to Dec 31, 2022

60. [Breaux Bros. Farms, Inc. v. Teche Sugar Co., 1994 U.S. App. LEXIS 40949](#)

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:
Oct 01, 1991 to Dec 31, 2022

61. [Poindexter v. American Bd. of Surgery, 911 F. Supp. 1510](#)

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:
Oct 01, 1991 to Dec 31, 2022

62. [Bond v. Cedar Rapids Television Co., 518 N.W.2d 352](#)

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:
Oct 01, 1991 to Dec 31, 2022



63. [Syscomm Int'l Corp. v. Synoptics Communications, 856 F. Supp. 135](#)

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:
Oct 01, 1991 to Dec 31, 2022

64. [Tice v. Hoff, 1994 U.S. App. LEXIS 16407](#)

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:
Oct 01, 1991 to Dec 31, 2022

65. [Diskin v. Daily Racing Form, 1994 U.S. Dist. LEXIS 9129](#)

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:
Oct 01, 1991 to Dec 31, 2022

66. [Reiman v. Garcia, 1994 U.S. App. 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:
Oct 01, 1991 to Dec 31, 2022

67. [National Basketball Ass'n v. Williams, 857 F. Supp. 1069](#)

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:
Oct 01, 1991 to Dec 31, 2022

68. [Morgenstern v. Wilson, 29 F.3d 1291](#)

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:
Oct 01, 1991 to Dec 31, 2022

69. [USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800](#)

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:
Oct 01, 1991 to Dec 31, 2022

70. [Manufacturers Life Ins. Co. v. Superior Court, 32 Cal. App. 4th 821](#)

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:
Oct 01, 1991 to Dec 31, 2022

71. [Roy B. Taylor Sales v. Hollymatic Corp., 28 F.3d 1379](#)

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:
Oct 01, 1991 to Dec 31, 2022

72. [Staudinger v. Educational Comm'n for Foreign Medical Graduates, 1994 U.S. Dist. LEXIS 10580](#)

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:
Oct 01, 1991 to Dec 31, 2022

73. [Northlake Mktg. & Supply v. Glaverbel S.A., 861 F. Supp. 653](#)

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:
Oct 01, 1991 to Dec 31, 2022

74. [Valley Disposal v. Central Vt. Solid Waste Management Dist., 31 F.3d 89](#)

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:
Oct 01, 1991 to Dec 31, 2022

75. [United States v. Airline Tariff Publ'g Co., 1994 U.S. Dist. LEXIS 11904](#)

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:
Oct 01, 1991 to Dec 31, 2022

76. [Allen-Myland, Inc. v. IBM Corp., 33 F.3d 194](#)

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:
Oct 01, 1991 to Dec 31, 2022

77. [American Ass'n of Cruise Passengers v. Cunard Line, 31 F.3d 1184](#)

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:
Oct 01, 1991 to Dec 31, 2022

78. [New York v. Panex Indus., 860 F. Supp. 977](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Narrowed by



Cases

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

79. [Vinci v. Waste Management, 1994 U.S. Dist. LEXIS 12071](#)

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:
Oct 01, 1991 to Dec 31, 2022

80. [Leyba v. Renger, 874 F. Supp. 1229](#)

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:
Oct 01, 1991 to Dec 31, 2022

81. [Hammes v. AAMCO Transmissions, 33 F.3d 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:
Oct 01, 1991 to Dec 31, 2022

82. [County of Stanislaus v. Pacific Gas & Elec. Co., 1994 U.S. Dist. LEXIS 21032](#)

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:
Oct 01, 1991 to Dec 31, 2022

83. [Picker Int'l v. Leavitt, 865 F. Supp. 951](#)

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:
Oct 01, 1991 to Dec 31, 2022



84. [Willman v. Heartland Hosp. E., 34 F.3d 605](#)

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:
Oct 01, 1991 to Dec 31, 2022

85. [S-2 Yachts v. WMJB Marine, 1994 U.S. Dist. LEXIS 14725](#)

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:
Oct 01, 1991 to Dec 31, 2022

86. [Serfecz v. Jewel Food Stores, 1994 U.S. Dist. LEXIS 12239](#)

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:
Oct 01, 1991 to Dec 31, 2022

87. [G.E.E.N. Corp. v. Southeast Toyota Distrib., 1994 U.S. Dist. LEXIS 21553](#)

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:
Oct 01, 1991 to Dec 31, 2022

88. [TCA Bldg. Co. v. Northwestern Resources Co., 861 F. Supp. 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:
Oct 01, 1991 to Dec 31, 2022

89. [Aa All Star Enters., 173 B.R. 343](#)

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:
Oct 01, 1991 to Dec 31, 2022

90. [Armbruster Prods. v. Wilson, 1994 U.S. App. LEXIS 24796](#)

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:
Oct 01, 1991 to Dec 31, 2022

91. [Stelwagon Mfg. Co. v. Tarmac Roofing Sys., 862 F. Supp. 1361](#)

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:
Oct 01, 1991 to Dec 31, 2022

92. [Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 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:
Oct 01, 1991 to Dec 31, 2022

93. [Bob Nicholson Appliance v. Maytag Co., 883 F. Supp. 321](#)

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:
Oct 01, 1991 to Dec 31, 2022

94. [General Devices v. Bacon, 888 S.W.2d 497](#)

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:
Oct 01, 1991 to Dec 31, 2022

95. [Pine Ridge Recycling v. Butts County, 864 F. Supp. 1338](#)

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:
Oct 01, 1991 to Dec 31, 2022

96. [O.K. Sand & Gravel v. Martin Marietta Technologies, 36 F.3d 565](#)

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:
Oct 01, 1991 to Dec 31, 2022

97. [Sullivan v. NFL, 34 F.3d 1091](#)

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:
Oct 01, 1991 to Dec 31, 2022

98. [D'Last Corp. v. Ugent, 863 F. Supp. 763](#)

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:
Oct 01, 1991 to Dec 31, 2022

99. [Norcen Energy Resource v. Pacific Gas & Elec. Co., 1994 U.S. Dist. LEXIS 21347](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Narrowed by



Cases

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

100. [Valley Drive Sys. v. EMPI, Inc., 1994 U.S. Dist. LEXIS 13233](#)

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:
Oct 01, 1991 to Dec 31, 2022





C.A. Westel de Venez. v. American Tel. & Tel. Co.

United States District Court for the Southern District of New York

November 30, 1993, Decided ; November 30, 1993, Filed

90 Civ. 6665 (PKL)

Reporter

1993 U.S. Dist. LEXIS 16857 *

C.A. WESTEL DE VENEZUELA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY and AT&T INTERNATIONAL, INC., Defendants.

Core Terms

enterprise, defendants', subject matter jurisdiction, alleges, replead, motion to dismiss, fraudulent, scheme to defraud, unfair competition, predicate act, Sherman Act, particularity, employees, wire, racketeering activity, inter alia, Clayton Act, terminal, mail

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN1[] Private Actions, Racketeer Influenced & Corrupt Organizations

The heart of any Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. §§ 1961-68](#), complaint is the allegation of a pattern of racketeering activity.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] Motions to Dismiss, Failure to State Claim

The court's task on a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion is not to rule on the merits of plaintiffs' claims, but to decide whether, presuming all factual allegations of the complaint to be true, and drawing all reasonable inferences in the plaintiff's favor, the plaintiff could prove any set of facts which would entitle him to relief.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[HN3](#) Private Actions, Racketeer Influenced & Corrupt Organizations

The requirement of proximate cause, a legal concept derived from tort law, is also applicable to claims under the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. §§ 1961-68](#). This doctrine is described as traditionally requiring some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

[HN4](#) Wire Fraud, Elements

The law of the United States Court of Appeals for the Second Circuit is that an element of both mail and wire fraud is the defendant's knowing participation in a scheme to defraud.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[HN5](#) Racketeer Influenced & Corrupt Organizations Act, Elements

Under § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C.S. §§ 1961-68](#), a corporate entity may not be simultaneously the "enterprise" and the "person" who conducts the affairs of the enterprise through a pattern of racketeering activity. In a § 1962(c) prosecution, the named RICO defendant and the alleged enterprise cannot be the same; they must be separate entities.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

[HN6](#) Heightened Pleading Requirements, Fraud Claims

[Fed. R. Civ. P. 9\(b\)](#) provides that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally. Though, in accordance with the explicit language of [rule 9\(b\)](#), knowledge may be averred generally, in the United States Court of Appeals for the Second Circuit plaintiffs must plead the factual basis which gives rise to a "strong inference" of fraudulent intent.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

[**HN7**](#) [down] **Pleadings, Heightened Pleading Requirements**

Fed. R. Civ. P. 9(b) requires that where more than one defendant is named, the complaint shall inform each defendant of the nature of his alleged participation in fraud.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[**HN8**](#) [down] **Pleadings, Heightened Pleading Requirements**

To plead an association in fact a plaintiff must plead facts establishing an enterprise that is separate and distinct from the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. §§ 1961-68, persons. Moreover, the courts of the Second Circuit have closely scrutinized pleadings alleging associations-in-fact of a corporation and its employees or of affiliated corporations.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

[**HN9**](#) [down] **Amendment of Pleadings, Leave of Court**

Fed. R. Civ. P. 15(a) provides that leave to amend pleadings shall be freely given when justice so requires.

Counsel: [*1] ROSNER & GOODMAN, New York, New York, Jonathan Rosner, Esq., of counsel, Attorneys for Plaintiff.

ANDERSON KILL OLICK & OSHINSKY, P.C., New York, New York, Rudolph W. Giuliani, Esq., of counsel, Mark L. Weyman, Esq., of counsel, Steven Cooper, Esq., of counsel, Alon M. Markowitz, Esq., of counsel, Attorneys for Defendants.

Judges: Leisure

Opinion by: PETER K. LEISURE

Opinion

OPINION AND ORDER

LEISURE, *District Judge*:

This is an action for violation of section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), [18 U.S.C. §§ 1961-68](#). Defendants have moved this Court for an order dismissing the Second Amended Complaint pursuant to [Rules 12\(b\) \(1\)](#), [12\(b\) \(6\)](#) and [9\(b\) of the Federal Rules of Civil Procedure](#). For the reasons stated below, defendants' motion to dismiss the Second Amended Complaint pursuant to [Rule 12\(b\) \(6\)](#) is granted.

BACKGROUND

The plaintiff, C.A. Westel de Venezuela ("Westel"), is a Venezuelan corporation that manufactured, distributed and serviced telecommunications, computer, and data terminal equipment on behalf of the defendants American Telephone and Telegraph Company ("AT&T") and AT&T international, Inc. ("ATTI") until [*2] approximately early 1990. The instant suit arises out of this business relationship. The history of this suit is briefly summarized below.

I. THE PRIOR COMPLAINTS

Westel commenced this action in October 1990, asserting claims for attempted monopolization under [section 2](#) of the Sherman Act, [15 U.S.C. § 2](#), unfair competition, and violations of RICO. With respect to the Sherman Act claim, Westel asserted that the defendants had attempted to monopolize the Venezuelan market for telecommunications, computer and data terminal equipment and services. In January 1991, defendants moved to dismiss the complaint on various grounds. Defendants argued, *inter alia*, that the Court lacked subject matter jurisdiction with respect to the Sherman Act claim in light of [15 U.S.C. § 6a](#), which limits the applicability of American [antitrust law](#) to foreign commerce.

Westel did not file papers in opposition to defendants' motion to dismiss the complaint but instead, in May 1991, filed an Amended Complaint. Westel's Amended Complaint included claims for unfair competition and violations of RICO but did not include the Sherman Act [*3] claim, which Westel conceded was foreclosed by [15 U.S.C. § 6a](#).

Westel alleged in its Amended Complaint that the defendants sought to enter into and dominate the market for telecommunications, computer and data equipment and services in Venezuela, and in so doing: (1) engaged in acts of unfair competition, including the misappropriation of technology, proprietary business information, business opportunities and employees of Westel; and (2) violated RICO by devising a scheme to defraud Westel through, *inter alia*, fraudulent representations and promises transmitted via the United States Postal Service or via wire, in violation of [18 U.S.C. § 1341](#) (relating to mail fraud) and [18 U.S.C. § 1343](#) (relating to wire fraud).

Defendants moved to dismiss the unfair competition claim for failure to state a claim upon which relief could be granted, pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#); in light of considerations of comity; and for failure to join indispensable parties, pursuant to [Fed. R. Civ. P. 12\(b\)\(7\)](#). Defendants moved to dismiss the RICO claim for lack of subject matter jurisdiction, [*4] pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#); in light of considerations of comity; and for failure to plead fraud with particularity, pursuant to [Fed. R. Civ. P. 9\(b\)](#).

On August 17, 1992 this Court dismissed Westel's claim of unfair competition, finding that Venezuela had no law of unfair competition and that United States law was not applicable to Westel's claim. In addition, the Court dismissed Westel's RICO claim pursuant to [Fed. R. Civ. P. 9\(b\)](#) for failure to plead fraud with particularity, though the Court rejected defendants' motion to dismiss for lack of subject matter jurisdiction.

II. THE SECOND AMENDED COMPLAINT

On September 25, 1992, Westel filed the Second Amended Complaint. According to the Second Amended Complaint, AT&T initiated business discussions with Westel in 1976 because it was seeking an established Venezuelan company to represent it in marketing telecommunications, computer and data terminal equipment and services in Venezuela. In October 1977, as a result of these discussions, Westel became an authorized representative of AT&T to promote, market, distribute, sell and service AT&T products in Venezuela.

At about the same time, according to Westel, the United [*5] States Department of Justice brought an antitrust action against AT&T that AT&T allegedly concluded could lead to a diminishment of its revenues. Consequently, at some point either prior to initiating a business relationship with Westel or sometime thereafter, AT&T devised a scheme to defraud Westel in order to replace its otherwise diminishing revenues. In essence, AT&T's scheme was first to misappropriate Westel's technology, personnel and business opportunities and then to eliminate Westel as a competitor by destroying its business reputation and weakening its financial condition. The fraud was effected by, "inter alia, false and fraudulent pretenses, representations and promises transmitted by, *inter alia*, the mails, wire and other means and instrumentalities of interstate and foreign commerce." Second Amended Complaint at P 6.

Westel alleges that the defendants' fraud spanned the period from the inception of AT&T's business relationship with Westel in 1977 to its termination 13 years later in April, 1990 and beyond. The defendants' fraud therefore involved actions in a number of areas including the following: (1) AT&T's System 75 and Dimension PABX systems; (2) Westel's [*6] direct inward dialing service; (3) Westel's annual business plan; (4) AT&T's establishment of a Venezuelan subsidiary, AT&T Andinos, S.A. ("AT&T Andinos"); (5) opportunities for Westel and defendants jointly to engage in various projects with or for the Venezuelan national telephone company, Compania Anonima Nacional Telefonos de Venezuela; (6) AT&T's exertion of "economic pressure" upon Westel; and (7) AT&T's efforts to induce certain Westel employees to terminate their employment with Westel and undertake employment with AT&T, and to appropriate to itself certain Westel customers.

Westel contends that this conduct involved repeated acts of wire and mail fraud and constituted a violation of Section 1962(c) of RICO. Westel identifies ATTI and AT&T Andinos, among others, as RICO persons and defendant AT&T as the RICO enterprise. See Second Amended Complaint at PP 88-89.

Defendants have moved to dismiss the Second Amended Complaint for lack of subject matter jurisdiction, pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#); for failure to state a claim upon which relief can be granted, pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#); and for failure to plead fraud with particularity pursuant to [Fed. R. Civ. P. 9\(b\)](#). Defendants have also moved pursuant to [Fed. R. Civ. P. 12\(f\)](#) to strike certain portions of the Second Amended Complaint. Westel opposes these motions in all respects.

DISCUSSION

I. SUBJECT MATTER JURISDICTION

As a threshold matter, the defendants urge this Court to reconsider its prior holding that subject matter jurisdiction exists over Westel's RICO claim. See [C.A. Westel de Venezuela V. American Tel. & Tel. Co, No. 90 Civ. 6665, 1992 U.S. Dist. LEXIS 12301, 46-47](#) (August 17, 1992). In that decision, this Court rejected the defendants' argument that the "conduct" and "effects" test used to assess subject latter jurisdiction in securities law cases was applicable in the RICO context, relying on [Alfadda v. Fenn, 935 F.2d 475](#) (2d Cir.), cert. denied, 116 L. Ed. 2d 656, 112 S. Ct. 638 (1991), a decision by the United States Court of Appeals for the Second Circuit (the "Second Circuit"):

The Second Circuit's *Alfadda* opinion suggests that, in determining whether this Court has subject matter jurisdiction with respect to Westel's RICO claim, the Court should not apply the "conduct" and [*8] "effects" tests as articulated in the securities law context, but rather should examine the nature of Westel's allegations of a pattern of racketeering activity and the predicate acts that constitute the racketeering activity . . . Because Westel has alleged predicate acts -- using the mails or wires in furtherance of defendant's scheme or artifice to defraud Westel of its money and property -- that occurred in the United States, these predicate acts serve as a basis for subject matter jurisdiction with respect to Westel's Rico claim.

Westel at 46-47. The defendants urge this Court to reconsider this holding.

The defendants argue that, since the RICO statute is silent as to its extraterritorial application, the Court should look to the Clayton Act for guidance. The defendants note that the Supreme Court has recognized that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act . . .", *Holmes v. Securities Investor Protection Corp.*, 117 L. Ed. 2d 532, 112 S. Ct. 1311, 1317 (1992), and has therefore sometimes turned to the Clayton Act for guidance when the RICO statute is silent on a particular issue. See, [*9] e.g., *Agency Holding Corp. v. Malley-Duff & Associates, Inc.* 483 U.S. 143, 145, 97 L. Ed. 2d 121, 107 S. Ct. 2759 (1987) (applying 4-year statute of limitations applicable under Clayton Act civil enforcement actions to RICO civil enforcement actions). Based upon this line of cases, the defendants argue that the Court should apply the "effects" test which Courts have borrowed from the Sherman Act and used to determine subject matter jurisdiction over extraterritorial Clayton Act claims. This test, set forth in Section 7 of the Sherman Act, [15 U.S.C. § 6a](#), requires that the alleged conduct have had "a direct, substantial, and reasonably foreseeable effect" on United States domestic, import or export commerce.

The defendants advance various policy arguments in favor of their position that are not without merit. However, the defendants have failed to convince the Court that the Second Circuit's opinion in *Alfadda* does not control the outcome of this case. Both the facts and the language of *Alfadda* make clear that the Second Circuit had very much before it the question that this Court faces today -- namely, when there exists subject matter jurisdiction [*10] over a RICO suit brought by foreign plaintiffs who were injured abroad. *Alfadda* involved securities law and RICO claims by investors who alleged that their ownership stakes in a corporation had been fraudulently diluted by the sale of stock to third parties in contravention to an offering prospectus. See [935 F.2d at 477](#). The plaintiffs were residents and nationals of Saudi Arabia and Bahrain. The defendants were two French banks, two Netherlands Antilles companies, and two United States citizens. [Id. at 476](#). The District Court had held that it did not have subject matter jurisdiction because "the fraud was perpetrated by placing the misleading prospectus into the plaintiffs' hands outside the United States." See *Alfadda v. Fenn*, 751 F. Supp. 1114, 1118 (S.D.N.Y. 1990). However, the Second Circuit reversed, finding subject matter jurisdiction.

The Second Circuit noted that [HN1](#)[] the "heart of any RICO complaint is the allegation of a pattern of racketeering activity." [Id. at 479](#) (quoting *Agency Holding*, 483 U.S. at 154). The Second Circuit found that the [*11] plaintiffs had pled a pattern of racketeering activity in the United States since the subsequent sales that diluted the plaintiffs' stakes "were predicate acts which occurred primarily in the United States, and hence, serve as a basis of subject matter jurisdiction for the RICO claims." [Alfadda, 935 F.2d at 480](#).

Similarly, this Court finds subject matter jurisdiction over the RICO action at bar. As in *Alfadda*, Westel has alleged that at least two participants in the RICO enterprise, AT&T and ATTI, committed predicate acts within the United States. Thus, the Court finds no basis for reconsidering its conclusion that this Court has subject matter jurisdiction over plaintiff's RICO claim.¹

[*12] II. THE DEFENDANTS' 12(b)(6) MOTION

Defendants move this Court to dismiss the Second Amended Complaint pursuant to 12(b)(6) alleging a variety of pleading defects. [HN2](#)[] "The court's task on a [Rule 12\(b\)\(6\)](#) motion is not to rule on the merits of plaintiffs' claims, but to decide whether, presuming all factual allegations of the complaint to be true, and drawing all reasonable inferences in the plaintiff's favor, the plaintiff could prove any set of facts which would entitle him to relief." [Weiss v. Wittcoff](#), 966 F.2d 109, 112 (2d Cir. 1992) citations omitted).

A. Proximate Cause

¹ The defendants urge this Court, as an alternative to dismissing for lack of subject matter jurisdiction, to certify this question for appeal pursuant to [28 U.S.C. § 1292\(b\)](#). This motion is moot in light of this Court's decision to grant defendants' motion to dismiss the complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#).

The defendants argue that Westel has failed to meet its obligation under 1964(c) to allege facts showing that Westel suffered an injury "by reason of" the defendants' RICO violations, citing [*Holmes v. Securities Investor Protection Corp.*, 117 L. Ed. 2d 532, 112 S. Ct. 1311, 1317 \(1992\)](#). In *Holmes*, the Supreme Court found that HN3[¹] the requirement of proximate cause, a legal concept derived from tort law, was also applicable to claims under RICO. *Id.* at 1318, 1322. The Court described this doctrine as traditionally requiring "some [*13] direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 318. Thus, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id.*

In the case at bar, Westel has clearly pled RICO violations that were the proximate cause of injuries to Westel. Westel is not a "third person" with respect to the defendants' conduct. Rather, the predicate acts alleged by Westel are fraudulent statements made to Westel. Moreover, these statements were allegedly made for the very purpose of inducing Westel to enter into and continue contractual relations so that the defendants could, *inter alia*, misappropriate proprietary information and destroy Westel's business reputation. Plainly, these type of allegations meet the requirements of proximate cause as set forth in *Holmes*.

B. The Defendants' Knowledge

The defendants maintain that Westel's pleadings are defective for failure to allege that the defendants knowingly participated in a scheme to defraud Westel.

The defendants properly state HN4[¹] the law of this Circuit that an element [*14] of both mail and wire fraud is the defendant's knowing participation in a scheme to defraud. See *United States v. Rodolitz*, 786 F.2d 77, 80 (2d Cir.), cert. denied, 479 U.S. 826, 93 L. Ed. 2d 52, 107 S. Ct. 102 (1986); [*United States v. Precision Medical Laboratories, Inc.*, 593 F.2d 434, 443-44 \(2d Cir. 1978\)](#). The Court finds, however, that the Second Amended Complaint adequately alleges knowing participation by AT&T and ATT. Westel alleges that AT&T "devised a scheme and artifice to defraud and obtain money and property of Westel." Second Amended Complaint at P 6. Moreover, as part of this scheme, Westel alleges various knowing misrepresentations including, for example, that AT&T "falsely represented . . . that Westel would be authorized to manufacture AT&T product in Venezuela" when in fact "AT&T did not intend to authorize Westel to manufacture" such equipment. *Id.* at P 28-29. The Court finds these allegations suggest that AT&T purposely and knowingly participated in a scheme to defraud.

To find that the Second Amended Complaint also alleges scienter on the part of ATT, the Court must exercise considerable generosity [*15] in its reading thereof, but the Court does so find. Paragraph 28(B) of the Second Amended Complaint alleges that "ATT president Robert Sageman falsely represented to Westel" that certain telephone equipment would function in Venezuela.² Among the definitions of the term "falsely" are "dishonestly" and "deceitfully". See Websters Third New International Dictionary, (1981) at 819. This Court finds that, generously interpreted, this paragraph alleges that ATT purposely and knowingly participated in the scheme to defraud through intentional misrepresentations to Westel.

C. Plaintiff's Allegation that AT&T is the [*16] Enterprise

Finally, defendants argue that the Second Amended Complaint is defective because it names AT&T as the RICO enterprise.

In [*Bennett v. United States Trust Co.*, 770 F.2d 308 \(2d Cir. 1985\)](#), cert. denied, 474 U.S. 1058, 88 L. Ed. 2d 776, 106 S. Ct. 800 (1986), the Second Circuit held that HN5[¹] "under section 1962(c) a corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of

² Westel also alleges in paragraph 6 of the Second Amended Complaint that "Defendant AT&T, alone and in concert with the predecessor of ATT, devised a scheme and artifice to defraud and obtain money and property of Westel . . ." However, Westel nowhere explains what it means by the predecessor of ATT nor by what legal theory a corporation may be held liable for the acts of such a "predecessor."

racketeering activity." [770 F.2d at 315](#). In reaching its decision, the Second Circuit followed the clear majority of circuit courts that had addressed the issue. See *id.* *Bennet* was reaffirmed in [United States v. Gelb, 881 F.2d 1155, 1164 \(2d Cir. 1989\)](#) ("In a section 1962(c) prosecution, the named RICO defendant and the alleged enterprise cannot be the same; they must be separate entities.").

In *Bennet*, though the defendant U.S. Trust had been explicitly identified in the complaint as the RICO "enterprise," it had not been identified as a section 1962(c) "person." However, the Second Circuit reasoned that "because U.S. Trust is named [*17] as the defendant, we interpret the complaint to name U.S. Trust as the section 1962(c) 'person'." [Bennet, 770 F.2d at 315 n.2](#). Consequently, since U.S. Trust was interpreted to be both the "person" and the "enterprise" under section 1962(c), the Court dismissed the complaint. [Bennet, 770 F.2d at 315](#).

In the instant case Westel's RICO claim suffers from the same defect as that identified in *Bennet*. Westel's complaint states that defendant AT&T is the RICO enterprise. See Second Amended Complaint at P 88. Moreover, while Westel does not name defendant AT&T as a "person" in the Second Amended Complaint, the complaint must be so construed because AT&T is named as a defendant. Thus, Westel's claim is clearly defective.

Westel argues that *Bennet* does not establish that a corporation cannot be named as both an enterprise and a defendant, claiming that the Courts of this Circuit have repeatedly misstated the holding of *Bennet*. See, e.g., [Richter v. Sudman, 634 F. Supp. 234, 240 \(S.D.N.Y. 1986\)](#) ("Since they are being sued, the named defendants are considered the RICO 'persons' . . . [*18] . . ."). Westel urges upon this Court, instead, the view taken by the United States District Court for the Western District of Michigan that purportedly interprets *Bennet*. However, the case to which Westel cites, [Ross v. Omobusch, Inc., 607 F. Supp. 835, 837-38 \(W.D. Mich. 1984\)](#) does not discuss [Bennet v. United States Trust Co., 770 F.2d 308 \(2d Cir. 1985\)](#), decided a year after *Ross*, but rather an Eighth Circuit case named [Bennet v. Berg, 685 F.2d 1053 \(8th Cir. 1982\)](#)

Westel establishes no basis for departing with the clear holding of *Bennet*. Accordingly, this Court finds that Westel's Second Amended Complaint improperly identifies AT&T as the RICO enterprise and dismisses this complaint for failure to state a claim upon which relief may be granted.

III. THE DEFENDANTS' 9(b) MOTION

The defendants contend that Westel has failed to plead fraud with the requisite particularity required by [Fed. R. Civ. P. 9\(b\)](#). This [HNC](#) Rule provides that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, [*19] and other condition of mind of a person may be averred generally."

The purpose of [Rule 9\(b\)](#) is "to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from 'improvident charges of wrongdoing,' and to protect a defendant against the institution of a strike suit." See [O'Brien v. National Property Analysts Partners, 936 F.2d 674, 676 \(2d Cir. 1991\)](#). Though, in accordance with the explicit language of [Rule 9\(b\)](#), knowledge may be averred generally, the Second Circuit has consistently held that plaintiffs must "plead the factual basis which gives rise to a 'strong inference' of fraudulent intent." *Id.* (quoting [Wexner v. First Manhattan Co., 902 F.2d 169, 172 \(2d Cir. 1990\)](#)). The defendants contend that Westel has failed to plead facts that give rise to a strong inference of fraudulent intent.

Westel has plainly been responsive to the Court's prior dismissal of the Amended Complaint for failure to plead fraud with particularity by providing greater detail in its Second Amended Complaint concerning the defendants' alleged fraudulent statements. However, the Court is troubled by [*20] the question of scienter, particularly in light of the paucity of facts regarding the participation of ATTI representatives in the scheme to defraud. The Second Amended Complaint makes only two references to specific acts by ATTI and these references provide a meager basis for inferring fraudulent intent on the part of ATTI. See Second Amended Complaint at PP 28(B), 41(A).

Moreover, the Section "Scienter: Reasons For AT&T's False Representations," both in its title and content, addresses itself only to the motive for fraud by AT&T.³

Westel counters that it does not know whether the employees it alleges committed various acts are employees of AT&T or ATTI and that [rule 9\(b\)](#)'s requirement is relaxed where information is peculiarly within the knowledge of a defendant, citing *Di Vittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987). [*21] However, [HN7](#)⁴ [Rule 9\(b\)](#) requires that where more than one defendant is named, the complaint shall "inform each defendant of the nature of his alleged participation in fraud." *Id.* Westel is correct that the requirements of 9(b) are somewhat relaxed as to information that is peculiarly within the defendant's knowledge. See *id.* However, whether this requirement may be relaxed to the extent of not requiring Westel to specify whether or not the fraudulent acts in question were even committed by employees of ATTI is unclear.⁴

This Court concludes that [*22] it is the wiser course to decline to reach the defendants' 9(b) motion at this juncture. Because the Court has concluded that Westel has improperly named AT&T as both a RICO person and the RICO enterprise, Westel will be required, if it repleads, to identify a RICO enterprise that is not also a RICO person. Westel has a number of options in identifying the RICO enterprise and the RICO persons and the choice Westel makes may significantly alter the repledged complaint. In light of this possibility, this Court declines to reach the defendants' 9(b) motion.

IV. DEFENDANTS' MOTION TO STRIKE CERTAIN PORTIONS OF THE COMPLAINT

The Court also declines to reach the defendants' motion to strike certain portions of the Second Amended Complaint since this matter is rendered moot by the Court's decision to dismiss the complaint.

IV. PERMISSION TO REPLEAD

The defendants urge this Court to deny Westel an opportunity to replead. The defendants note that this is the third failed effort by Westel to properly plead a claim against them.⁵ The defendants argue that "despite Westel's efforts to amplify its pleadings and increase the volume thereof (now 56 pages), Westel remains unable to [*23] refute the simple fact that [it cannot transform] business dealings conducted in Venezuela into viable claims under United States laws and in a United States Court." Memorandum of Law In Support of Defendants' Motion to Dismiss, dated November 23, 1992, at 42-43.

This Court is not unmindful of the defendants' concerns nor unaware of the obstacles Westel faces in properly pleading a claim. Westel may seek, for example, to replead its claim by alleging an enterprise "associated in fact". See *United States v. Huber*, 603 F.2d 387, 393-94 (2d Cir. 1979), cert. denied, 445 U.S. 927, 63 L. Ed. 2d 759, 100 S. Ct. 1312 (1980) (a group of corporations may constitute a "group of individuals associated in fact" under [section 1961\(4\)](#) of RICO). [HN8](#)⁶ To plead an association in fact, however, a plaintiff must plead facts establishing [*24] an enterprise that is "separate and distinct from the RICO persons." *Center Cadillac, Inc. v. Bank Leumi Trust Co.*, 808 F. Supp. 213, 236 (S.D.N.Y. 1992); see *Fustok v. Conticommodity Services, Inc.*, 618 F. Supp. 1074, 1076 (S.D.N.Y. 1985). Moreover, the Courts of this Circuit have closely scrutinized pleadings alleging associations-in-fact

³ This section makes one reference to ATTI but only alludes to subsequent paragraphs of the complaint containing the two allegations already noted. See *Second Amended Complaint* at P 21(B).

⁴ At least some support for such a relaxed approach is nonetheless provided in *Luce v. Edelstein*, 802 F.2d 49 (2d Cir. 1986), in which the Second Circuit held that "no specific connection between fraudulent representation in [an] Offering Memorandum and particular defendants is necessary where, as here, defendants are insiders or affiliates participating in the offer of the securities in question." *Id. at 55*.

⁵ Westel voluntarily replied after AT&T moved to dismiss Westel's first complaint. The Amended Complaint was then dismissed by this Court pursuant to [Fed. R. Civ. P. 9\(b\)](#) and [12\(b\)\(6\)](#).

of a corporation and its employees or of affiliated corporations. See, e.g., [Official Publications, Inc. v. Kable News Co., 775 F. Supp. 631, 635-36 \(S.D.N.Y. 1991\)](#) (a corporation and its principal officers cannot form an enterprise); [Center Cadillac v. Bank Leumi Trust Co., 808 F. Supp. 213, 236 \(S.D.N.Y. 1992\)](#) (association in fact properly pled where plaintiff alleged continuing participation of employee in enterprise after leaving employ of corporate defendant); [Fustok, 618 F. Supp. at 1076](#) (finding association of related corporations where plaintiff pled facts that "separated and distinguished [the RICO enterprise] from the . . . named defendants."). In addition, Westel's claim for the purposes [*25] of opposing defendants' 9(b) motion that it cannot distinguish between acts of AT&T and ATTI may tend to undermine any effort by it to plead that there is an enterprise that is not identical with AT&T itself.

Thus, the Court is cognizant of various obstacles that Westel may face in seeking to replead its claim. However, this Court cannot conclude that Westel will not be able to plead a claim under RICO. Moreover, [HN9](#) [Fed. R. Civ. P. 15\(a\)](#) provides that leave to amend pleadings "shall be freely given when justice so requires." See [Devaney V. Chester, 813 F.2d 566, 569 \(2d Cir. 1987\)](#). Thus the Court grants Westel permission to replead.

CONCLUSION

For the reasons stated above, defendants' motion to dismiss the Second Amended Complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) is hereby granted. In order to provide Westel with ample time to carefully consider both whether and how to replead its claim, the Court grants Westel 30 days from the date of this Opinion and Order in which to replead. In the event that Westel does not replead its claim within such time, the Clerk of the Court is hereby directed to enter judgment in favor of defendants.

SO ORDERED

New [*26] York, New York

November 30, 1993

Peter K. Leisure

U.S.D.J.

End of Document



Union Carbide Corp. v. Florida Power & Light Co.

United States District Court for the Middle District of Florida, Tampa Division

December 8, 1993, Decided ; December 8, 1993, Filed

CASE NO. 88-1622-CIV-T-21C

Reporter

1993 U.S. Dist. LEXIS 21203 *

UNION CARBIDE CORPORATION, a New York corporation, Plaintiff v. FLORIDA POWER & LIGHT COMPANY, a Florida corporation, and FLORIDA POWER CORPORATION, a Florida corporation, Defendants

Disposition: [*1] Defendants' Motion for Summary Judgment DENIED. Plaintiff's Motion for Partial Summary Judgment DENIED. Defendants DIRECTED to file a response to Plaintiff's Motion to Substitute Parties on or before December 20, 1993, in the absence of which the Court will take Plaintiff's Motion under advisement and rule thereon. Amicus Curiae Florida Public Service Commission's Motion for Leave to File Response to Union Carbide's Notice Re: Ticor DENIED as MOOT, as all parties and amicus participants have submitted revised memoranda to the Court. Defendants' Motion to Strike Section III of Plaintiff's Response Re: Supplemental Authority DENIED as MOOT, as all parties have submitted revised memoranda to the Court.

Core Terms

territorial, maps, boundary line, service area, electric, facilities, state action, antitrust, immunity, approve, parties, territorial boundary, summary judgment, anticompetitive, supervision, state policy, articulated, genuine, regulation, customers, provide a service, witness testimony, public interest, witnesses, allocate, displace, retail

LexisNexis® Headnotes

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

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

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

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

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

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

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

HN1 [blue icon] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate only when the court is satisfied that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). In making this determination, the court must view all of the evidence in a light most favorable to the non-moving party. The burden of establishing the absence of a genuine issue is on the moving party. However, the burden extends only to facts that might affect the outcome of the suit under the governing law. Factual disputes that are irrelevant or unnecessary will not be counted. Once this burden is met, the non-moving party must go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. However, a plaintiff need only present evidence from which a jury might return a verdict in its favor in order to survive a summary judgment motion.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Governments > Local Governments > Administrative Boards

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 > General Overview

[HN2](#) Antitrust & Trade Law, Exemptions & Immunities

The state action immunity doctrine provides that federal antitrust laws do not apply to proscribe anticompetitive conduct undertaken by or directed to be undertaken by a state. The doctrine may also preclude antitrust attack on private conduct taken pursuant to state regulation.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

[HN3](#) Exemptions & Immunities, Parker State Action Doctrine

The United States Supreme Court has established a two part test to determine when private conduct regulated by state law is immune from antitrust attack. To establish immunity, a party must show 1) that the challenged restraint on competition is one clearly articulated and affirmatively expressed as state policy and (2) that the policy is actively supervised by the state itself. Compliance with both parts of this test ensures that the state will be responsible for the anticompetitive activity it has sanctioned and undertaken to control. Additionally, both parts of the test ensure that the particular anticompetitive mechanism operates because of a deliberate and intentional state policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

[HN4](#) Exemptions & Immunities, Parker State Action Doctrine

A clearly articulated state policy under the first part of the Midcal test will exist when the state intends to displace competition in a particular field with a regulatory structure. In some instances, a state legislature will expressly state its intent to displace competition in a given area. However, a clearly articulated policy can also be established if a state statute authorizes an agency to regulate the area and provides for a regulatory scheme that inherently displaces unfettered business freedom.

Administrative Law > Separation of Powers > Jurisdiction

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > General Overview

Governments > Local Governments > Administrative Boards

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN5 Separation of Powers, Jurisdiction

Fla. Stat. § 366.04 provides in part that, in the exercise of its jurisdiction, the Florida Public Utilities Commission (commission) shall have power over electric utilities for the following purposes: to approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction and to resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

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

HN6 Energy & Utilities, State Regulation

The state has comprehensive control over competition among its retail utility service providers.

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

Governments > Local Governments > Administrative Boards

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN7 Utility Companies, Buying & Selling of Power

An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. Larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the Florida Public Utilities Commission.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Energy & Utilities Law > Utility Companies > General Overview

Governments > State & Territorial Governments > Boundaries

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

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

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN8 [] Energy & Utilities, State Regulation

Florida, through its legislation, regulation, and judicial holdings and pronouncements, has demonstrated its intent to displace competition in the field of retail electric service with a regulatory mechanism to designate territorial boundaries. As such, Florida has a clearly articulated and affirmatively expressed state policy as contemplated by the first element of Midcal's test for state action immunity.

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN9 [] Energy & Utilities Law, Antitrust Issues

Under Florida's policy of non-competition, the validity of a territorial agreement is premised on Florida Public Utilities Commission approval.

Energy & Utilities Law > Antitrust Issues > General Overview

Governments > Local Governments > Boundaries

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN10 [] Energy & Utilities Law, Antitrust Issues

Fla. Stat. ch. 366 recognizes that the Florida Public Utilities Commission (commission) must examine actual and potential competition between utility companies to resolve territorial disputes. The commission will establish territorial boundaries based on factors including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services. [Fla. Stat. § 366.04\(e\)](#).

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

HN11 [] Exemptions & Immunities, Parker State Action Doctrine

For purposes of determining whether a private conducted regulated by state law is immune from antitrust attack, a court will examine several factors to assess a state's participation in operative decisions relating to the anticompetitive conduct at issue. A state cannot simply authorize the anticompetitive activity, then enforce the

decisions of individual parties made pursuant to its authorization. A state must help to establish the anticompetitive practice, or must review private decisions made pursuant to state authorization. Courts will further examine whether the state monitors conditions in the relevant market and engages in pointed reexamination of the program. If an examination of these factors reveals that the state has effective control over all decisions being challenged in the antitrust action, the second element of Midcal's test will be established.

Governments > Local Governments > Boundaries

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Governments > Local Governments > Duties & Powers

Governments > State & Territorial Governments > Boundaries

HN12 [blue icon] Local Governments, Boundaries

Utilities may initially negotiate the territorial boundaries to be submitted to the Florida Public Utilities Commission for approval. However, such private conduct constitutes part of Florida's contemplated scheme for establishment of boundaries.

Counsel: For UNION CARBIDE, plaintiff: Marvin E. Barkin, Keith E. Rounsville, Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A., Tampa, FL USA. James D. McGibbon, Dulany L. O'Roark, III, Sutherland, Asbill & Brennan, Atlanta, GA USA. Nathan P. Eimer, William H. Baumgartner, Sidley & Austin, Chicago, IL. Donald I. Baker, Earle O. O'Donnell, Karen L. Grimm, Judy A. Center, Sutherland, Asbill & Brennan, Washington, DC.

For FLORIDA P&L, defendant: J. T. Blount, Florida Power & Light [*2] Co., Miami, FL USA.

For FLORIDA POWER CORP., defendant: Robert L. Ciotti, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, FL USA. Benjamin H. Hill, III, Hill, Ward & Henderson, P.A., Tampa, FL USA. Daniel M. Gribbon, James R. Atwood, Covington & Burling, Washington, DC USA. Albert H. Stephens, Florida Power Corporation, St. Petersburg, FL.

For FLORIDA PUBLIC, movant: Susan F. Clark, Florida Public Service Commission, Tallahssee, FL USA.

For TAMPA ELECTRIC CO., movant: Michael A. Fogarty, Glenn, Rasmussen & Fogarty, Tampa, FL USA.

For CLAY ELECTRIC COOPER, T. B. MILLICAN, movants: John Harry Haswell, Chandler, Gray, Lang, Haswell & Enwall, P.A., Gainesville, FL USA.

For FLORIDA PUBLIC, amicus: Richard Bellak, Fowler, White, Gillen, Boggs, Villareal & Bunker, P.A., Tallahassee, FL USA.

Judges: RALPH W. NIMMONS, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: RALPH W. NIMMONS, JR.

Opinion

ORDER

This cause comes before the Court on Defendants' Motion for Summary Judgement (Dkt. # 10) and on Plaintiff's Motion for Partial Summary Judgment (Dkt. # 32). This Order will address these Motions and several additional motions pending herein.

FACTUAL BACKGROUND

[*3] Plaintiff Union Carbide¹ brought this antitrust action against Defendants Florida Power Corporation ("FPC") and Florida Power and Light ("FPL") in October of 1988. Plaintiff alleges that a territorial agreement between FPL and FPC, pursuant to which FPL provides retail electric service to Plaintiff's plant in Brevard County, constitutes a division of territories by competitors in violation of federal and state antitrust laws.

The alleged unlawful agreement stems from negotiations between Defendants in the late 1950s and early 1960s. It appears that Defendants initiated discussions because they were concerned about the convergence of their utility [*4] facilities due to expanded growth in various service areas. In an effort to serve the public interest and to eliminate uneconomical and potentially dangerous duplication of facilities, Defendants entered their first agreement in November of 1958. Under this agreement, Defendants set forth "boundaries between their respective service areas," as shown on maps of Volusia County and Seminole County. The parties further agreed that "neither Company [would] serve or offer to serve a customer outside its service area as shown on the attached maps." Letter of FPC to FPL, dated October 28, 1958; accepted and signed November 26, 1958. In September of 1962, Defendants entered a second such arrangement in which they "extended this territorial boundary agreement to include Orange County and a portion of Osceola County." Letter of FPC to FPL, dated September 4, 1962; accepted and signed September 11, 1962. This second agreement referred to boundaries drawn on attached maps of Orange County and Osceola County.²

[*5] On June 2, 1964, Defendants became unsure of the validity of their territorial Agreement. They therefore submitted an Application to the Florida Public Utilities Commission ("Commission"),³ [*6] requesting that the Commission hold a hearing and enter an order approving the Agreement.⁴ The Application indicated that such an order would help to resolve problems with duplication of service facilities "running roughly from Lake George in Volusia County to the southeast corner of Osceola County." Application at 2. Defendants attached to the Application maps of Seminole, Volusia, Orange and Osceola Counties, and a composite map of the four counties. The individual and composite maps depicted a red line which commenced at the northwestern corner of Volusia County at Lake George, meandered eastward across Volusia and Seminole Counties, and continued northward along the border between Orange and Osceola Counties and Brevard County. The boundary line terminated at the southernmost point of Brevard County.

On June 8, 1964, the Commission held a hearing "In the Matter of Application of Florida Power and Light Company and Florida Power Corporation for Approval of a Territorial Agreement Relative to Their Respective Service Areas in Volusia, Seminole, Orange and Osceola Counties" ("Hearing").⁵ The Commission described the agreement to be reviewed as consisting of "two letter agreements, the first dated October 28, 1958, and an amendatory letter dated September 24, 1962, with maps attached showing the territory in question." Hearing Transcript, Dkt. No. 7420-EU (June 8, 1964) at 4. At the Hearing various witnesses testified regarding the advisability of approving the Agreement. Primarily, the witnesses addressed growth in the areas between Volusia and Seminole Counties and between Orange and Osceola Counties which necessitated the Agreement, and the public interest to be served by it. At two instances during [*7] the Hearing, witnesses mentioned Brevard County. One witness testified:

¹ Pending in this action is Plaintiff Union Carbide's Motion to Substitute Parties (Dkt. # 129). Plaintiff indicates that it has spun off the assets and business that are the subject of this lawsuit into a corporation known as Praxair, Inc., a Delaware corporation. For the purposes of this Order, the Court will refer to Plaintiff as Union Carbide or as Plaintiff.

² The 1958 and 1962 agreements will henceforth be jointly referred to as the "Agreement".

³ The Florida Public Utilities Commission has subsequently changed its name to the Florida Public Service Commission.

⁴ Application of Florida Power and Light Company for Approval of an Agreement with Florida Power Corporation Relative to Service Areas, Docket No. 7420-EU (1964)(hereinafter "Application").

⁵ The Commission sent notice of the public hearing to the Volusia, Seminole, Orange and Osceola County governments. The record reflects that no notice was sent to the Brevard County government. At the time of the Commission proceedings, Florida law required that agencies inform affected parties of agency hearings. § 120.33 Fla. Admin. Proc. Act, 120 F.S.A. (1961).

To a lesser extent, the facilities of the two systems [FPC and FPL] were growing closer together in the areas of the boundary line between Orange and Brevard and Osceola and Brevard Counties.

Hearing Transcript at 10. A second witness testified:

I would say that this [convergence of facilities] was most intense in the Volusia and Seminole County areas, and to a lesser, but nevertheless important degree, in the Orange-Brevard County and Osceola-Brevard County areas.

Hearing Transcript at 11.

Additionally, witnesses clarified the location of [*8] the boundary line on the composite map and explained the service areas defined by it. Witnesses stated that the areas to the east or right of the red boundary line were those served by FPL, and those to the west or left of the line were those served by FPC. Defendants were further questioned regarding those areas on the map in which they had not established a boundary line. Defendants indicated that those areas were either served by intervening Rural Electric Cooperatives ("REAs") or "the area[s] [were] not developed to the point where there would be competition between the two companies for the same customers with resultant bad effects." Hearing Transcript at 17 (testimony of witness A.B. Wright, Vice President for Northern Division of Florida Power and Light Company).

On April 28, 1965, following the Hearing, the Commission entered Order No. 3799, which approved the boundary lines set forth in Defendants' Application.⁶ The Order contained the following language:

In these seven dockets [including Application of FPL and FPC, Docket No. 7420-E] the utilities . . . have entered into agreements where there has been or is about to be some conflict as to the boundaries of [*9] the territory that they seek to serve. . . It is even wiser that the Commission and the utilities involved anticipate these conflicts and make effective some reasonable territorial agreement.

The Order further stated that Defendants could not modify the Agreement without approval of the Commission. Since 1965, the parties have applied to the Commission on several occasions for approval to modify the Agreement.⁷ Defendants have otherwise provided service and developed their facilities in accordance with Order No. 3799.

[*10] From 1981 to 1987, the Commission engaged in an intensive review of the various approved territorial agreements among utility service providers in an effort to develop maps reflecting proper territorial boundaries and service areas. The Commission sent out a series of letters and memoranda to electric utilities throughout Florida, requesting materials and maps regarding territorial boundaries. The Commission then developed a computerized system to organize information regarding service areas, and developed comprehensive maps of service territories. These maps reflect that FPL provides service in Brevard County.

The events giving rise to this action by Plaintiff commenced in 1987. Plaintiff owns a plant located in the town of Mims, Brevard County, Florida, which has always received its electric service from FPL. In 1987, Plaintiff became dissatisfied with FPL's rates, and sought to obtain a special rate. FPL submitted an application to the Commission, seeking approval of a proposed agreement pursuant to which it would provide Plaintiff service at a special rate.

⁶ In re: Proposed territorial agreement between Florida Power and Light Company and Florida Power Corporation, Dkt. No. 7420-EU, Order No. 3799 (April 28, 1965).

⁷ In 1971, the Commission approved an agreement between FPC and Tampa Electric Company for the wholesale sale of electric power. In re: Application of Florida Power Corporation for modification of territorial orders, Dkt. No. 71340-EU, Order No. 5255 (October 29, 1971). Again, in 1974, the Commission entered an order which "ratified" an agreement between FPL and FPC to modify and extend boundaries in the City of Sanford. In re: Application of Florida Power & Light Company for approval of a modification of territorial agreement with Florida Power Corporation relative to service areas, Dkt. No. 74097-EU, Order No. 6184 (June 28, 1974). In 1989, the Commission conditionally approved a third modification to the Agreement, clarifying the Agreement's procedure for variances in the territorial boundaries due to exceptional circumstances and changes in municipal boundaries. In re: Application of Florida Power Corporation and Florida Power & Light Company for Approval of Amendment of Territorial Agreement, Dkt. No. 890403-EU, Order No. 21309 (June 2, 1989).

However, in April of 1988, the Commission denied FPL's request, stating that a special rate would effectively provide a [*11] subsidy of Plaintiff's service at the expense of other customers.⁸

In August of 1988, Plaintiff then asked FPC to sell it electricity. Plaintiff also asked FPL to "wheel" the FPC generated electricity to its Mims plant in Brevard County by using existing FPL power lines. Both FPC and FPL independently refused Plaintiff's request, asserting that they were required to do so by Order No. 3799. In response to this refusal, Plaintiff filed this action in October of 1988.

Later that same month, FPL filed a petition with the Commission, requesting a declaratory statement that Defendants would violate Order No. 3799 if they complied with Plaintiff's request for the wheeling of power. The Commission issued a declaratory statement in February of 1989, indicating that the wheeling of power would be in contravention of Order No. 3799.⁹ The [*12] Commission did not, however, address the antitrust implications of Defendants' acts, which Plaintiff now raises in this action.

ANALYSIS

HN1[] Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Fed.R.Civ.P. 56\(c\)](#). In making this determination, the Court must view all of the evidence in a light most favorable to the non-moving party. [Samples v. City of Atlanta, 846 F.2d 1328, 1330 \(11th Cir. 1988\)](#). The burden of establishing the absence of a genuine issue is on the moving party. [Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#). However, the burden extends only to facts that might affect the outcome of the suit under the governing law. "Factual disputes that are [*13] irrelevant or unnecessary will not be counted." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). Once this burden is met, the non-moving party must go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial."[Celotex Corp., 477 U.S. at 324](#). However, a plaintiff need only present evidence from which a jury might return a verdict in its favor in order to survive a summary judgment motion. [Samples, 846 F.2d at 1330](#).

Plaintiff and Defendants each make several arguments in support of their summary judgment motions. The Court will first address Defendants' contention that the State Action Immunity Doctrine ("Doctrine") bars Plaintiff's attack on the Agreement between FPL and FPC. If, in fact, the Doctrine provides such immunity, the Court need not determine if Defendants' activities violate state and federal **antitrust law**. The State Action Immunity Doctrine was first enunciated by the Supreme Court in [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#). **HN2**[] The Doctrine provides [*14] that federal antitrust laws do not apply to proscribe anticompetitive conduct undertaken by or directed to be undertaken by a state. [Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 56-57, 85 L. Ed. 2d 36, 105 S. Ct. 1721 \(1985\)](#); [Municipal Utilities Board of Albertville v. Alabama Power Co., 934 F.2d 1493 \(11th Cir. 1991\)](#). The Doctrine may also preclude antitrust attack on private conduct taken pursuant to state regulation. [Id. at 1502](#).

HN3[] The Supreme Court has established a two part test to determine when private conduct regulated by state law is immune from antitrust attack. To establish immunity, a party must show 1) that the challenged restraint on competition is one "clearly articulated and affirmatively expressed as state policy" and (2) that "the policy [is] actively supervised 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 \(1980\)](#). Compliance with both parts of this test ensures that "the State [will be] responsible for the [anticompetitive activity] it has sanctioned and undertaken to control." [Federal Trade Commission v. Ticor Title Insurance \[*15\] Co., 504 U.S. 621, 112 S. Ct. 2169, 2177, 119 L. Ed. 2d 410 \(1992\)](#).

⁸ In re: Petition of Florida Power and Light Company for approval of large power agreement with Union Carbide Corporation, Dkt. No. 871029-EQ, order No. 19231 (April 26, 1988).

⁹ In re: Petition of Florida Power and Light Company for a Declaratory Statement Regarding Request for Wheeling, Dkt. No. 881326-EI, Order No. 20808 (February 24, 1989).

Additionally, both parts of the test ensure that the particular anticompetitive mechanism operates because of a deliberate and intentional state policy. *Id.*

HN4¹⁰ A clearly articulated state policy under the first part of the *Midcal* test will exist when the "state intends to displace competition in a particular field with a regulatory structure." *Southern Motor Carriers*, 471 U.S. at 64. In some instances, a state legislature will expressly state its intent to displace competition in a given area. *Id.* However, a clearly articulated policy can also be established if a state statute authorizes an agency to regulate the area and "provides for 'a regulatory scheme that inherently displaces unfettered business freedom.'" *Executive Town & Country Services, Inc. v. City of Atlanta*, 789 F.2d 1523, 1529 (11th Cir. 1986)(citation omitted).

A review of Florida case law and of Florida's current statutory and regulatory provisions reveals that Florida has effectively displaced competition between electric utilities in the retail market. The Florida Supreme Court first affirmed the Commission's authority to approve [*16] territorial agreements among utilities in *City Gas Co. v. Peoples Gas System, Inc.*, 182 So. 2d 429 (Fla. 1965). In *City Gas*, the Florida Supreme Court concluded, "these provisions [of Chapter 366] add up to what can only be considered a very extensive authority over the fortunes and operation of the regulated entities." *Id. at 435*. The Court further stated, "in short, we are of the opinion that the commission's existing statutory powers over areas of service, both expressed and implied, are sufficiently broad to constitute an insurmountable obstacle to the validity of a service area agreement between regulated utilities, which has not been approved by the commission." *Id. at 436*. In 1974, the Florida legislature incorporated its first specific reference to territorial agreements into Chapter 366 of the Florida Statutes, by expressly granting the Commission jurisdiction to review and approve territorial agreements. Ch. 74-196, 1974 Fla. Laws 538 (codified at *Fla. Stat. §§ 366.04(2), 366.05(7)-(8)*).¹⁰

[*17] During the 1980s, the Commission proposed several legislative measures to establish service territories, which were not accepted. Therefore, the Commission utilized its statutorily granted authority to enact a comprehensive regulatory scheme governing the adoption of territorial agreements and the resolution of territorial disputes. Fla. Admin. Code, Rules 25-6.0439-0442 (adopted March, 1990). In 1989, the Legislature enacted a revised version of Chapter 366 which permitted the Commission to resolve territorial disputes on its own motion. *Fla. Stat. §§ 366.04(2)(e), 366.04(3)*. Under this current legislative and regulatory scheme, the Commission effectively exercises authority over the designation of territories in which each utility will operate.

The Commission has stated on many occasions that its supervision of territorial agreements among utilities is intended to eliminate the harmful effects of unrestrained competition on individual consumers and on the public.¹¹ The Florida Supreme Court has similarly concluded that **HN6**¹¹ the state has comprehensive control over competition among retail utility service providers. *Storey v. Mayo*, 217 So. 2d 304, 307 (Fla. 1968)(holding

¹⁰ **HN5**¹² *Section 366.04*, "Jurisdiction of the commission", provides in pertinent part:

- (2) in the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:
- (d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. . .
- (e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction . . .

* * *

- (5) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

¹¹ Such harmful effects include "unsatisfactory customer relations", "service inefficiencies," and "the premature erection of more lines than are needed for immediate service, which lessens the immediate return of the investment, and, in effect, must be subsidized by other customers of the utility." Order No. 3799 at 4.

that [*18] "the powers of the Commission over these privately owned utilities is omnipotent within the confines of the statute and the limits of organic law"); see also *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988)(holding that "the regulation of the production and sale of electricity [under chapter 366] necessarily contemplates the granting of monopolies in the public interest"). The Court has further stated that *HN7*↑ "an individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself.' Larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the [Commission]." *Lee County Electric Cooperative v. Marks*, 501 So. 2d 585, 587 (Fla. 1987)(citation omitted).

[*19] *HN8*↑ Florida, through its legislation, regulation, and judicial holdings and pronouncements, has demonstrated its intent to displace competition in the field of retail electric service with a regulatory mechanism to designate territorial boundaries. As such, Florida has a "clearly articulated and affirmatively expressed state policy" as contemplated by the first element of *Midcal*'s test for state action immunity.

Plaintiff contends that even if Florida has a clearly articulated policy, the actions of FPL and FPC with respect to Plaintiff's Brevard County facility were not taken in accordance with that policy. Plaintiff specifically asserts that the Commission never approved an agreement between Defendants with respect to Brevard County. *HN9*↑ Under Florida's policy of non-competition, the validity of a territorial agreement is premised on Commission approval. See *City Gas Co. v. Peoples Gas System*, 182 So. 2d 429, 436 (Fla. 1965); Fla. Stat. §§ 366.04(2), 366.05(7)-(8). Therefore, if FPL and FPC denied FPC's service to Plaintiff pursuant to a territorial agreement, and such agreement was never approved by the Commission, the actions of FPL and FPC would not merit state action immunity [*20] protection.¹²

Plaintiff's argument centers [*21] on the 1958 and 1962 letter agreements, which were incorporated into the 1964 Agreement and subsequently approved by Order No. 3799. Plaintiff asserts that Defendants' Agreement was not intended to place Brevard County within FPL's service territory. In support of this contention, Plaintiff notes that the letters which form the Agreement make no mention of Brevard County. Additionally, Plaintiff argues that the Commission did not intend to approve an agreement concerning Brevard County. Defendants' Application made no mention of Brevard County, Brevard County's government was not notified of the hearing on the Application, and only two references were made to Brevard County at the Hearing on the Application. Lastly, Plaintiff notes that the maps attached to the Agreement and Application, which depict the boundary line, do not include a full map of Brevard County.

In contrast, Defendants assert that they clearly intended to include Brevard County within FPL's service area in their Agreement and subsequent Application. Defendants note that the maps incorporated into their Agreement and used by the Commission to approve the Agreement, depict a red line running along the borders between [*22] Brevard County, and Orange and Osceola Counties. Additionally, testimony at the public hearing reflected that the line contemplated a division of territories, with FPL serving the area to the east or right of the line, and FPC serving to the west or left of the line. Lastly, Defendants contend that following the issuance of Order No. 3799, the Commission has acted as if FPL's service area included Brevard County. Defendants note that maps prepared by the Commission during its 1981-1987 comprehensive review of service territories place Brevard County in FPL's service area.

¹² Plaintiff relies on the Supreme Court's recent decision in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992), to argue that a state must expressly approve the particular anticompetitive act of the party seeking state action immunity. In *Ticor* the Supreme Court stated that "Midcal's requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence; it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State." Given the Supreme Court's previous statements with respect to state action immunity, it is not likely that the Court would require a state to give express approval of each anticompetitive act. Nonetheless, the Court need not reach this issue for the purposes of this Order, as Florida law does require the Commission to expressly approve all anticompetitive territorial agreements among utilities.

The Court has closely examined the materials which document the events giving rise to the formation of the Agreement and the Commission's subsequent approval of the Application. Such documentation gives rise to conflicting interpretations of the intent of Defendants and the Commission regarding the provision of service in Brevard County. At no time during the application or approval process did FPL, FPC or the Commission definitively state that FPL would exclusively provide service to Brevard County. However, it was indicated throughout negotiations and proceedings that the Agreement permitted FPL to provide service [*23] in areas to the east of the demarcated boundary line, which, in a large portion of the map, included only Brevard County.

The Commission's intent can be better discerned by examining the effect it generally gave to such territorial boundary lines, at the time it approved the Agreement. The Court finds a 1965 statement by the Commission particularly instructive, as it was made during the same year in which the Commission entered Order No. 3799. The Commission explained the effect of approved boundary lines as follows:

We should not approve an agreement which awards to a utility territory with respect to which there is not a reasonably immediate possibility of duplicating service by one or the other of the parties to the agreement. In truth, what we call 'territorial agreements' are more aptly described in most cases as a boundary agreement and the extent of the boundary line should bear a reasonable relationship to the area in which competition may be expected . . . In the case at hand we have such a boundary drawn across two counties, providing a line of demarcation beyond which neither utility may extend its facilities. While the contractual agreement between the parties [*24] went much farther and purported to secure to each company, inviolate from any competition by the other, all that part of the two counties on its side of the line, we do not think that we have the authority to grant our approval to this extent. Rather, our approval should be limited to the establishing of a line beyond which the utilities will not extend their service facilities, and the extent of such line should be limited to the area in which possible encroachment is threatened.

Commission Order No. 3835 (June 24, 1965)(order quoted in *Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335, 337 (Fla. 1966)).

Later statements by the Commission have reinforced its 1965 interpretation of territorial boundary lines as allocating territory in areas where competition between utilities is expected. See e.g. Order No. 3799 (finding that "the utilities . . . have entered into agreements where there has been or is about to be some conflict as to the boundaries of the territory they seek to serve"); Order No. 20808 (finding that boundary lines serve to prevent overlapping distribution systems in affected areas).

HN10 Chapter 366, Florida Statutes, also recognizes that the Commission [*25] must examine actual and potential competition to resolve territorial disputes. The Commission will establish territorial boundaries based on factors including "population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services." [Fla. Stat. § 366.04\(e\)](#). Based on the foregoing examination, the Court concludes that the Commission, by establishing a boundary line, intends to allocate to each utility that territory on its respective side of the boundary line in which competition is reasonably expected.

Given this effect of approved boundary lines, the Court must now determine whether a material question of fact exists regarding territory allocated by the boundary line established in Order No. 3799. The line approved by the Commission in 1965 contemplated an allocation of territory in those areas where competition between FPL and FPC would have been reasonably expected in the foreseeable future. Statements made by witnesses at the hearing on Defendants' Application confirm that the line represented the pattern of development of Defendants' systems within Orange, Seminole, [*26] Volusia and Osceola Counties, and along the borders between Brevard County and Orange and Osceola Counties. The line established did not extend further into those areas which "in the foreseeable future would not be developed to the point where there would be competition between the two companies for the same customers." Hearing Transcript at 17.

It appears that Mims, Florida is situated within twenty miles from the established boundary line. Given the proximity of the line to Mims and development in the disputed territory, the Court concludes that a genuine issue of material fact remains regarding whether Mims was located in an area to the east of the boundary line in which competition between FPL and FPC was reasonably foreseeable in the future. It is possible that Defendants' refusal to provide FPC's electricity to Plaintiff was in accordance with Order 3799's requirements. The Court therefore cannot conclude as a matter of law that Defendants did not act pursuant to Florida's clearly articulated state policy which allocates territory among utility providers. Conversely, the Court cannot conclude that Defendants acted pursuant to this policy. Accordingly, summary judgment in favor [*27] of Defendants is not proper, as a genuine issue remains with respect to whether Defendants' actions fall within the State Action Immunity Doctrine.

Although the Court finds summary judgement in favor of Defendants inappropriate at this juncture, the Court will address the second element of the State Action Immunity Doctrine. If the second element of *Midcal*'s test for state action immunity is not met, Defendants' actions will not be afforded immunity. The second prong of the test requires that an articulated state policy be actively supervised by the state. [*Midcal, 445 U.S. at 105*](#). Such supervision prevents the "casting [of] a gauzy cloak of state involvement" over an essentially private anticompetitive activity, *id. at 106*, and ensures that private anticompetitive activity promotes state policy, rather than the interests of private parties. [*Municipal Utilities, 934 F.2d at 1503*](#).

HN11 [↑] A court will examine several factors to assess a state's participation in operative decisions relating to the anticompetitive conduct at issue. *Id.* A state cannot simply authorize the anticompetitive activity, then enforce the decisions of individual parties made pursuant to its authorization. [*28] [*Midcal, 445 U.S. at 105*](#). A state must help to establish the anticompetitive practice, or must review private decisions made pursuant to state authorization. *Id. at 105*. Courts will further examine whether the state monitors conditions in the relevant market and engages in "pointed reexamination of the program." *Id. at 106*. If an examination of these factors reveals that the state has effective control over all decisions being challenged in the antitrust action, the second element of *Midcal*'s test will be established. [*Municipal Utilities, 934 F.2d at 1505*](#).

A review of Florida's case law and legislation indicates that Florida actively supervised territorial allocations among utilities in 1965 and has continued to do so. The Florida Supreme Court's decision in [*City Gas Co. v. Peoples Gas System, 182 So. 2d 429 \(Fla. 1965\)*](#), established that only those territorial agreements approved by the Commission would be valid. When Defendants submitted their Application to the Commission, it conducted a public hearing, at which witnesses testified and the public participated. The Commission was required to evaluate the public interest of the proposed boundary line and to [*29] review the placement of the line to ensure that it reflected anticipated service patterns. Order. No. 3799; see also [*Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731, 732 \(Fla. 1985\)*](#). The Commission had the choice to approve or disapprove the Application, and by its written order, approved it. The Commission further maintained continuing jurisdiction over any modifications made to the Agreement to ensure that changes would serve the public interest. Order No. 3799; see also [*Peoples Gas System Inc. v. Mason, 187 So. 2d 335, 339 \(Fla. 1966\)*](#).

Since the approval of Defendants' Application, the above procedure for the review and supervision of territorial agreements has been codified and established by regulation. Fla. Admin. Code §§ 25-6.0439-.0442. The administrative code permits the Commission staff to investigate each proposed territorial agreement and evaluate its effect on the relevant territory, customers, and utility facilities. [*Fla. Stat. § 366.08*](#). Additionally, agreements cannot be modified without Commission approval. [*Public Service Commission v. Fuller, 551 So. 2d 1210 at 1212*](#). Moreover, the Florida Supreme Court continues [*30] to find that an "agreement has no existence apart from the Public Service Commission's order approving it." *Id.*

It is true that **HN12** [↑] utilities may initially negotiate the territorial boundaries to be submitted to the Commission for approval. However, such private conduct constitutes part of Florida's contemplated scheme for establishment of boundaries. The Florida courts and the Commission have recognized that agreements initiated by utilities enable the economical expansion of utility facilities. [*Utilities Commission of the City of New Smyrna Beach, 469 So. 2d at 732*](#); In re Joint Petition of Florida Power Corporation and Withlacoochee River Electric Cooperative for Approval of Territorial Agreement, 88 Fla. Pub. Serv. Comm'n Rep. 6:215 (Order No. 19480, June 10, 1988). The Commission's

extensive control over the validity and effect of such agreements negates any inference that the privately initiated agreements lack state supervision. Accordingly, the Court finds that no genuine issue of material fact exists regarding the active supervision exercised by the state of Florida over territorial arrangements among retail utility providers. The second element of *Midcal's* test for [*31] state action immunity has therefore been satisfied.

Because a genuine issue of material fact remains regarding Defendants' qualification for state action immunity, the Court cannot conclude that Defendants have, as a matter of law, engaged in violations of state and federal antitrust laws. Accordingly, summary judgment in favor of Plaintiff is not proper at this time.

CONCLUSION

Upon consideration of the foregoing, it is hereby ORDERED and ADJUDGED that:

1. Defendants' Motion for Summary Judgment (Dkt. # 10) is DENIED.
2. Plaintiff's Motion for Partial Summary Judgment (Dkt. # 32) is DENIED.
3. Defendants are DIRECTED to file a response to Plaintiff's Motion to Substitute Parties (Dkt. # 129) on or before December 20, 1993, in the absence of which the Court will take Plaintiff's Motion under advisement and rule thereon.
4. Amicus Curiae Florida Public Service Commission's Motion for Leave to File Response to Union Carbide's Notice Re: Ticor (Dkt. # 126) is DENIED as MOOT, as all parties and amicus participants have submitted revised memoranda to the Court.
5. Defendants' Motion to Strike Section III of Plaintiff's Response Re: Supplemental Authority (Dkt. # 142) is DENIED [*32] as MOOT, as all parties have submitted revised memoranda to the Court.

DONE AND ORDERED, at Tampa, Florida, this 8th day of December, 1993.

RALPH W. NIMMONS, JR.

UNITED STATES DISTRICT JUDGE

End of Document

Virtual Maintenance v. Prime Computer

United States Court of Appeals for the Sixth Circuit

August 9, 1991, Argued ; December 15, 1993, Decided ; December 15, 1993, Filed

Nos. 90-2249, 91-1273

Reporter

11 F.3d 660 *; 1993 U.S. App. LEXIS 32575 **; 1993-2 Trade Cas. (CCH) P70,446

VIRTUAL MAINTENANCE, INC., Plaintiff-Appellee, v. PRIME COMPUTER, INC., Defendant-Appellant.

Subsequent History: [\[**1\]](#) Rehearings En Banc Denied March 3, 1994, Reported at: [1994 U.S. App. LEXIS 4416](#).

Prior History: On Appeal from the United States District Court for the Eastern District of Michigan. District No. 89-71762. Elizabeth Higdon, Senior District Judge.

Original Opinion of June 4, 1993, Reported at: [1993 U.S. App. LEXIS 13182](#).

Core Terms

software, customer, market power, hardware, tying product, suppliers, switching, matter of law, aftermarkets, manufacturer, prices, automotive, derivative, consumer, package, costs, district court, minicomputers, revisions, license, updates

LexisNexis® Headnotes

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

[**HN1**](#) **Summary Judgment, Burdens of Proof**

[Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538 \(1986\)](#), did not create a special burden on plaintiffs responding to summary judgment challenges in antitrust cases, but requires only that the non-moving party's inferences be reasonable and not economically senseless.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

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

[**HN2**](#) **Tying Arrangements, Per Se Rule**

The elements of a per se tying claim are as follows: (1) There must be a tying arrangement between two distinct products or services, (2) the seller must have sufficient economic power in the tying market to restrain appreciably competition in the tied product market, and (3) the amount of commerce affected must be not insubstantial.

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

HN3 **Regulated Practices, Market Definition**

Defining a market, or submarket, on the basis of demand considerations alone is erroneous because such an approach fails to consider the supply side of the market. The relevant product market cannot be determined without considering the cross-elasticity of supply.

Counsel: For VIRTUAL MAINTENANCE, INC., Plaintiff - Appellee: Ronald S. Katz, Janet S. Arnold, Coudert Brothers, San Francisco, CA. Donald M. Falk, Mayer, Brown & Platt, Washington, DC. Rodger D. Young, ARGUED, BRIEFED, Jamal J. Hamood, BRIEFED, Young & Hamood, Southfield, MI.

For PRIME COMPUTER, INC., Defendant - Appellant: Stephen F. Wasinger, Howard B. Iwrey, Honigman, Miller, Schwartz & Cohn, Detroit, MI. Charles Fried, ARGUED, Harvard Law School, Cambridge, MA. Deborah J. Hart, BRIEFED, James C. Burling, BRIEFED, Hale & Dorr, Boston, MA.

Judges: Before: JONES and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

Opinion by: SUHRHEINRICH

Opinion

[*661] AMENDED OPINION

SUHRHEINRICH, Circuit Judge.

In our original decision in this case,¹ we reversed the judgment of the trial court, which implemented the jury's general verdict in favor of plaintiff and overruled defendant's motion for judgment notwithstanding the verdict ("j.n.o.v."). We did so upon our conclusion that each of three alternative legal theories of anticompetitive conduct that were presented to the jury were erroneous as a matter of law. We then vacated the award of damages and the injunction issued by the trial court and remanded with instructions to enter judgment in favor of the defendant. The United States Supreme Court directed us to reconsider our original decision in light of *Eastman Kodak Co. v. Image Technical Serv. Inc.*, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992), in which the Supreme ^[*662] Court held that the existence of competition in a primary equipment market does not preclude, ^[**2] as a matter of law, a finding of market or monopoly power in derivative aftermarkets.

I.

The opinion only briefly revisits the relevant facts.² Defendant Prime Computer, Inc. ("Prime") manufactures and markets computer systems, and provides maintenance services for those systems. Of significance to this lawsuit is one of its hardware lines, the "50 Series" minicomputer, and one of its applications software products, the so-called Computer-Aided Design/Computer-Aided Manufacturing system ("CAD/CAM"), which can be used with the 50 Series minicomputers.

¹ *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 957 F.2d 1318 (6th Cir. 1992), vacated, 121 L. Ed. 2d 235, 113 S. Ct. 314 (Oct. 13, 1992) (No. 92-90). ("Virtual I").

² For a more detailed history of the case, see *id.*

Ford Motor Company ("Ford") created [**3] and owns a CAD/CAM software design program for use in designing automobiles. Ford's CAD/CAM program is called Product Design Graphic System ("PDGS"). Ford frequently revises the software program, and requires the automotive design companies with which it does business to use the most recent version of Ford's PDGS in order to facilitate the transmission of design specifications through CAD/CAM software.

Ford licenses defendant Prime as the exclusive distributor of Ford's version of PDGS under a year-to-year contract. Ford's version of PDGS runs only in Prime's 50 Series minicomputers, but can be translated to other systems at a higher cost.

Prime also distributes software support (i.e., revisions, modifications, updates, and support services) for PDGS software. Prime offers this software support to Ford's design companies as part of a package that includes hardware maintenance on the Prime 50 Series minicomputers. PDGS revisions may be purchased separately from the hardware maintenance, but only at a prohibitive expense. In contrast, the general contract to purchase PDGS does not contain a hardware maintenance requirement.

Plaintiff Virtual Maintenance, Inc. ("Virtual") brought this [**4] antitrust action after unsuccessfully attempting to enter into hardware maintenance contracts with owners of Prime 50 Series computers. Virtual contended that Prime's package constituted an illegal tying arrangement in violation of [§ 1](#) of the Sherman Act, [15 U.S.C. § 1](#), by conditioning the purchase of software support required by Ford to hardware maintenance from Prime (the tying product).

Virtual's case was presented to the jury on three alternative theories of liability based on the alleged tie of hardware maintenance services to PDGS updates: (1) a per se claim based on a tying market of all CAD/CAM software; (2) a per se claim based on a tying product market of Ford-required PDGS; and (3) a rule of reason claim alleging that the clause in Prime's software maintenance package contract requiring the customer to use Prime's hardware maintenance services created unreasonable and anticompetitive effects in the market for maintaining Prime's 50 Series computer systems. The jury returned a general verdict in favor of Virtual. The district court denied Prime's motion for j.n.o.v. and entered judgment in favor of Virtual.

On appeal, we rejected each of [**5] Virtual's theories, and reversed the judgment of the district court with instructions to enter judgment in favor of Prime. In accordance with the Supreme Court's directive, we will consider whether any of these prior rulings are impacted by **Eastman Kodak**.

II.

A.

In Eastman Kodak, the antitrust plaintiffs were a group of independent service organizations (ISO's) that had been servicing Kodak copying and micrographic equipment since the early 1980s. They brought suit after Kodak began restricting the sale of replacement parts for its photocopiers and micrographic equipment to only those buyers who also purchased Kodak service or repaired their own machines. Kodak equipment is unique; its parts are not compatible with its competitors' machines. Because of [*663] Kodak's restrictive policy, the ISO's were unable to obtain suitable parts and many were forced out of business. The plaintiffs also offered evidence that some customers who preferred the plaintiffs' service were forced, as a result of Kodak's practice, to switch to Kodak's service. Plaintiffs alleged, inter alia, that Kodak had tied the sale of service to the sale of parts in violation of [section 1](#) of the Sherman Act. [**6] 112 S. Ct. at 2076-77.³

³ Plaintiffs also claimed that Kodak had unlawfully monopolized and attempted to monopolize the sale of service for Kodak machines in violation of § 2 of the Sherman Act.

The district court granted summary judgment for Kodak. A divided panel of the Ninth Circuit reversed, finding a genuine issue of material fact as to whether Kodak had sufficient economic power in the tying product market (parts) to restrict competition appreciably in the tied product market (service). [Id. at 2078.](#)

Before the Supreme Court, Kodak did not offer any actual data on the proposed markets, but rather urged the adoption of a substantive legal rule that interbrand competition foreclosed finding of monopoly power in derivative aftermarkets as a matter of law. [Id. at 2082.](#) The Supreme Court framed the issue as "whether a defendant's lack of market power in the primary equipment market precludes--as a matter of law--the possibility of market power in derivative aftermarkets." Starting with the assumption that Kodak [**7] lacked market power in the equipment market, the Supreme Court nonetheless refused to accept on faith Kodak's proposed rule absent evidence to support it. Thus, contrary to Kodak's assertion, "there [was] no immutable physical law--no 'basic economic reality'--insisting that competition in the equipment market cannot coexist with market power in the aftermarkets." [Id. at 2084.](#)⁴

The Court found that the plaintiffs had offered a "forceful reason" why Kodak's theory might not accurately explain the behavior of the primary and derivative markets for complex and durable goods: "the existence of significant [**8] information and switching costs." [Id. at 2085.](#) Regarding information costs, the Court observed that in order for the service-market price to affect equipment demand, consumers must engage in accurate "lifecycle pricing"--that is, they must inform themselves of the total cost of the package at the time of purchase. Lifecycle pricing, however, is difficult to perform. [Id. at 2085-86.](#)

Furthermore, the cost of switching products may be high, and consumers who have already purchased the equipment will tolerate some level of service-price increase before switching equipment brands. [Id. at 2087.](#) "Under this scenario, a seller profitably could maintain supra-competitive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchases." [Id.](#)

Also critical to the Court's conclusion that summary judgment on the ISO's claims was improper was evidence presented by the plaintiffs that certain parts were available exclusively through Kodak, that Kodak had control over the availability [**9] of parts it didn't manufacture, and that Kodak's control over its parts market had excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service when plaintiffs' service would have been preferred. [Id. at 2081.](#) The Court stated that under existing precedents, the foregoing evidence "would be sufficient to entitle [the plaintiffs] to a trial on their claim of market power." [Id.](#) The Supreme Court affirmed the decision of the appellate court reversing the district court's grant of summary judgment to Kodak.

B.

1.

Eastman Kodak did not involve a rule of reason theory of liability, and we see [*664] no reason to alter our conclusion that there was insufficient evidence to support a jury verdict under the rule of reason. Even with Ford-required software support as the tying product market, Virtual failed to demonstrate a substantial threat that Prime would acquire market power in the most narrowly defined tied product market of hardware maintenance of Prime 50 Series systems.⁵ See [Virtual I, 957 F.2d at 1330](#) (the foreclosure of at most the 400 50 Series systems out of

⁴The Supreme Court made clear that [HN1\[↑\] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#), did not create a special burden on plaintiffs responding to summary judgment challenges in antitrust cases, but requires only that the non-moving party's inferences be reasonable and not "economically senseless." [Eastman Kodak, 112 S. Ct. at 2083.](#)

⁵Virtual claimed that a jury could find that Prime possessed almost total control over the Prime 50 Series hardware maintenance market. [Virtual I, 957 F.2d at 1330.](#)

thousands of systems [**10] capable of using PDGS is insignificant as a matter of law). Given Virtual's failure of proof under the most restrictive definition of tied product market, we do not think our ruling on this issue is affected by **Eastman Kodak**.

2.

Under Virtual's first per se claim ⁶, the district court defined the relevant market as "the sale of software revisions and support for the CAD/CAM industry in general." We found no error in the legal adequacy of the district court's definition, but concluded that Prime possessed at most an 11% share of the market, which is insufficient as a matter of law to confer market power. *Virtual I*, 957 at 1325 (citing **Jefferson Parish Hosp. Dist. No. 2 in Hyde**, *466 U.S. 2, 26, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* (30% market share does not confer market power); **A.I. Root v. Computer/Dynamics, Inc.**, *806 F.2d 673, 675 (6th Cir. 1986)* [**11] (2-4% market share is insufficient); **Grappone, Inc. v. Subaru of New England, Inc.**, *858 F.2d 792, 796 (1st Cir. 1985)* (5% market share insufficient)).⁷ We find nothing in **Eastman Kodak** which requires us to alter this analysis. We therefore hold that a per se tying violation could not be established under Virtual's first per se theory because Prime lacks market power in the general CAD/CAM product market, for the reasons stated here and in section II.B.1. of our decision in **Virtual I**.

[**12] 3.

Our ruling regarding Virtual's second per se claim requires much closer scrutiny. The other market that Virtual urged was defined as "the sale of software revisions and support of software necessary to do business with Ford Motor Company." *Virtual I*, *957 F.2d at 1325*. Prime argued that this instruction defined the tying product market too narrowly as a matter of law, and we agreed. We found that market definition defective as a matter of law because it was "based solely on one customer's requirements," which "this court has held . . . does not create a separate product market." *Id. at 1327* (citing **International Logistics Group, Ltd. v. Chrysler Corp.**, *884 F.2d 904, 908 (6th Cir. 1989)*, cert. denied, *494 U.S. 1066, 108 L. Ed. 2d 784, 110 S. Ct. 1783 (1990)*; **Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.**, *691 F.2d 241 (6th Cir. 1982)*).

In response to Virtual's contention that Ford is not the only customer of Prime's products, but that all of Ford's design suppliers made up the customer market for "Ford-required CAD/CAM," we stated:

Virtual seeks to distinguish these [**13] cases by pointing out that Ford is not the only customer of Prime's products; rather, all of Ford's design suppliers make up the customer market for "Ford-required CAD/CAM." This ignores the fact that Ford requires its suppliers to purchase the software updates for Ford's benefit. Ford is ultimately the single consumer of its specialized design software because Ford's requirements define the demand for the software and the updates. But defining the [*665] market by Ford's requirements creates the appearance of market power based only upon the demand side of the market. **HN3**⁸ Defining a market, or "submarket," on the basis of demand considerations alone is erroneous because such an approach fails to consider the supply side of the market. Philip E. Areeda & Herbert Hovenkamp, **Antitrust Law**, P518.1g at 471 & n.26 (Supp. 1990) (citing **United States v. Central State Bank**, *817 F.2d 22 (6th Cir. 1987)*). The relevant product market cannot be determined without considering the cross-elasticity of supply.

⁶ As noted in **Virtual I**, **HN2**⁹ the elements of a per se tying claim are as follows: "(1) There must be a tying arrangement between two distinct products or services; (2) the seller must have sufficient economic power in the tying market to restrain appreciably competition in the tied product market; and (3) the amount of commerce affected must be not insubstantial." *Virtual I*, *957 F.2d at 1323* (quoting **Directory Sales Management Corporation v. Ohio Bell Tel. Co.**, *833 F.2d 606, 609 (6th Cir. 1982)* (other quotations omitted)).

⁷ We stated: "An 11% market share, standing alone, is insufficient as a matter of law to confer the 'great market power, evidenced by an exceptional demand for the tying product' necessary for a per se illegal tie." *Virtual I*, *957 F.2d at 1325* (quoting **A.I. Root**, *806 F.2d at 676*).

957 F.2d at 1327.

Virtual countered that Prime has no supply side competition because of its exclusive license for PDGS. We rejected this argument as "confusing the tying [**14] product (software support for PDGS) with the interbrand market relevant for antitrust analysis," *id.*,⁸ and ruled that "the relevant tying market is comprised of all CAD/CAM software reasonably interchangeable with PDGS." *Id.* Critical to this analysis was the view that PDGS software support is an intrabrand "submarket":

[**15] Prime has market power in the trivial sense that no one else makes PDGS. But true market power--power sufficient to change and sustain anticompetitive prices--cannot be inferred from this because were Prime to charge exorbitant prices for its software support, its customers would simply switch to some other manufacturer of PDGS-type software. Prime's lack of market power over the general market for CAD/CAM software thus prevents Prime from controlling the "submarket" for PDGS software.

957 F.2d at 1327-28.⁹ Upon refusing to view Ford-required PDGS software support as a separate tying product market, we rejected Virtual's lock-in and switching costs arguments as a matter of law:

[**16] Virtual responds that Ford and its design suppliers cannot switch to a new supplier of software support because they are "locked-in" to Prime as the sole supplier due to their substantial investments in Prime 50 Series computers and other hardware. While Ford might believe it is "locked- in," this is due in large part to its own decision to purchase Prime's software and invest in Prime's computer systems. [*666] But a customer's initial purchase of a particular manufacturer's product does not justify a limited market definition. Defining the market by customer demand **after** the customer has chosen a single supplier fails to take into account that the supplier (here Prime) must compete with other similar suppliers to be designated the sole source in the first place.

Id. at 1328 (citation omitted).

⁸We observed that this court previously had refused to ignore interbrand competition by limiting the product market to one manufacturer's product, citing *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986) and *Kingsport Motors, Inc. v. Chrysler Corp.*, 644 F.2d 566 (6th Cir. 1991). Both of these cases can be distinguished from the instant one. The disposition in *A.I. Root* turned on the fact that the evidence in the case established that equipment using BOSS software had "close substitutes." *806 F.2d at 676*. The relevant market was not BOSS software as a unique product market, but small business computers. *Id. at 675-76*. Thus, the defendant lacked that "essential characteristic" of an illegal tying arrangement, the seller's ability to coerce customers into buying an unwanted tied product. *Id. at 677*. In fact, the plaintiff in that case, rather than submitting to the tie, purchased new IBM equipment and software. *Id. at 675*.

Kingsport Motors, 644 F.2d 566, is likewise distinguishable because there the relevant product market, "properly analyzed," was "all medium priced cars available for sale in the United States." *Id. at 571*. So defined, there was simply no proof that the seller had any power to raise prices or that the tying arrangement at issue affected any appreciable number of buyers within the applicable market. *Id.* Thus, *Kingsport Motors*, by focusing on the primary equipment market rather than the aftermarket cannot compel a similar result in this case.

⁹In rejecting Virtual's contention that PDGS constitutes a relevant "submarket," we relied, in part, on the proposition in *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986), that "competitors of [defendant] could produce computer hardware and software equivalent to that manufactured by [defendant]. Accordingly, [defendant's product] did not compose a separate and distinct submarket within the computer industry as to which we should measure 'market share.'" *Virtual I*, 957 F.2d at 1327 (quoting *A.I. Root*, 806 F.2d at 675-76). As previously noted, see *supra* note 7, *A.I. Root* rejected the plaintiff's attempts to define BOSS as a separate market because although it was copyrighted, there was proof of close substitutes. *Id.* Closer to the mark is a case discussed in *A.I. Root*, *Digidyne Corp. v. Data General*, 734 F.2d 1336 (9th Cir. 1984). *A.I. Root* distinguished *Digidyne* on the basis that the tying product (RDOS), a computer command system, was unique. In contrast, the plaintiff in *A.I. Root* had not presented any evidence that BOSS was particularly unique or desirable. Here, Virtual has offered proof of PDGS's desirable-ness; namely, Ford's requirement that all the design companies with which it does business use the software and software updates.

Under **Eastman Kodak**, our rejection of Virtual's second per se claim based on a tying product of Ford-required software support was misguided. That Ford had many competitors to choose from when it made its initial decision to grant the exclusive license to Prime cannot, after **Eastman Kodak**, preclude as a matter of law Virtual's proposed theory of market power because it ignores information [**17] costs. It follows that our rejection of Virtual's "lock-in" argument, on the basis of an interbrand competitive market in the initial purchase of Prime's software package and Prime 50 Series minicomputers, was also in error.

Eastman Kodak also requires us to rethink our characterization of the tying product market here as merely the preference of one customer. Unlike **Eastman Kodak**, the initial decision to purchase Prime equipment and software was made by a single consumer, Ford. However, by shifting the focus to the derivative aftermarket of software support, there is not a single consumer, but numerous automotive design companies doing business with Ford. In contrast with **International Logistics**, 894 F.2d at 904, which involved vertical nonprice restraints unilaterally imposed by defendant Chrysler upon its distributors, the automotive design companies in the present case are independent companies, not a part of Ford. Unlike Dunn & Mavis, 691 F.2d 241, where it was held that an agreement between a single seller of transportation services and a single automobile manufacturer was not an illegal "group boycott," the [**18] present case does not involve merely an arrangement between a single consumer and a single supplier. Thus, the market in this case is not defined by Ford, as a customer of Prime, but by Ford's requirements that affect the choice of Prime's other customers, Ford suppliers.¹⁰

The similarities between this case and **Eastman Kodak** [**19] are apparent. As in **Eastman Kodak**, the alleged tie is not between equipment and parts, where interbrand competition would defeat market power and a per se tying claim. Rather, the alleged tie is in the derivative aftermarkets. Like Kodak, Prime is able to exercise control over the sale of software support because of its exclusive distribution license from Ford, and Ford's requirement that its automotive design suppliers use the most current version of Prime's software support. Thus, it can be argued that Prime enjoys a significant advantage in the Ford-required software support market by virtue of Ford's license and the requirement Ford places on the automotive design companies to use the most current version of PDGS. In other words, there is evidence to make the argument that Prime's tying arrangement bears that "essential characteristic" of an illegal tying arrangement, the ability to exploit control over the tying product to force the buyer to purchase an unwanted tied product. **Jefferson Parish**, 466 U.S. at 12.

Like the ISO's in **Eastman Kodak**, Virtual presented evidence of price manipulation. An expert for Virtual testified that although Prime [**20] offered software support for sale separately, repurchase of software to obtain updates would cost as much as 900% more than if purchased in the software support/hardware maintenance package. There was also evidence that Prime does not treat all customers equally. Prime apparently allows one customer, Ford Aerospace, to continue to [*667] receive software support without purchasing hardware maintenance from Prime. Virtual also offered proof that customers would have preferred Virtual's service to Prime's, but were effectively precluded by the tie.

Virtual offered expert testimony concerning lock-in and switching costs. Virtual's industry experts testified that customers were "locked-in" to the hardware maintenance by the substantial cost incurred for hardware, maintenance, and training, most of which would be substantially worthless if the customer switched to another manufacturer's system. A Ford employee, called by Prime, testified that Ford itself felt "locked-in" to Prime, stating that Ford could not change from Prime's computer system and remain economically viable in the automotive industry. Virtual's expert also opined that Prime could substantially raise its maintenance prices before [**21] customers would abandon their investment.

¹⁰ This view is not inconsistent with dicta in International Logistics, 884 F.2d at 909. There, we stated that Chrysler products could not be a relevant market "absent a government imposed distinctions between Chrysler manufactured replacement parts and Chrysler compatible replacement parts . . ." **Id.** By implication, had such a government imposed distinction existed, it may have had the "unique characteristics that would support its consideration as a separate geographic market." **Id.** In this case, the "imposed distinction" is Ford's requirement that its automotive design suppliers use the most current version of PDGS marketed exclusively through Prime.

Finally, Virtual made a showing that a "not insubstantial" amount of commerce was affected in that it stood to lose significant profits over a five-year period. Thus, under **Eastman Kodak**, we conclude that Virtual's second definition of tying product market was not improper.

C.

Eastman Kodak dictates that we vacate our holding as to Virtual's second definition of tying product market on a per se tying claim. All other aspects of our holdings in **Virtual I** are reaffirmed and reinstated. Because the general jury verdict in the first trial provides no indication of the jury's reliance on this theory in support of the original verdict, we are obligated to reverse the verdict and remand for a new trial. See [Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 29-30, 8 L. Ed. 2d 305, 82 S. Ct. 1130 \(1962\)](#); [United New York and New Jersey Sandy Hook Pilots Assoc. v. Halecki, 358 U.S. 613, 619, 3 L. Ed. 2d 541, 79 S. Ct. 517 \(1959\)](#); [Wilmington Star Mining Co. v. Fulton, 205 U.S. 60, 51 L. Ed. 708, 27 S. Ct. 412 \(1907\)](#); [Maryland v. Baldwin, 112 U.S. 490, 28 L. Ed. 822, 5 S. Ct. 278 \(1884\)](#); see also [Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050](#) [**22] (6th Cir.), cert. denied, 469 U.S. 1036, 83 L. Ed. 2d 401, 105 S. Ct. 510, 105 S. Ct. 511 (1984). On remand, the district court is instructed to conduct a new trial on the sole theory of a per se claim based on a tying product market of Ford-required PDGS software support.

ADDENDUM

Both Virtual and Prime petitioned for rehearing in this matter. We have reviewed our decision carefully in light of these petitions and responses thereto. Prime's requests for clarification have been incorporated in the corrected opinion; Prime's petition for rehearing is otherwise denied. We decline Virtual's request to apply [Griffin v. United States, 116 L. Ed. 2d 371, 112 S. Ct. 466 \(1991\)](#), which held that a general jury verdict in a criminal case may be affirmed even though one of the alternate legally sound theories is not supported by sufficient evidence. **Griffin**, a criminal case, does not alter the longstanding civil general verdict rule, see [Wilmington Star Mining Co. v. Fulton, 205 U.S. 60, 78, 51 L. Ed. 708, 27 S. Ct. 412 \(1907\)](#), a principle to which this circuit has consistently adhered. See, e.g., [Lilley v. BTM Corp., 958 F.2d 746, 753](#) (6th Cir.), cert. denied, [**23] 121 L. Ed. 2d 287, 113 S. Ct. 376 (1992); [Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1058](#) (6th Cir.), cert. denied, 469 U.S. 1036, 83 L. Ed. 2d 401, 105 S. Ct. 510, 105 S. Ct. 511 (1984); [Doherty v. American Motors Corp., 728 F.2d 334, 344](#) (6th Cir. 1984); [The Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 147-48](#) (6th Cir. 1972); [Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 390](#) (6th Cir. 1962). We therefore hold that **Griffin** has no application in the present case. The opinion filed in this cause June 4, 1993, and reported [995 F.2d 1324](#), is withdrawn and superseded by this amended opinion.

Ashmore v. Northeast Petroleum Div.

United States District Court for the District of Maine

January 19, 1994, Decided ; January 19, 1994, Filed

Civil No. 93-199-P-C

Reporter

843 F. Supp. 759 *; 1994 U.S. Dist. LEXIS 671 **; 1994-1 Trade Cas. (CCH) P70,506

FREDERICK ASHMORE, DAVID BOYA, WILLIAM SIMONE, and RICHARD SIMEONE, Plaintiffs v. NORTHEAST PETROLEUM DIVISION OF CARGILL, INC., NORTHEAST PETROLEUM CORPORATION OF MAINE, NORTHEAST PETROLEUM CORPORATION OF CAPE COD, d/b/a NORTHEAST PETROLEUM, and CARGILL, INC., Defendants

Core Terms

antitrust, anti trust law, pricing system, antitrust violation, promise, discriminatory, customers, sales representative, competitors, terminated, factors, anticompetitive, Defendants', employees, damages, promissory estoppel, purchasers, retaliatory discharge, Robinson-Patman Act, Clayton Act, parties, treble damages, suffer injury, conspiracy, consumers, centers, courts, violation of antitrust laws, motion to dismiss, cause of action

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN1 [] **Defenses, Demurrsers & Objections, Motions to Dismiss**

To resolve a defendant's motion to dismiss, a court must accept as true all factual allegations in the complaint, construe them in favor of the plaintiff, and decide whether, as a matter of law, the plaintiff could not prove any set of facts which would entitle it to relief.

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

HN2 [] **Private Actions, Remedies**

See [15 U.S.C.S. § 15\(a\)](#).

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN3 [] **Price Discrimination, Competitive Injuries**

See [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

HN4 Price Discrimination, Competitive Injuries

See [15 U.S.C.S. § 13a](#).

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

Torts > ... > Elements > Causation > 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

In determining whether a plaintiff has standing to sue for treble damages under section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), a court must consider: (1) the causal connection between the plaintiff's injury and the defendant's violation of the antitrust law; (2) the nature of the plaintiff's alleged injury and whether it was of the type that the antitrust laws were intended to forestall; (3) the directness of the injury particularly if the harm to the plaintiff is of a tenuous and speculative nature; (4) the danger of duplicative recoveries or complex apportionment of damages; and (5) the existence of more immediate classes of potential plaintiffs who could be expected to vindicate the violation of the antitrust laws.

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

HN6 Private Actions, Standing

The antitrust laws were enacted for the protection of competition, not competitors.

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

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

HN7 Regulated Practices, Market Definition

Antitrust standing does not require an allegation that one is a competitor or consumer in the relevant market if a plaintiff was manipulated or utilized by a defendant as a fulcrum, conduit, or market force to injure competitors.

843 F. Supp. 759, *759A994 U.S. Dist. LEXIS 671, **671

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > 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 > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

[**HN8**](#) Remedies, Damages

Congress's purpose in enacting the treble damage remedy in section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), was 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. The statute provides a remedy for "any person" injured and does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Jurisdiction

Antitrust & Trade Law > Clayton Act > Penalties

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

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

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

[**HN9**](#) [L] Coverage, Commerce Requirement

There can be no doubt that Congress was concerned with the conduct of employees and agents who assisted in carrying out antitrust violations in the discharge of their duties. The Robinson-Patman Act imposes personal criminal liability on any person engaged in commerce who knowingly assists in a discriminatory transaction of sale. [15 U.S.C.S. § 13a](#). Providing a remedy to those employees who suffer injury for refusing to violate this law will serve the deterrent purpose of both the criminal sanctions in the Robinson-Patman Act and the treble-damages remedy of the Clayton Act.

Labor & Employment Law > Wrongful Termination > Remedies > General Overview

Workers' Compensation & SSDI > Remedies Under Other Laws > Common Law

Labor & Employment Law > Wrongful Termination > General Overview

Labor & Employment Law > Wrongful Termination > Public Policy

[**HN10**](#) [L] Wrongful Termination, Remedies

Maine law provides a limited statutory cause of action which protects employees who refuse to implement an employer's unlawful practice only when such practice would create a danger of serious injury or death. [Me. Rev. Stat. Ann. tit. 26, § 833](#). However, the Maine courts have not yet ruled on whether Maine common law will permit a cause of action to be established for wrongful discharge in violation of public policy.

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

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

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

[**HN11**](#) [L] Regulated Practices, Market Definition

Failure to allege participation in the relevant market, although it weighs heavily against antitrust standing, is not fatal to a claim of standing under the antitrust laws.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

[**HN12**](#) [L] Subject Matter Jurisdiction, Federal Questions

Supplemental state-law claims in a case where jurisdiction is based on federal question are decided with reference to the choice-of-law provisions of the state in which the federal court sits.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN13 [blue icon] **Federal & State Interrelationships, Choice of Law**

In the absence of an effective choice of law by the parties to a contract, a court must consider what state has the most significant relation with respect to a specific issue in dispute, including the following contacts to the extent that they are relevant to the issue: (1) place of contracting; (2) place of negotiation; (3) place of performance; (4) where the subject matter of the contract is located; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties. Where the place of negotiating the contract and the place of performance are in the same state, the local law of that state will be applied except in limited circumstances.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Labor & Employment Law > Wrongful Termination > Public Policy

Torts > Procedural Matters > Conflict of Law > Significant Relationships

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Torts > Procedural Matters > Conflict of Law > General Overview

HN14 [blue icon] **Choice of Law, Significant Relationships**

To evaluate conflicts of law in tort cases and in order to determine the state which has the most significant relationship to the occurrence and parties, the following contacts are considered by Maine courts to the extent that they are relevant to a particular issue: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered.

Counsel: **[**1]** For Plaintiff: Daniel W. Bates, Esq., Kenneth D. Keating, Esq., Petruccelli & Martin, Portland, Maine.

For Defendants: John J. O'Leary Jr., Esq., Pierce, Atwood, Scribner, Allen, Smith & Lancaster, Portland, Maine. Chriss B. Wetherington, Esq., Bernhardt K. Wruble, Esq., Verner, Liipfer, Bernard, McPherson & Hand, Washington, D.C.

Judges: CARTER

Opinion by: GENE CARTER

Opinion

[*760] GENE CARTER, Chief Judge

MEMORANDUM OF DECISION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This action was commenced by Plaintiffs Frederick Ashmore, David Boya, William Simone, [*761] and Richard Simeone alleging that they were dismissed from employment as sales representatives for Defendants¹ in retaliation for Plaintiffs' refusal to implement a pricing system which allegedly violated the Robinson-Patman Antidiscrimination Act of 1936.² [15 U.S.C. §§ 13, 13\(a\)](#), and [22](#). The Complaint states five causes of action. In Count I, Plaintiffs seek treble damages for injury sustained due to violation of the Robinson-Patman Act in accordance with Section 4 of the Clayton Act. [15 U.S.C. § 15](#). Complaint (Docket No. 1) PP 12-37. Counts II, III, IV, and V state claims based [**2] on breach of contract, promissory estoppel, breach of implied duty of fair dealing, and tortious termination in violation of public policy, respectively. *Id.* PP 38-54. In Count VI, Plaintiff Ashmore seeks relief under the Maine "Whistleblowers' Protection Act." 26 M.R.S.A. §§ 831-840. Motion to Amend Complaint (Docket No. 11), Reply Memorandum in Support of Plaintiffs' Motion for Leave to Amend Complaint (Docket No. 15) at 3-4.

[**3] Now pending before the Court is Defendant Cargill Inc.'s Motion to Dismiss Count I, for lack of standing, and Counts II, III, IV, and V for failure to state a claim. (Docket No. 4). Defendants seek dismissal of Count I because they contend that Plaintiffs lack standing to bring a private action under section 4 of the antitrust laws.³ *Id.* Defendants also seek dismissal of Counts II, IV, and V as to Plaintiff Ashmore for failure to state a cause of action under Maine law, which Defendants contend governs this contract. Finally, Defendants seek dismissal of Count III for failure to state a claim of promissory estoppel.

[**4] [HN1](#) To resolve Defendants' Motion to Dismiss, the Court must accept as true all factual allegations in the Complaint, construe them in favor of Plaintiffs, and decide whether, as a matter of law, Plaintiffs could not prove any set of facts which would entitle them to relief. See [Roeder v. Alpha Industries, Inc., 814 F.2d 22, 25 \(1st Cir. 1987\)](#); [Gott v. Simpson, 745 F. Supp. 765, 768 \(D. Me. 1990\)](#).

I. The Factual Allegations

Plaintiffs were employed as sales representatives by Defendant Cargill's Northeast Division As sales representatives, Plaintiffs sold petroleum products to both small and large retailers in the northeastern United States. Plaintiff Ashmore worked out of Northeast Division's Maine office. Plaintiffs Boya and Simone were based in Northeast's Connecticut office, and Plaintiff Simeone was based in Massachusetts. All were trained at and received pricing instructions from the Chelsea, Massachusetts administrative offices of Northeast Division.

Plaintiffs allege that in 1991, Defendants adopted a discriminatory pricing system which violated the Robinson-Patman Act. Specifically they claim that:

Northeast [**5] implemented a company-wide program of assigning customers to pricing groups based on the characteristics of customer loyalty and the ability of each customer to ascertain a fair price ("price sensitivity"). Northeast then assigned different allowances (discounts) to each pricing group. The most generous allowances were assigned to customers in the group [*762] considered to be the most able to ascertain a fair price, and

¹ The exact relationship and role of the four Defendants is unclear. Cargill Inc. has responded on behalf of itself and "its unincorporated divisions." Motion to Dismiss (Docket No. 4) P 1. It appears that these unincorporated divisions include Northeast Petroleum Division of Cargill, Inc. It is not clear whether Northeast Petroleum Division of Maine, Inc. and Northeast Petroleum Division of Cape Cod exist at all, are unincorporated divisions of Cargill, or are Massachusetts corporations as alleged in the Complaint. Docket No. 1 PP 7-8. For purposes of this motion to dismiss, the identity and relationship of the Defendants are not critical.

² Plaintiff Ashmore refused to implement this pricing policy at any time; Plaintiffs Boya, Simone, and Simeone refused at first but ultimately were compelled to implement the pricing policy.

³ The issue of whether Plaintiffs have antitrust standing is not an issue of standing in the constitutional sense. Defendants do not argue that Plaintiffs do not allege a case or controversy sufficient to satisfy the requirements of Article III of the Constitution. Rather, their standing argument merely alleges that Plaintiffs are not proper parties to bring this antitrust action. See [Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n.31, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1977\)](#).

the least loyal to Defendants; and the least generous allowance was granted to customers in the group considered to be the least price sensitive and the most loyal. Northeast determined the daily sale price of each product offered to a particular customer by subtracting from the rack price for the product the allowance assigned to the customer's pricing group. . . . The scheme conferred favored status on large retailers and disfavored status on small retailers

Plaintiffs' Objection to Defendants Motion to Dismiss and Incorporated Memorandum of Law (Docket No. 7) at 2. Plaintiffs further allege that Northeast's sales representatives were required to take an active role in implementing this policy and "based on their familiarity with their customers, they were **[**6]** required to assign each customer" to one of the pricing groups. *Id.* at 3. Plaintiff Ashmore refused to implement the pricing system. Complaint (Docket No. 1) P 26. Plaintiffs Boya, Simeone, and Simone objected to the new pricing system but were allegedly "forced to implement the price grouping policy under threats of dire consequences." *Id. P 27*. Defendants terminated Plaintiffs' employment at Northeast on May 29, 1992. Plaintiffs allege that this discharge was in retaliation for "their refusal to engage in criminal activity, and resistance to the unlawful" discriminatory pricing system and "to make an example of them" to other employees who resisted the allegedly illegal practice. *Id. PP 34-35*.

Plaintiffs further allege that "at all relevant times Defendants Cargill and Northeast Petroleum promised its employees, in writing, that 'no employee will be asked or expected to compromise' Cargill's purported standard that 'business transactions will be the result of legal, open, and honest competition.'" *Id. P 39*. Plaintiff's allege that they relied on this promise to their detriment. *Id. P 10*. Based on this written promise and reliance, they allege that Defendants are **[**7]** liable under a theory of breach of contract or promissory estoppel.

II. Standing Under Section 4 of the Clayton Act

Defendants' principal argument for dismissal of Count I is that Plaintiffs lack standing to sue under section 4 of the Clayton Act to recover for damages due to the alleged violation of the Robinson-Patman Act.⁴ **[**8]** Defendants argue that the Robinson-Patman Act was intended to protect only competitors and purchasers and that because Plaintiffs do not allege that they were either competitors or purchasers, they lack standing.⁵ Defendants further

⁴ Section 4 of the Clayton Act provides in relevant part:

HN2 Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[15 U.S.C.S. § 15\(a\)](#).

⁵ For purposes of this challenge to standing, the Court will assume, without deciding, that Plaintiffs could prove that the alleged discriminatory pricing system violates the Robinson-Patman Act which prohibits discrimination in prices under certain circumstances. In relevant part, the Act provides that:

HN3 It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them

[15 U.S.C.S. § 13\(a\)](#). Also relevant to the arguments before the Court is [15 U.S.C.S. § 13a](#), which provides criminal penalties For participation in discriminatory sales.

HN4 It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser

argue that section 4 provides a remedy only to those who suffer injury which flows from the "anticompetitive effects" of an [*763] antitrust violation. Therefore, they contend that the injury which Plaintiffs suffered due to the allegedly retaliatory discharges was not the type of "antitrust injury" with which Congress was concerned when it enacted section 4 of the Clayton Act. In response to these arguments Plaintiffs contend that because they were "essential participants" in the anticompetitive scheme, and their discharge was a necessary step to achieve the antitrust violation, they have standing under section 4.

[**9] The issue of whether an employee has standing to sue under section 4 on a claim of retaliatory discharge for resisting the implementation of a policy which violates the federal antitrust laws has not been addressed by the Supreme Court and is a matter of first impression in this Circuit. As the parties point out, there is a split among federal courts on this issue.⁶ [**11] The Court of Appeals for the Ninth Circuit has held that an employee subjected to retaliatory discharge for refusing to cooperate with a price-fixing conspiracy in violation of the Sherman Act has standing under section 4. *Ostrofe v. H. S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), cert. dismissed at request of parties, 469 U.S. 1200 (1985).⁷ The United States District Court for the Southern District of New York followed the Ninth Circuit's *Ostrofe II* holding in *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F. Supp. 1423 (S.D.N.Y. 1986). On the other hand, courts in the Seventh, Third, and Tenth Circuits have held that employees who allege retaliatory discharge for refusal to cooperate with policies that violate the antitrust [**10] laws do not have standing under Section 4. *Bichan v. Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982), cert. denied, 460 U.S. 1016, 75 L. Ed. 2d 487, 103 S. Ct. 1261 (1983); *Winther v. DEC International, Inc.*, 625 F. Supp. 100 (D. Colo. 1985); *McNulty v. Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982).⁸ The Sixth Circuit has also denied standing to a sales representative who alleged his territory was reduced and later eliminated due to his refusal to cooperate in an antitrust violation. *Fallis v. Pendleton Woolen Mills, Inc.*, 866 F.2d 209, 211 (6th Cir. 1989).⁹

[**12] These different results have stemmed from varied interpretations of the Supreme Court's holdings in three recent antitrust standing cases: *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982); and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). In the most recent of this trilogy, the Supreme Court set out a comprehensive antitrust standing analysis, identifying factors which must be considered in determining whether a plaintiff may sue under section 4 of the Clayton Act. *Associated General*, 459 U.S. at 535-45. It is in this framework that this Court must evaluate

Any person violating any of the provisions of this section shall upon conviction thereof, be fined not more than \$ 5,000 or imprisoned not more than one year, or both.

⁶ Northeast makes much of the fact that no court has granted standing under section 4 based on a violation of the Robinson-Patman Act. However, the analysis required by the Supreme Court to determine whether a plaintiff has standing under section 4 of the Clayton Act does not depend upon whether the underlying violation is of the Sherman Act or of the Robinson-Patman Act. (see discussion of Associated General, *infra*). Therefore, the Court is not constrained to consider only those cases based on Robinson-Patman violations.

⁷ In this case, the Court of Appeals for the Ninth Circuit adhered to its prior decision in *Ostrofe v. H. S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), vacated, 460 U.S. 1007 (1983). The earlier decision will be referred to as "Ostrofe I" and the decision on remand as "Ostrofe II".

⁸ There is contrary authority at the district court level in the Third Circuit. See *Shaw v. Russell Trucking Line, Inc.*, 542 F. Supp. 776 (W.D. Pa. 1982). However, the decision in *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92 (3d Cir. 1986), denying standing to a broker who alleged retaliatory discharge for refusal to violate the Robinson-Patman Act, suggests, without deciding, that the Third Circuit would deny standing to an employee claiming retaliatory discharge for refusal to violate the antitrust laws.

⁹ However, *Fallis* requires a case-by-case standing analysis, and does not appear to stand for the proposition that no employee may recover on a theory of retaliatory discharge. See *Helder v. Hitachi Power Tools, U.S.A. Ltd.*, 1992-2 U.S. Trade Cas. (CCH) P69,930 (W.D. Mich. 1992) (denying a motion for judgment on the pleadings in a retaliatory discharge case).

Plaintiffs' claim to antitrust standing. [*764] Therefore, the Court will review the *Associated General* approach before analyzing the matter *sub judice*.

A. Antitrust Standing under Associated General

Before *Associated General*, the various circuit courts had adopted different tests incorporating traditional common-law principles to limit the scope of the treble damages provision [**13] of the Clayton Act which provides standing to *any person* injured by reason of violations of the antitrust laws. [15 U.S.C.S. § 15\(a\)](#). The three principal tests that emerged focused on the "directness" of a plaintiff's injury to the alleged violation; whether a plaintiff was in the "target area" of the anticompetitive activity; and whether a plaintiff was arguably within the zone of interests protected by the antitrust laws. [Associated General, 459 U.S. at 536 n.33](#) (citations omitted). In considering these tests, the Supreme Court concluded that Congress intended the availability of the remedy to be construed in light of traditional notions of common law.¹⁰ [**15] [Id. 530-35](#). However, the Court declined to adopt a single standard, observing that:

There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause," and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass [**14] every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise *make it virtually impossible to announce a black-letter rule* that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

[Id. at 535-36](#) (footnotes omitted and emphasis added).¹¹ The Court then went on to identify the factors which are relevant to the issue of antitrust standing and apply them to the plaintiff's claim for recovery. Both the identification of the factors and their application are instructive in this Court's determination of whether Plaintiffs have standing in the present matter.

In *Associated General*, [**16] two carpenters' unions ("the Union") alleged that the defendant, a multiemployer association of general contractors, coerced its members, other general contractors, and certain third parties (landowners and customers in the construction market) to divert business to nonunion firms. The Union alleged that the express purpose of the multiemployer association's actions was to injure the Union. However, the first class of victims of the alleged conspiracy was the coerced contractors, the second the unionized firms, and then presumably the Union might have suffered injury through [*765] loss of dues or collective bargaining agreements.

HN5 [↑] The Court considered each of the following factors in assessing the Union's standing to sue for treble damages under section 4:

¹⁰ When Congress originally enacted the Sherman Act, there was no provision for treble recovery. The amendment providing for treble damages was enacted in 1914 to encourage private enforcement of the *antitrust law*. By 1914, when section 4 of the Clayton Act was enacted, courts were already applying traditional notions of proximate cause to circumscribe liability under the Act. See [Associated General, 459 U.S. at 534](#) (*citing Loeb v. Eastman Kodak Co, 183 F. 704 (3d Cir. 1910)* (in which a stockholder of a corporation injured by an antitrust violation was not entitled to recover treble damages because the injury was "indirect, remote, and consequential")). Therefore, when Congress enacted section 4 of the Clayton Act in 1914, it "presumably also [adopted] the judicial gloss." *Id.*

¹¹ Defendants argue that the "target area" test for antitrust standing, which the First Circuit followed before *Associated General*, bars Plaintiffs' claim. See [Engine Specialties, Inc. v. Bombardier, Ltd., 605 F.2d 1 \(1st Cir. 1979\)](#), cert. denied, 446 U.S. 983, 64 L. Ed. 2d 839, 100 S. Ct. 2964 (1980). The "target area" test permits standing only for those in the market towards which an anticompetitive activity is directed. In *Associated General*, however, the Supreme Court rejected the "target area" test in favor of the standing analysis set out in the text below. [Associated General, 459 U.S. at 536, n.33](#). *Associated General* requires a broader inquiry and a balancing of concerns which is not satisfied by the "target area" test. See [Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1086 \(6th Cir. 1983\)](#) ("implementing the Supreme Court's directive to consider the § 4 inquiry on a case by case basis by applying the criteria mandated by *Associated General*").

- (1) the causal connection between the Union's injury and Defendant's violation of the **antitrust law**,
- (2) the nature of the Union's alleged injury and whether it was of the type that the antitrust laws were intended to forestall;
- (3) the directness of the injury particularly as it related to the tenuous and speculative nature of the harm to the Union;
- (4) the danger of duplicative recoveries or complex apportionment of damages; **[**17]** and
- (5) the existence of more immediate classes of potential plaintiffs who could be expected to vindicate the violation of the antitrust laws.

Associated General, 459 U.S. at 536-45. Of the five relevant factors, only the causal connection between the Union's alleged injuries and the violation of the antitrust laws weighed in favor of standing. The Supreme Court, in denying the Union standing to sue under section 4, summarized the analytical path pursued at some length in the opinion, reaching the following conclusion:

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 judicial enforcement of the Union's antitrust claim.

*Id. at 545. [**18]*

Though *Associated General* outlined a comprehensive approach to the question of antitrust standing, it has engendered much confusion. The decision gives little guidance as to how to weigh the various factors and, more particularly, whether the absence of any one factor is fatal to standing in every instance.¹² It is this Court's reading of *Associated General* that a proper standing analysis should include a review of all relevant factors outlined in that case. Accord, *Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1086 (6th Cir. 1983)*. While any of these factors may be controlling, each should be considered on a case-by-case basis in an effort to guard against "engrafting artificial limitations on the § 4 remedy." *McCready, 457 U.S. at 472*. This conclusion is based on the Supreme Court's refusal in *Associated General* to adopt a single test, its emphasis on the impossibility of adopting a black letter rule of antitrust standing and its application of each factor to the facts alleged by the Union.

[19] B. Application of Associated General to Plaintiffs' Case**

At the outset, it is clear that the allegations made by Plaintiffs, if proven, satisfy four of the five factors identified in *Associated General*. As to the first factor, Plaintiffs' allegations satisfy the causal connection required by section 4; that is, Plaintiffs allege that their employment was terminated in order for Northeast to accomplish a violation of the **antitrust law**. If not for the implementation of a discriminatory pricing system, Plaintiffs contend that they would not have had to resist the allegedly illegal scheme and, consequently, consequently they would not have been discharged.

¹² For a general discussion of the various approaches to standing analysis in the wake of *Associated General*, see Robert M. Taylor, *Antitrust Developments: Antitrust Standing: Its Growing -- or More Accurately Shrinking -- Dimensions*, 55 Antitrust L.J. 515 (1986). For a discussion of the application of *Associated General* to the case of discharged employees, see, e.g., Gary M. Shaw, *Retaliatorily Discharged Employees' Standing to Sue Under the Antitrust Laws*, 67 Or. L. Rev. 331 (1988); Matthew H. Lynch, Note, *Antitrust Standing After Associated General Contractors: The Issue of Employee Retaliatory Discharge*, *63 B.U. L. Rev. 983 (1983)*.

[*766] The harm to Plaintiffs in this case was direct also and, in this regard, does not implicate the concerns underlying the third factor which militated against standing in *Associated General*. In *Associated General* the Supreme Court noted that several "vague links" separated the defendant's alleged antitrust violation from the Union's harm. *Associated General*, 459 U.S. at 542. Because of the attenuated link between the antitrust violation and the injury to the Union, the Union's alleged injuries [**20] were "highly speculative." *Id.* In that case, it was unclear what effect the alleged conspiracy had on the unionized firms. *Id.* It was even more difficult to determine whether the conspiracy, as opposed to other intervening causes, had caused any injury to the Union itself in the form of decreased membership revenues or termination of particular collective bargaining agreements. *Id.* Here, there is nothing that is either indirect or speculative about Plaintiffs' claims. They allege that their injuries were the direct and intended result of Defendants Intentional act in furtherance of an antitrust violation. The damages claimed are in the form of lost wages and benefits. These damages are easily quantifiable and are not speculative.

The fourth factor considered by the Supreme Court in *Associated General* was the danger of duplicative treble-damage awards, or problems of complex apportionment of damages. In *Associated General*, to the extent that the Union had suffered injury, it was derivative of the injury suffered by the coerced contractors and unionized firms. Therefore, there was a risk that the defendant could be exposed to multiple awards of treble damages or [**21] that the Court would have to engage in complex apportionment. Determining to what extent losses were absorbed at each level of the chain of distribution -- the coerced contractors, the unionized firms, their employees, and finally the Union -- was a task that was rejected by the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977). Failure to make such a determination would lead inevitably to liability in treble damages to multiple parties for the same injury.¹³ In contrast, Plaintiffs in the present case allege injuries in the form of lost compensation and benefits. These damages are wholly distinct from damages that could be claimed by other plaintiffs injured by the alleged antitrust violation. The injury is not derivative, but personal to Plaintiffs. Therefore, there is no danger of duplicative recovery.

[**22] As to the fifth factor, there is no other class more directly affected than Plaintiffs in the present case that is more likely to redress society's interest in enforcement of the antitrust laws. In *Associated General*, the Supreme Court noted that both the coerced contractors and the union contractors were more directly affected than the Union and, therefore, "denying the Union a remedy [was] not likely to leave a significant antitrust violation undetected or unremedied." *Associated General*, 459 U.S. at 542. As a general matter, however, a major challenge in antitrust law enforcement is that a violation "is usually a concealed crime and there is rarely an identifiable victim who is aware of the violation." *Statement of Former Assistant Attorney General Donald Baker Before Tenth New England Antitrust Conference*, 790 Antitrust & Trade Reg. Rep. (BNA) D-1 (1976), cited in, Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 847. This challenge to antitrust law enforcement is strongly implicated in the present case.

Here, although purchasers disadvantaged by the alleged discriminatory [**23] pricing system are also direct victims of the alleged antitrust violation, the very nature of the pricing system makes it unlikely that the victims will become aware of the price differentials unless sales representatives reveal the violation and risk discharge. The alleged pricing system discriminates against purchasers on the [*767] basis of customer loyalty and lack of accurate pricing information. It relies for concealment of this discriminatory activity upon the loyalty, expertise, and perceived self-interest of its sales employees. Those victims directly damaged by the anticompetitive effect of the pricing system are the least informed purchasers in the market and are unlikely to discover the violation in a timely manner.

14

¹³ The Court noted that this task was further complicated by the variety of forms in which the cost of the anticompetitive violation might be absorbed in *Associate General*. These costs may have taken the form of reduced profits, reduced wages, reduced workforce, reduced hours, and lost union dues at various levels in the chain. *Associated General* 459 U.S. at 544.

¹⁴ The delay that can be expected before such disadvantaged purchasers become aware of the anticompetitive effects of an antitrust violation is not without costs. Although treble damages may provide a remedy for injured individuals, once competition has been reduced, damages alone cannot restore it. Furthermore, under the rule of *Illinois Brick*, consumers of petroleum

[**24] Plaintiffs, as sales representatives, were allegedly charged with implementing the discriminatory pricing system. They are alleged to have been made responsible for grouping clients according to the clients' loyalty and lack of accurate price information. In this position Plaintiffs were more likely to recognize the antitrust violation at an earlier stage and to vindicate the public interest in prohibiting anticompetitive activities before any purchasers and consumers and before competition suffered extensive injury. Although the purpose of the discriminatory pricing system was not to injure Plaintiffs, discharging uncooperative sales representatives was a prerequisite to full implementation of the discriminatory pricing system from the standpoint of Defendants. Furthermore, Plaintiffs allege that their discharge was used to demonstrate to other sales representatives the consequences of challenging the pricing system.

These sales representatives were direct and necessary victims of the antitrust violations because they faced the options of exposing themselves to criminal liability or risking retaliatory discharge. There is no other class of plaintiffs which has any claim under which [**25] it can redress the harm Plaintiffs' allegedly suffered by reason of their refusal to violate the antitrust laws. Nor could the purchasers affected by the allegedly discriminatory pricing system challenge the system at as early a stage as the employees charged with implementing the pricing system. Assuming, without deciding, that the allegations made by Plaintiffs are true, barring standing to Plaintiffs under these circumstances is "likely to leave a significant antitrust violation undetected or unremedied."¹⁵ [Associated General, 459 U.S. at 542.](#)

[**26] These four factors favor antitrust standing for Plaintiffs in this case. Their injuries are the direct result of actions taken in furtherance of an alleged attempt to implement a discriminatory pricing system in violation of the Robinson-Patman Act. There is no other class of plaintiffs which is *more* directly effected by these actions, and Plaintiffs' injuries are wholly distinct from the injuries suffered by any other class of victims; therefore, there is no danger of duplicative recoveries or complex apportionment. Finally, there is nothing speculative about the amount of damages suffered by these Plaintiffs.

[*768] C. Antitrust Injury

The principal standing issues raised by the Plaintiffs' claim relate to the second factor: whether the alleged injury is "antitrust injury"; that is, the type of injury that the antitrust laws were intended to forestall. In the context of the retaliatory discharge claim raised in this case, there are two relevant inquiries. First, whether the harm caused by retaliatory discharge is "antitrust injury." And second, whether failure to demonstrate "antitrust injury" in the narrowest sense is fatal to standing in every case. The Court will address these [**27] questions in turn.

The concept of "antitrust injury" was first articulated in [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#). In that case, several small bowling centers sued Brunswick Corp. to challenge its acquisition of a number of failing bowling centers. The challenge was mounted under section 7 of the Clayton Act which proscribes mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly." [15 U.S.C.A. § 18](#). The smaller bowling centers also sued to recover treble damages under section 4

products are unlikely to have any remedy for their injury in this case. Any damage to consumers would be derivative of the injury to the purchasers of petroleum goods for resale who are allegedly the first line of victims of this price discrimination scheme.

¹⁵ This Court notes that, in light of the difficulty in detecting antitrust violations, providing standing to employees who are coerced to violate the antitrust laws is more likely to provide efficient enforcement than denying standing. In reaching this conclusion, the Court has rejected the Seventh Circuit's economic analysis as unconvincing. See [Bichan v. Chemetron Corp., 681 F.2d 514, 520 \(7th Cir. 1982\)](#). The Court of Appeals for the Seventh Circuit's approach to "efficient enforcement" balances the conflicting interest of enforcement of the antitrust laws with "the avoidance of excessive treble damages litigation" and concludes that only consumers and competitors should have standing because "it is this select class of plaintiffs that can impose the deterrent sting of treble damages at the smallest cost of enforcement." *Id.* This conclusion rests on the unrealistic assumption that consumers and competitors will discover antitrust violations. Moreover, it fails to consider the efficiency of the deterrent effect that employee standing will have in preventing antitrust violations. Finally, no consideration is given to the fact that an employee who complies with coercion to avoid discharge will himself be guilty of criminally violating the antitrust laws or that such cooperation both increases the number of antitrust violations and the cost to consumers, competitors, and the legal system when antitrust schemes are eventually discovered.

for the profits lost due to the continued competition from the acquired bowling centers which they contended would have otherwise gone out of business. They did not prove that Brunswick had engaged in any of the predatory actions which section 7 was designed to prevent. Although the plaintiffs in *Brunswick* had standing to challenge the improper mergers, the Supreme Court unanimously held that they were not entitled to relief under section 4 of the Clayton Act because they had not proven "antitrust injury" of the type the antitrust laws were intended to prevent and that [**28] flows from that which makes defendants' acts unlawful." *Id. at 489*.

The antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. *The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced.* [HN6](#)¹⁶ The antitrust laws, however, were enacted for "the protection of *competition*, not *competitors*." It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

. . . It is far from clear that the loss of windfall profits that would have accrued had the acquired centers failed even constitutes "injury" within the meaning of § 4. And it is quite clear that if respondents were injured it was not "by reason of anything forbidden in the antitrust laws": while respondents' loss occurred "by reason of" the unlawful acquisitions, it did not occur "by reason of" that which made the acquisitions unlawful.

Id. at 488 (citations omitted [**29] and emphasis added). The Supreme Court found that the *Brunswick* plaintiffs were not entitled to a remedy under section 4 because their losses were due to an *increase in competition* and were not the result of predatory actions.

Five years later, in *McCready*, the Supreme Court addressed the issue of whether injury that occurred as a necessary step to accomplishing an antitrust violation was "antitrust injury." [Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 \(1982\)](#). In *McCready*, the plaintiff was a subscriber to the Blue Shield medical plan. She alleged that Blue Shield and an association of psychiatrists had engaged in an anticompetitive conspiracy to disadvantage psychologists. This conspiracy was accomplished by refusing reimbursement to Blue Shield subscribers for treatment rendered by psychologists while reimbursing subscribers for the same treatment received from psychiatrists or from psychologists acting under the supervision of a physician. *McCready* received treatment from a psychologist and Blue Shield refused to reimburse her for the treatment. The Court concluded that:

Although *McCready* was not a competitor of the conspirators, [**30] the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market.

[*769] In light of the conspiracy here alleged we think that *McCready's* injury "flows from that which makes defendants' acts unlawful" within the meaning of *Brunswick*, and falls squarely within the area of congressional concern.

*Id. at 483-84.*¹⁶ Blue Shields' refusal to reimburse *McCready* for therapy received from a psychologist was a means whereby it coerced her to either become an unwilling participant in its illegal campaign to boycott the services of psychologists or pay the costs for treatment from her own pocket in order to see the therapist of her

¹⁶ Defendants argue that *McCready* has no application in the present case because *McCready* was a consumer in the market for psychotherapy treatment. Reply Brief in Support of Motion to Dismiss (Docket No. 12) at 1. However, they ignore the central thrust of *McCready* which rejects artificial constraints on section 4, refusing to limit its protection "to consumers, or to purchasers, or to competitors, or to sellers." *Id. at 472*.

The central problem raised by *McCready*'s claim was that *her injury was not the result of any anticompetitive effect of the conspiracy*. As Justice Rehnquist noted in his dissenting opinion, *McCready* "alleges that Blue Shield's policy violates the antitrust laws only by virtue of its anticompetitive effect on psychologists. She does not allege that Blue Shield's policy is illegal in any way because of its effect on subscribers."

Id. at 491.

The issue which split the Court was whether injury which was caused by the attempted use of *McCready* as an *instrument* to carry out an antitrust violation was "antitrust injury."

choice. The injury that she suffered was due to her refusal to be manipulated and was not due to anticompetitive effect or a change of price in the market.

[**31] Here, Plaintiffs allegedly confronted a similar Hobson's choice, though the consequences on either side were much more grave than in *McCready*. They could capitulate to their employer's pressure and participate in a violation of the antitrust laws or resist the discriminatory pricing system and face discipline or discharge. Here, however, Plaintiffs' cooperation may also have exposed them to criminal liability. In *Ostrofe I*, the Court of Appeals for the Ninth circuit concluded that injury suffered by an employee under these circumstances is within the "core of Congressional concern" which motivated the antitrust laws. *Ostrofe I*, 670 F.2d at 1387.

The central theme of *Brunswick* is that to be actionable under Section 4, plaintiff's injury should fall within the core of Congressional concern underlying the substantive provision of the antitrust laws allegedly violated. In outlawing price fixing and customer allocation under the Sherman Act, Congress was concerned with competitive conditions in the product market; hence competitors and perhaps consumers injured by the elimination of competition between the conspiring business concerns have [**32] standing to sue.

But Congress was also concerned with the conduct of individuals acting on behalf of conspiring economic entities. Congress imposed criminal liability upon individuals who violate the Sherman Act even though they act in a representative capacity and in discharge of the duties of the employment. It cannot be said that Ostrofe's asserted loss was "of no concern to the antitrust laws." Ostrofe was injured because of his efforts to comply with the mandate of the Sherman Act; he suffered an "antitrust injury . . . of the type the antitrust laws were intended to prevent."

Moreover, the loss did not result from increased competition, as did the asserted loss in *Brunswick*, but from a conspirator's efforts to realize an anticompetitive purpose.

Ostrofe I, 670 F.2d at 1387-88 (footnotes omitted). On remand, application of *Associated General* and *McCready* to the question of whether standing for an employee subjected to retaliatory discharge for refusing to participate in an antitrust violation did not undercut this conclusion. See *Ostrofe II*, 740 F.2d at 745-46 (affirming the reasoning in *Ostrofe I* [**33] and concluding that Ostrofe's injury "was such an integral part of the scheme to eliminate competition in that market as to constitute 'antitrust injury,'" *id. at 746*); see also *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F. Supp. 1423 (S.D.N.Y. 1986) (following *Ostrofe II*). On similar reasoning, the Court of Appeals for the Sixth Circuit has found that *HNT* [**34] antitrust standing does not require an allegation that one is a competitor [*770] or consumer in the relevant market if a plaintiff was "manipulated or utilized by [defendant] as a fulcrum, conduit or market force to injure competitors." *Fallis*, 866 F.2d at 211 (quoting *Southaven*, 715 F.2d at 1086).¹⁷

[**34] Other courts have read the antitrust laws more narrowly, holding that Congress intended to provide a remedy for injuries suffered only by market participants when it enacted section 4. *Bichan v. Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982); *Winther v. DEC International, Inc.*, 625 F. Supp. 100 (D. Colo. 1985); *McNulty v. Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982). These courts reason that because a discharged employee's injury is not due to diminished competition in any market in which the employee is a consumer or competitor it is not "antitrust injury."¹⁸ [**36] In *Bichan* the Court of Appeals for the Seventh Circuit concluded that Congress was concerned

¹⁷ Nevertheless the Court of Appeals of the Sixth Circuit denied standing in *Fallis*, holding that the plaintiff sales representative's injury was not direct. *Fallis*, 866 F.2d at 212. In so doing, they revert to the "target test" and conclude that the injury to the sales representative is indirect because it is a "byproduct" of the antitrust violation. *Id. at 211*. This reasoning improperly introduces the element of intent into the directness inquiry. See *McCready*, 457 U.S. at 479 (concluding that the fact that the goal of the conspiracy was to injure psychologists did not make the subscriber's injury "remote"). There is no doubt that the injury alleged in this case is the *direct* and *immediate* result of steps taken in furtherance of the antitrust violation. There are no intermediate victims; no danger of duplicative damages; and nothing speculative about the injury to a discharged employee. *The fact that the injury is not the primary goal of the violation does not render the injury indirect.*

¹⁸ One concern of these courts is that the damages claimed by a victim of wrongful discharge are "unrelated" to the anticompetitive effect of a violation. These costs, though they may be unrelated to the anticompetitive effects in a mathematical sense, are incurred by the intentional acts of an employer to carry out an anticompetitive scheme. The cost to a discharged

only with damages due to anticompetitive effects of antitrust violations, "not employee coercion or discharge." *Bichan*, 681 F.2d at 519, accord *Winther*, 625 F. Supp. at 102 (Congress did not "intend[] to protect employees from wrongful coercion or discharge"); cf., *McNulty*, 542 F. Supp. at 661 (acknowledging the weighty policy considerations raised [**35] in *Ostrofe* but finding that under Third Circuit "target test" then in use, only competitors and consumers had standing under the Robinson-Patman Act).¹⁹

Upon review of all these cases and the history of section 4 and the Robinson-Patman Act, this Court is persuaded that the more flexible approach of *Ostrofe II* is more consistent with the purposes of the antitrust laws than the extremely narrow limitations of *Bichan*. As was noted in *McCready*, HN8[¹] Congress's purpose in enacting the treble damage remedy in section 4 was "to create a private enforcement mechanism that would deter violators and [**37] deprive them of the fruits of their illegal actions and would provide ample compensation to the victims of antitrust violations." *McCready*, 457 U.S. at 472. The statute provides a remedy for "any person" injured and "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers." *Id.* (quoting *Mandeville Island Farms Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 92 L. Ed. 1328, 68 S. Ct. 996 (1948)). While it has been clear from the beginning [*771] that courts must formulate some limits on liability for antitrust violations, these limitations have been adopted "in accordance with [section 4's] plain language and its broad remedial and deterrent objectives." 457 U.S. at 473. *Associated General* does not hold otherwise. *Associated General* rejected any black letter rule but considered each factor in light of the overall purposes of the antitrust laws. If failure to allege that one is a competitor, consumer, or purchaser in the relevant market is dispositive in every case, as Defendants contend, than the greater part of the *Associated General* opinion is useless verbiage.²⁰

[**38] The Supreme Court was absolutely unambiguous in *Associated General* in rejecting any black letter rule of antitrust standing, and this Court will not adopt one now. Therefore, we reject the reasoning of the Seventh, Third, and Tenth Circuits as inconsistent with the analysis required by *Associated General* and *McCready* which does not permit a single factor to be dispositive unless consideration of the overall purpose of the antitrust laws so dictates.²¹

HN9[¹] There can be no doubt that Congress was concerned [**39] with the conduct of employees and agents who assisted in carrying out antitrust violations in the discharge of their duties. The Robinson-Patman Act imposes personal criminal liability on any person engaged in commerce who knowingly assists in a discriminatory

employee are much like those injuries incurred in *McCready*. The amount of the reimbursement refused to *McCready* had no relationship to the anticompetitive effects on the market for psychotherapy. Rather, this amount related to the type and cost of treatment that *McCready* received. Nevertheless, there was no surprise or injustice to Blue Shield, who knowingly refused *McCready* a fixed amount in furtherance of its anticompetitive conspiracy. The injuries which are deliberately inflicted in an attempt to coerce third parties to participate in an anticompetitive scheme should be part of the calculus that encourage would-be antitrust violators to shrink from pursuing illegal schemes.

¹⁹ The reasoning in all these cases is scant. They rely on *Brunswick* and interpret it as limiting section 4 claims to injury caused by the anticompetitive effects of antitrust violations. The cases ignore the fact that *Brunswick* dealt with injuries caused by *increased competition*. They also overlook the essential *Brunswick* holding that the purpose of the antitrust laws is to protect "competition, not competitors." *Brunswick*, 429 U.S. at 488. In the retaliatory discharge context, refusing standing to employees for no other reason than that they are not competitors seems to read this statement backwards.

²⁰ Indeed, even the discussion about whether the Union had alleged "antitrust injury" within the meaning of *Brunswick* was unnecessary according to Defendants. Under Defendants' approach, the first sentence of this discussion was dispositive insofar as it pointed out that the Union was neither a consumer nor a competitor in the relevant market. Nevertheless, the *Associated General* court went on to observe that labor enjoys a broad exemption from antitrust laws, is protected by another body of federal law, and is generally not served by increased competition. *Associated General*, 459 U.S. at 539-40. All these considerations apparently went into the determination that the Union had not alleged "antitrust injury" *Id.*

²¹ *Brunswick* is not to the contrary; there, not only did the Supreme Court hold that the plaintiffs in that case had not alleged antitrust injury, but they found that the "injury" which had been alleged was "inimical" to the purposes of the antitrust laws. The *Bichan* conclusion that Congress was not concerned with employee coercion or discharge, even if correct, does not automatically lead to the conclusion that injury related to such coercion is "inimical" to the purposes of the antitrust laws.

transaction of sale. [15 U.S.C.A. § 13a](#). Providing a remedy to those employees who suffer injury for refusing to violate this law will serve the deterrent purpose of both the criminal sanctions in the Robinson-Patman Act and the treble-damages remedy of the Clayton Act.

Finally standing is appropriate in light of the remedial purposes of section 4. Here, unlike *Associated General* in which the Supreme Court emphasized that the Union was protected by federal labor law, it is not at all clear that employees subjected to wrongful discharge will have any remedy at law. See, e.g., [Fallis 866 F.2d at 211](#) (holding plaintiff lacked standing under section 4 and had no cause of action under Ohio law because Ohio law did not recognize an action for wrongful discharge and treated employment contracts "until retirement" as at-will employment contracts) As was noted [**40] in *Ostrofe I* many states do not recognize a cause of action for at-will employees who are subjected to retaliatory discharge.²² [Ostrofe I, 670 F.2d at 1384 n.12](#). Because the Court finds that the type of injury alleged herein was within the core area of congressional concern, the Court concludes that Plaintiffs have alleged "antitrust injury" within the meaning of *Associated General*, *McCready*, and *Brunswick*.

[**41] [*772] Even if this Court reads the concept of "antitrust injury" too broadly, and if this concept is limited to injuries suffered by participants (consumers, sellers, purchasers) in the relevant market, this Court concurs with the courts that have reasoned that [HN11](#) failure to allege participation in the relevant market, although it weighs heavily against antitrust standing, is not fatal to a claim of standing under the antitrust laws. See, e.g., [South Dakota v. Kansas City Southern Industries, Inc., 880 F.2d 40, 46 n.16 \(8th Cir. 1989\)](#), cert. denied, 493 U.S. 1023, 107 L. Ed. 2d 745, 110 S. Ct. 726 (1990); [Province v. Cleveland Press Publishing Co., 787 F.2d 1047, 1052 \(6th Cir. 1986\)](#); [Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290, 293 \(2d Cir. 1983\)](#), cert. denied, 467 U.S. 1252, 82 L. Ed. 2d 841, 104 S. Ct. 3536 (1984); [Sullivan v. Tagliabue, 828 F. Supp. 114, 117 \(D. Mass. 1993\)](#). As the Court of Appeals for the Ninth Circuit observed in *Ostrofe II*, granting standing to an employee who is discharged for his attempt to resist an anticompetitive scheme [**42] will accomplish the principal goal of antitrust laws, which are designed to "protect competition not competitors" without compromising the concerns raised by the other factors identified in *Associated General*. *Ostrofe II*, 740 F.2d at 747. Permitting Plaintiffs' standing here will advance enforcement and deterrence, and protect competition in the affected market. All the other factors identified in *Associated General* weigh heavily in favor of standing for the Plaintiffs in this case. Therefore, this Court holds that Plaintiffs have standing on the allegations of the Complaint under the approach set out in *Associated General* and that such conclusion is consistent with the purposes of the Robinson-Patman Act.

III. Choice of Law

Defendants argue that Maine law applies to Plaintiff Ashmore's claims for breach of contract (Count II), breach of covenant of good faith (Count IV), and wrongful termination (Count V). Defendants move, pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), for the dismissal of these claims, arguing that Maine law does not recognize a cause of action for termination of an employment contract unless the contract expressly [**43] provides some limitation on the employer's ability to terminate the employee. Memorandum in Support of Defendants' Motion to Dismiss (Docket No. 5) at 16 citing [Larrabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97, 99 \(Me. 1984\)](#). Plaintiffs oppose this motion, contending that the most significant contacts in this contract case are with the Commonwealth of Massachusetts and that Maine choice-of-law rules lead to the conclusion that Massachusetts law governs these claims.

²² The trend has been to recognize a cause of action for wrongful discharge; however, as of 1992, nine of the forty-seven states that had ruled on this issue did not provide a remedy for employees discharged for refusing to violate the law. See [Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 106 n.4 \(Colo. 1992\)](#) (adopting a cause of action based on wrongful discharge in violation of public policy and reviewing the holdings of other state courts). See generally, 82 Am. Jur. 2d § 47. Maine is one of the few states that have not yet ruled on this issue. [HN10](#) Maine law provides a limited statutory cause of action which protects employees who refuse to implement an employer's unlawful practice only when such practice would create a danger of serious injury or death. [26 M.R.S.A. § 833](#). However, the Maine courts have not yet ruled on whether Maine common law will permit a cause of action to be established for wrongful discharge in violation of public policy.

As a threshold matter, it is necessary for the Court to determine what choice-of-law rules to apply to these claims. A federal court which exercises supplemental jurisdiction over state-law claims based on diversity jurisdiction must apply the choice-of-law rules of the state in which it sits. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941). In this case, the Complaint invokes federal question jurisdiction under federal substantive **antitrust law**.²³ 28 U.S.C.A. §§ 1331 and 1337. HN12↑ Supplemental state-law claims in a case where jurisdiction is based on federal question are also decided with reference [**44] to the choice-of-law provisions of the state in which the federal court sits. *Bangor Baptist Church v. Maine Department of Educational and Cultural Services*, 576 F. Supp. 1299, 1313 (D. Me. 1983); *Rental Car of New Hampshire Inc. v. Westinghouse Electric Corp.*, 496 F. Supp. 373 (D. Mass. 1980). The Court will, therefore, apply Maine's choice of law rules to determine what law applies to Plaintiff Ashmore's supplemental state-law claims.

The State [**45] of Maine generally follows the *Restatement (Second) of Conflicts* HN13↑ in determining choice-of-law issues. *Maine Surgical Supply Co. v. Intermedics Orthopedics, Inc.*, 756 F. Supp. 597, 600 (D. Me. 1991).

[*773] Counts II and IV both state claims based on contract law. In the absence of an effective choice of law by the parties to a contract, the Court must consider what state "has the most significant relation" with respect to a specific issue in dispute, including the following contacts to the extent that they are relevant to the issue: (1) place of contracting; (2) place of negotiation; (3) place of performance; (4) where the subject matter of the contract is located; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *Restatement(Second) of Conflicts* § 188(1),(2). Where the place of negotiating the contract and the place of performance are in the same state, the local law of that state will be applied except in circumstances not here applicable. *Restatement (Second) of Conflicts* § 188(3) (1971).

Taking all the relevant factors into account the contacts in this case point to the application [**46] of Massachusetts law. The place of contracting as well as the place of negotiation of the contract were in Massachusetts Affidavit of Frederick W. Ashmore in Support of Motion for Leave to Amend (Docket No. 11, Exhibit A) PP 2-3.²⁴ The place of performance is not so obvious. Ashmore worked out of an office in Portland, Maine. Maine taxes were withheld from his paycheck, and workers' compensation payments were made to the state of Maine during his employment at Northeast. Affidavit of Virginia Palladino (Docket No. 12, Exhibit 3) P 4. However, his sales territory included New Hampshire, Vermont, and Massachusetts as well as Maine. Affidavit of Ashmore PP 8-14. Ashmore's responsibilities included visiting customers in all these states. Affidavits of James Flaherty and William Overton. (Docket No. 2, Exhibit 5) P 5. When Ashmore was terminated, he had eighty-nine accounts: forty-one in Massachusetts, twenty-six in Maine, fourteen in New Hampshire, and five in Vermont. Affidavit of Frederick Ashmore (Docket No. 11, Exhibit A) PP 6-14. Some of the product he sold was from Maine terminals while other product was from Massachusetts. It appears that Ashmore generally met with his supervisors [**47] in Maine, New Hampshire, or Massachusetts when he was under the supervision of Flaherty; and in New Hampshire or Massachusetts in the last two years before his discharge. Affidavit of James Flaherty (Docket No. 12, Exhibit 4) P 6 and Affidavit of Overton P 4. All formal sales representative meetings took place in Massachusetts, as did training meetings. Affidavit of Ashmore P 4. It was in the Massachusetts headquarters of Northeast that Plaintiffs were instructed on the allegedly discriminatory pricing plan, and later told that their employment was terminated. *Id.* PP 4, 15.

Plaintiff Ashmore is a resident of Maine. Northeast Division of Cargill, Inc. has its administrative office [**48] in Chelsea, Massachusetts. Affidavit of James Flaherty P 4. Northeast Division has sales offices in Rhode Island, Maine, New Hampshire, Massachusetts, Connecticut, and North Carolina. Affidavit of M.A. Kurschner P 3. Cargill

²³ Although Plaintiffs allege jurisdiction based on diversity as well as federal question, the Complaint indicates that at least one Plaintiff (Richard Simeone) and several Defendants are citizens of Massachusetts for diversity purposes. Complaint PP 5, 7, 8. Jurisdiction under *28 U.S.C.A. § 1332* requires complete diversity between plaintiffs and defendants. Therefore, on its face, the Complaint does not provide a basis for subject matter jurisdiction on diversity grounds.

²⁴ The written promise which Plaintiff alleges as the basis for the breach of contract and promissory estoppel claims was generated by Cargill, Inc.'s principle office in Minnesota for distribution to offices of Cargill throughout the United States and, possibly, the world. Affidavit of M.A. Kurschner (Docket No. 12, Exhibit 2) P 6.

does business worldwide, has its principal place of business in Minnesota, and is incorporated under Delaware law. *Id.*

The *Restatement (Second) of Conflicts* requires an issue-by-issue assessment of a claim to determine the state with the most significant contacts to a particular issue. The central issue for Counts II and IV are what actual or implied promises regarding terms of the employment contract were made from Northeast Division to Plaintiff Ashmore who agreed to represent Northeast in several New England states. The Second Restatement gives particular weight to the place of performance and the place of negotiation in contract cases where they are the same. *Restatement (Second) of Conflicts § 188(3)*. Here, although Plaintiff's territory was not limited to a single state, his performance included significant number of customers in Massachusetts. Because negotiation of the contract and a substantial part of performance was in Massachusetts as well [**49] as all supervisory decisions and training, the Court [*774] concludes that Massachusetts had the most significant contacts with the generation of the issue of what express or implied promises were made by Northeast Division, as raised in Counts II and IV. Moreover, the contract terms allegedly breached, the alleged discriminatory pricing policy, and the discharge were all handled through the activities of the Northeast Division administrative center in Massachusetts.²⁵ Because Massachusetts had the most significant contacts with respect to Counts II and IV, the Court will not dismiss these claims.

The claim based on wrongful termination in violation of public policy (Count V) is a claim based on tort law and, therefore, the relevant factors for choice of law are different. The Second Restatement of Conflicts provides [HN14](#)[
↑] the principles by which Maine courts generally evaluate conflicts of law in [**50] tort cases. *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 934 (Me. 1982); *Beaulieu v. Beaulieu*, 265 A.2d 610 (Me. 1970). In order to determine the state which has the most significant relationship to the occurrence and parties, the following contacts are considered to the extent that they are relevant to a particular issue: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. *Restatement (Second) of Conflicts § 145*.

Here the place where the conduct causing the injury occurred as well as the place where the injury occurred was Massachusetts, where Ashmore's employment was terminated. In addition to these two contacts, the relationship between Ashmore and the Defendants was centered in Massachusetts. It was in Massachusetts that the formal employment relationship was negotiated and commenced, where the sales representatives received training, and where Ashmore's supervisors were located. Affidavit [**51] of Ashmore PP 3-5, Affidavit of Flaherty PP 4, 6. These three factors all point to Massachusetts law as having the most significant contacts to the factual generation of the issue of whether a cause of action exists for wrongful discharge in violation of public policy.

The fourth factor does not point to any particular state; Ashmore is a citizen of Maine; Cargill has the strongest ties with Minnesota and Delaware but maintains offices throughout the world, with a major administrative center for the Northeast Division in Massachusetts; and Northeast Division of Cargill has its main administrative offices in Massachusetts. Because the first three contacts are all with Massachusetts, this Court has no difficulty deciding that most significant contacts to this tort claim are with Massachusetts. Therefore, Massachusetts law will be applied to the wrongful discharge claim, and the motion to dismiss this claim will be denied.

IV. The Promissory Estoppel Claim

Defendants urge the dismissal of Count III, which is based on promissory estoppel as to all Plaintiffs, for failure to state a cause of action. In order to prevail on this motion pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, [**52] the Court must be convinced that Plaintiffs could prove no set of facts that would entitle them to relief on a theory of promissory estoppel. Here, Plaintiffs have alleged that they detrimentally relied on Defendants' promise that they would not be required to engage in any but "legal, open, and honest competition." Complaint PP 39-40. Defendants argue that Plaintiffs have failed to state a claim based on promissory estoppel because they have not alleged "that absent the alleged 'promise,' they each would have participated in, and raised no complaint about, the

²⁵ Even if the policy decisions were generated in Minnesota, neither negotiation nor performance ties this contract to Minnesota.

supposedly improper pricing system." In effect, Defendants argue that Plaintiffs have not sufficiently alleged reliance. Defendants cannot prevail on this argument because the clear import of the Complaint is that absent the alleged promise the Plaintiffs would have acted differently.

This Court concludes that these Plaintiffs could potentially prove a set of facts that [*775] would show that absent the "promise," they might have remained silent or proceeded in a different manner. This conclusion is supported by the Plaintiffs' allegations that three Plaintiffs did, in fact, participate in the pricing system when coerced to do [**53] so. Under these circumstances, Plaintiffs may be able to prove that they would not have risked their employment by open resistance to the illegal pricing system absent Defendants' promise that they would not be expected to compromise fair and open competition.

Defendants also argue that promissory estoppel is a substitute for "traditional consideration" and, because the Plaintiffs were compensated for their employment, they cannot state a claim based on promissory estoppel. However, Defendants' argument misses the mark. The issue here is not whether Plaintiffs received consideration for their labor, but whether Defendants received consideration for their alleged "promise" not to require sales representatives to engage in anticompetitive activities. If Defendants' promise was supported by consideration, then it forms part of a contract, and Plaintiffs have no need for a claim based on promissory estoppel because they have a claim for breach of contract. The Court assumes, for the purposes of this motion, that Defendants do not intend to concede that the alleged "promise" was supported by consideration. Therefore, the Court concludes that Plaintiffs could potentially prove that, although [**54] this promise was not part of a bargained-for exchange but was merely gratuitous, the promise was of the type and formality that would foreseeably induce reliance. For these reasons the motion to dismiss Count V will be denied.

V.

Accordingly, it is hereby *ORDERED* that Defendants' Motion to Dismiss be, and it is hereby, *DENIED*.

GENE CARTER

Chief Judge

Dated at Portland, Maine this 19th day of January, 1994.

End of Document



R.W. Int'l Corp. v. Welch Food

United States Court of Appeals for the First Circuit

January 20, 1994, Decided

No. 93-1704

Reporter

13 F.3d 478 *; 1994 U.S. App. LEXIS 980 **; 1994-1 Trade Cas. (CCH) P70,488

R. W. INTERNATIONAL CORP. AND T. H. WARD DE LA CRUZ, INC., Plaintiffs, Appellants, v. WELCH FOOD, INC., ET AL., Defendants, Appellees.

Prior History: **[**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Gilberto Gierbolini, U.S. District Judge.

Core Terms

dealer, supplier, parties, bottled, terminate, products, grape juice, negotiations, district court, defendants', just cause, dealership, summary judgment, distributors, Plaintiffs', contractual, discovery, terms, summary judgment motion, antitrust claim, tortious interference, trial period, distributorship, one-year, frozen, juice, decision to terminate, anti trust law, Sherman Act, manufacturer

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN1 [down arrow] Standards of Review, De Novo Review

The appellate court's review of the district court's grant of summary judgment is plenary.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Negotiable Instruments > Transfer of Negotiable Instruments

Business & Corporate Law > ... > Remedies > Damages > Compensatory Damages

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

Business & Corporate Law > Distributorships & Franchises > Assignments & Transfers

13 F.3d 478, *478LÁ994 U.S. App. LEXIS 980, **1

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

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

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

HN2 Negotiable Instruments, Transfer of Negotiable Instruments

Puerto Rico Dealers' Contracts Act (Law 75), *P.R. Laws Ann. tit. 10*, § 278, subjects companies to substantial damages if they terminate dealership contracts for other than "just cause."

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

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

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

HN3 Private Actions, Remedies

Puerto Rico Dealers' Contracts Act (Law 75), *P.R. Laws Ann. tit. 10*, § 278a, provides that, notwithstanding any contractual provision to the contrary, the supplier in a distribution contract may terminate a dealership only for "just cause."

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

HN4 Private Actions, Remedies

See Puerto Rico Dealers' Contracts Act (Law 75), *P.R. Laws Ann. tit. 10*, § 278a.

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

HN5 Private Actions, Remedies

See Puerto Rico Dealers' Contracts Act (Law 75), *P.R. Laws Ann. tit. 10*, § 278(b).

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

HN6 Private Actions, Remedies

A supplier may withdraw from the Puerto Rico market without consequence under Law 75, *P.R. Laws Ann. tit. 10*, § 278, if the parties have bargained in good faith but have not been able to reach an agreement as to price, credit, or some other essential element of the dealership.

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN7**](#) [blue downward arrow] **Antitrust & Trade Law, Sherman Act**

The Sherman Act, [15 U.S.C.S. § 1](#) makes unlawful 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.

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

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

International Trade Law > General Overview

[**HN8**](#) [blue downward arrow] **Scope, Monopolization Offenses**

The Sherman Act, [15 U.S.C.S. § 2](#), makes it an offense for any person to 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.

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

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

[**HN9**](#) [blue downward arrow] **Regulated Practices, Trade Practices & Unfair Competition**

Heavy-handed competitive tactics alone do not constitute an antitrust violation. To survive defendants' motion for summary judgment, plaintiffs needed to demonstrate a genuine dispute as to whether defendants' actions caused an injury to competition, as distinguished from impact on themselves.

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

[**HN10**](#) [blue downward arrow] **Regulated Practices, Trade Practices & Unfair Competition**

Cutting prices in order to increase business often is the very essence of competition.

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

[**HN11**](#) [blue downward arrow] **Regulated Practices, Trade Practices & Unfair Competition**

Below-cost pricing is not automatically an antitrust violation if competition is not threatened.

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

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

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

HN12 [blue arrow icon] **Summary Judgment, Entitlement as Matter of Law**

The decision whether to allow discovery while a summary judgment motion is pending rests within the discretion of the district court and the party seeking additional time for discovery must show that the facts sought will, if obtained, suffice to engender an issue both genuine and material.

Counsel: Jose A. Hernandez Mayoral with whom Rafael Hernandez Mayoral was on brief for appellants.

Jaime E. Toro-Monserrate with whom Samuel T. Cespedes and Ana Matilde Nin were on brief for Welch Food, Inc.

Jorge I. Peirats with whom Jacabed Rodriguez Coss was on brief for Magna Trading Corp.

Judges: Before Breyer, Chief Judge, Coffin, Senior Circuit Judge, and Boudin, Circuit Judge.

Opinion by: COFFIN

Opinion

[*479] COFFIN, Senior Circuit Judge. The parties in this action attempted to negotiate a long-term distribution relationship, but after a year of haggling, defendant Welch Foods, Inc. (Welch) notified plaintiffs R.W. International Corp. (R.W.) and T.H. Ward de la Cruz, Inc.,¹ that it was calling off the corporate marriage because of irreconcilable differences. Plaintiffs claimed that the dissolution of the relationship violated the Puerto Rico Dealers' Contracts Act, *P.R. Laws Ann. tit. 10, § 278* (Law 75), and federal and state antitrust laws. Plaintiffs also alleged a claim of tortious interference with contractual relations against defendant Magna Trading Corp., [***2] supervisor of Welch's operations in Puerto Rico.

The district court concluded that the association between the parties had not yet matured into a relationship protected by Law 75, and it consequently granted summary judgment for defendants on the Dealers' Act and tort claims. It dismissed the antitrust [*480] claims on the ground that plaintiffs had failed to make the required showing of injury to competition. Our review of the caselaw and circumstances persuades us that only the antitrust claims properly were dismissed. We therefore reverse the summary judgment [***3] on the other causes of action.

I. Factual Background

The facts underlying this dispute essentially are undisputed, with the parties differing only with respect to their legal significance. **HN1** [blue arrow icon] Our review of the district court's grant of summary judgment is plenary. [Cambridge Plating Co. v. Napco, Inc., 991 F.2d 21, 24 \(1st Cir. 1993\)](#).

Welch, a producer of fruit juices and related products, has sold its products through local distributors in Puerto Rico since the 1930s. In 1987, Welch needed a new distributor for its frozen concentrate line of products, and, with the help of its local broker, Magna Trading, it identified R.W. as the most suitable -- though not perfect -- candidate.

From the beginning of Welch's interest in R.W., company executives had concerns about R.W.'s handling a competing line of juice products under the "Donald Duck" label. Welch's international marketing manager initially had suggested internally that R.W. would have to drop the Donald Duck line "to be a viable option," see App. at 213, but he later reported that R.W.'s owner, Thomas Ward, had agreed to undertake several measures to assure

¹ These two related corporations are both in the food distribution business. According to answers to interrogatories, R.W. does marketing for mainland corporations and accounting for De la Cruz, Inc.. De la Cruz, in turn, distributes but does not purchase products from producers. It makes purchases from Impex Trading, another related company. See District Court opinion at 5 n.2. For convenience, we refer to these companies jointly as either "plaintiffs" or "R.W.".

that the Welch frozen concentrates [**4] would receive full support despite the continued presence of the Donald Duck products. These included "[a] trial period with no commitment by Welch's for a larger period of representation," App. at 219, and a financial contribution from R.W. for advertising Welch's product.

Discussion among the parties took place through the early months of 1988 and, on March 25, Welch's international marketing manager wrote to Ward to announce his company's decision:

. . . I am pleased to inform you that Welch's has reached a decision to continue the frozen concentrate distribution and sales business begun by Ventura Rodriguez in Puerto Rico by transferring our account to R.W. International.

Confirming our conversation on Monday, Welch's will proceed to draft an agreement calling for the appointment of R.W. International in Puerto Rico for a one-year trial period

App. at 364. Four days later, on March 29, Welch notified its customers that it had

made the decision to appoint R.W. International and its distributing affiliate T.H. Ward de la Cruz Inc. as its distributors in Puerto Rico for Welch's frozen product line. This change will go into effect as of this date and a written [**5] agreement is expected to be arrived at in the near future.

App. at 366 (translation in appendix to appellant's brief).

The parties immediately began doing business, with plaintiffs regularly submitting purchase orders and defendants delivering the merchandise and billing plaintiffs. It was not until three months later, however, in late June, that Welch submitted a proposed contract to plaintiffs. Ward responded in August with a counterproposal. Of particular concern to the Puerto Rico company were provisions in the agreement that appeared to reflect an effort by Welch to bypass Act 75, which [HN2](#)[] subjects companies to substantial damages if they terminate dealership contracts for other than "just cause." The Welch document, for example, characterized the relationship with R.W. as a transfer of the contractual arrangement that had existed between Welch and its prior distributors before the passage of Act 75. Welch's draft also specified that New York law would govern the agreement. R.W.'s revised draft, *inter alia*, deleted the "transfer" language and specified that Puerto Rico law would apply.

In mid-October, after a series of telephone conversations between attorneys, Welch submitted [**6] a third proposed draft of the agreement, which reinstated all of the language that had been of primary concern to R.W. During a visit to Puerto Rico in early December and in subsequent correspondence, Welch's international marketing manager encouraged Ward to complete the contract negotiations "as soon as possible." On January [*481] 30, 1989, Ward responded by letter stating that he, too, was anxious to finalize the agreement, but that there were a few items "that your lawyer insists on and that we feel are not in the best interest of our future relationship." In response to an inquiry about R.W.'s investing \$ 50,000 in a promotional campaign, Ward noted that the commitment was not yet ripe because he had agreed to make this expenditure "once we as a company[] held a working agreement with Welch's." A follow-up letter sent by Ward on February 8 to the president of Magna Trading reiterated concerns about the "transfer" concept as a means of "avoiding Law 75 constraints."

At this point, the applicability of Law 75 remained the only significant point of contractual disagreement between the parties. They had resolved earlier conflicts as to which of Ward's entities would be named specifically [**7] in the contract (only R.W.), and whether R.W. would have an exclusive distributorship during the one-year trial period (no).

The companies had been continuing to do business throughout the negotiation period. Late in 1988, the relationship appeared to be working well; Magna Trading's president, Roberto Giro, wrote to Ward in early December to commend him for exceeding by 11 percent the goal on a special product promotion. Early in 1989, however, Giro began to express concern about R.W.'s side-by-side handling of the Welch and Donald Duck products. On January 20, he wrote to Welch's marketing manager indicating discomfort with Ward's involvement in a new line of Donald Duck grape juice products. This concern escalated, and Giro wrote again on March 22 suggesting that R.W. was not giving priority to Welch products as it had promised to do.

On March 30, 1989, Welch's international vice president, William Hewins, informed Ward in a letter of Welch's decision "to discontinue the existing pre-trial relationship . . . and, therefore, putting an end to the one-year trial or probationary relationship for our frozen concentrate products." The letter continued:

As you know, the idea of working [**8] together on a one-year trial basis was, as per your recommendations, to determine if Welch's frozen concentrates could be handled to our satisfaction in spite of your handling a competitive product. The pre-trial relationship proved to us that the conflicts of interest of your representing both competing lines are significant and irreconcilable. . . . An increased level of conflict in personal relations between our broker and R.W. International has also been noted, tracing to conflicts between the brands represented by the two firms. . . . Instead of complementing one another, as was your original premise, these brands represent conflicting interests for you and us. . . .

Because Welch terminated the relationship before the parties reached an agreement in writing, the one-year trial period envisioned at the outset of their dealings never even commenced.

Plaintiffs filed this action in April 1989. Their amended complaint alleges that Welch terminated their dealership agreement without just cause in violation of Law 75; that Magna Trading tortiously interfered with their contractual relationship with Welch; and that defendants violated antitrust laws by threatening, and then later [**9] actually terminating, plaintiffs' dealership if R.W. did not agree to drop Donald Duck products, and by seeking to monopolize the bottled grape juice market through a price-cutting war. The case was dismissed once on improper procedural grounds, see [R.W. International Corp. v. Welch Foods, Inc., 937 F.2d 11 \(1st Cir. 1991\)](#), and, following remand, dismissed again on defendants' motions for summary judgment.

In this appeal, plaintiffs maintain that all of their claims are viable. They argue that, contrary to the district court's ruling, precedent on Law 75 establishes that the statute *does* govern the business relationship within which R.W. and Welch operated for a year. They assert that this arrangement also provides a basis for their tortious interference claim against Magna. In addition, plaintiffs argue that their antitrust allegations were sufficient to withstand defendants' summary judgment motion and that, if their showing [*482] were deficient, the court erred in dismissing the claims without first allowing discovery.

II. Applicability of Law 75

Law 75 [HN3↑](#) provides that, notwithstanding any contractual provision to the contrary, the supplier [**10] in a distribution contract may terminate a dealership only for "just cause." *P.R. Laws Ann. tit. 10, § 278a.*² The statute was intended to protect Puerto Rico dealers from the harm caused when a supplier arbitrarily terminates a distributorship once the dealer has created a favorable market for the supplier's products, "thus frustrating the legitimate expectations and interests of those who so efficiently carried out their responsibilities," [Medina & Medina v. Country Pride Foods, Ltd., 858 F.2d 817, 820 \(1st Cir. 1988\)](#) (reproducing in full translation of Puerto Rico Supreme Court's response to certified question, 122 P.R. Dec. 172 (1988) (citing legislative reports)). The Act has been described as "very much a 'one-way street' designed to protect dealers from the unwarranted acts of termination by suppliers," [Nike Int'l Ltd. v. Athletic Sales, Inc., 689 F. Supp. 1235, 1237 \(D.P.R. 1988\)](#).

[**11] For purposes of its summary judgment motion, Welch did not dispute that R.W. and its affiliates were performing the functions of a distributor within the meaning of Law 75 during the twelve months the parties were doing business, see *P.R. Laws Ann. tit. 10, § 278(a).*³ Welch's position was, and is, that these operations occurred

² The provision states in full:

[HN4↑](#) Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration, except for just cause.

³ This provision defines a "dealer" as a "person actually interested in a dealer's contract because of his having effectively in his charge in Puerto Rico the distribution, agency, concession or representation of a given merchandise or service."

during a kind of "twilight zone" period while the parties attempted to negotiate in good faith the terms that would govern their actual relationship. Because the negotiations failed, the relationship never materialized, and so, in Welch's view, Law 75 never was implicated.

The district court accepted this argument, concluding that Law 75 was not meant to apply to a period of preliminary negotiations preceding a completed working agreement between [\[**12\]](#) a supplier and distributor. The court noted that keeping operations in abeyance during a good-faith negotiating process "would allow distributors to sit and wait while the principal loses its market -- obtaining, literally without any effort, a stronger bargaining position every day it waits." Applying Law 75 to dealings during that period, however, "would curtail the autonomy required for arms-length negotiations." Neither approach would serve the statute's purpose of "improving and permitting a system of free competition."

Plaintiffs' challenge to this judgment is straightforward. Law 75 makes no distinctions among distributorship arrangements, they assert, be they described as pre-trial, preliminary, temporary or tentative. The only relevant point of inquiry is whether R.W. and its affiliates were performing as a dealer under the statute; if so, Law 75 governs. R.W. thus contends that, because Welch concedes dealer status, its decision to terminate the relationship must be judged under the statute's "just cause" test.

We are persuaded that plaintiffs' position is the correct one. Their most compelling support is provided by the statutory language, which defines a "dealer's contract" [\[**13\]](#) subject to Law 75 as:

[\[a\] **HN5**](#) relationship established between a dealer and a principal or grantor whereby *and irrespectively of the manner in which the parties may call, characterize or execute such relationship*, the former actually and effectively takes charge of the distribution of a merchandise, or of the rendering of a service, by concession or franchise, on the market of Puerto Rico.

P.R. Laws Ann. tit. 10, § 278(b) (emphasis added). The statute clearly incorporates within its reach *any* arrangement between a supplier and dealer in which the dealer is actually in the process of distributing the [\[*483\]](#) supplier's merchandise in Puerto Rico. The statute does not apply to suppliers' simple sales to Puerto Rican wholesalers. It insists upon establishment of a "supplier/dealer" relationship. But once that relationship is established, the statute applies irrespective of the length of time such an arrangement has been in existence, and it explicitly rejects any efforts by the parties to foreclose coverage through semantic niceties. Welch's concession that R.W. was acting as a dealer (for purposes of summary judgment) thus seems dispositive.

Welch, however, asserts that the statute [\[**14\]](#) is not meant to be as inclusive as its language suggests, and it offers several reasons to support this position. In our view, each falters upon close scrutiny.

First, Welch claims that the word "established" in the provision indicates that Law 75 applies only once the parties have achieved a certain level of stability. The parties in this case may have been working with each other, Welch observes, but their failure to reach agreement on essential terms meant that their relationship was never "established" within the meaning of Law 75. In support of this argument, Welch cites language from cases describing the Law 75 relationship as "characterized by its continuity, stability, mutual trust, coordination between both parties as independent entrepreneurs," *J. Soler Motors, Inc. v. Kayser Jeep Int'l Corp.*, 108 P.R. Dec. 134, 145 (1978) (Official Translation); *see also Roberco, Inc. v. Oxford Industries, Inc.*, 122 P.R. Dec. 117 (1988), Official Translation of the Supreme Court of Puerto Rico, slip op. at 5 (June 30, 1988); [Medina & Medina, 858 F.2d at 822](#).

We cannot agree that a relationship [\[**15\]](#) is "established" within the meaning of Law 75 only *after* a supplier and dealer have reached the point at which their relationship might be described as "stable" or "continuous." Although the statute was enacted to protect from abrupt and arbitrary termination dealers whose longstanding representation had provided substantial economic benefit to the manufacturer, the law is drafted to govern relationships from their inception to ensure that they will both become and remain stable and continuous. See [Medina & Medina, 858 F.2d at 820](#) (Act 75 levels bargaining power between manufacturer and dealer "in order to achieve reasonably stable dealership relationships in Puerto Rico"). Although the precedent cited by Welch describes the type of longstanding commercial partnership that gave rise to Law 75, we do not read the cases to exclude fledgling relationships from

the act's coverage. A well-established dealer may have more to lose -- and may have provided more benefit to the supplier -- than a dealer with less tenure, but the statute makes no distinction between them.

Nor can it be said that a relationship is established within the meaning of Law 75 only [**16] if it is committed to writing. Indeed, Welch's counsel acknowledged at oral argument that a relationship subject to the statute may be established through a course of dealing, but argued that this was not such a case because the parties continued to disagree over the essential terms of their affiliation throughout their entire collaboration. In other words, Welch contends that this relationship was not established because its terms still were being negotiated.

While it is true that the parties had yet to agree on the dimensions of their future relationship, the fact remains that they were operating as business partners under *some* terms for a full year. Plaintiffs sent purchase orders to Welch approximately once a week between March 1988 and March 1989, and Ward's companies were actively involved in distributing Welch products throughout that time. As noted above, Ward received a commendation from Magna Trading's president for its effort in a successful special promotion. To be sure, the relationship envisioned by the parties when they began to do business never materialized; the relationship protected by Law 75, however, was the one that actually existed.

Welch's second argument, [**17] that applying Law 75 during a period of preliminary negotiations improperly burdens the parties' liberty to contract, is the one the district court found particularly convincing. When parties freely have agreed that a trial period will precede establishment of the long-term relationship Law 75 is intended to protect, the [*484] company asserts, invoking the Act before conclusion of the trial period is tantamount to coercing the parties into a contract neither agreed to enter. This is particularly harmful to the supplier, Welch maintains, because Law 75 is designed to empower dealers. Thus, a supplier who is not allowed to step away from an unsuccessful attempted relationship would be forced into accepting the dealer's terms and conditions, with the consequent loss of its financial and legal autonomy.

We detect several problems with this argument. In the first place, as we have noted, the parties in this case were not simply negotiating a relationship to be activated sometime in the future. R.W. had been serving as Welch's Puerto Rico dealer for twelve months. While we would have no difficulty in accepting that a supplier could break off negotiations, no matter how long they had been going [**18] on, the issue before us is whether Welch can terminate an actual dealership relationship that existed contemporaneously with the negotiations. Welch wants to insulate those dealings from Law 75 because they were part of a longer-term plan. The statute, however, plainly states that the characterization of a relationship (e.g., calling it temporary or preliminary) does not affect its status under Law 75. If the parties are dealing, a dealership exists for purposes of the Act.

This bright line makes sense. Otherwise, suppliers could insist on various types of contingency arrangements to avoid Law 75's restrictions for substantial periods of time. Although Welch's concerns about R.W.'s capacity to perform in the face of a potential conflict of interest seem legitimate, delaying Law 75's coverage until long after the dealership relationship began would allow Welch to terminate for any reason whatsoever. Welch, for example, could forsake R.W. without recourse and without regard for any efforts taken by R.W. to gear up for Welch's business, if another dealer willing to accept a smaller commission suddenly became available. Moreover, there seems to be no principled distinction between Welch's [**19] one-year trial period and a supplier's effort to designate a three- or even five-year "preliminary" distributorship before deciding on a long-term relationship. To rule that a contingent relationship is outside the scope of Law 75 is thus to allow a significant loophole in the protection the Puerto Rico legislature sought to provide.

In the second place, we fail to see how applying Law 75 in the circumstances of this case necessarily would require Welch to continue a relationship it does not want in a manner to which it has serious objections. Law 75 simply requires a supplier to justify its decision to terminate a dealership. If Welch's conflict-of-interest concerns about R.W. are legitimate, we have no doubt that this would constitute "just cause" under Law 75. See [Medina & Medina](#),

858 F.2d at 823-24.⁴ Thus, applying Law 75 here does not force a contract onto unwilling parties; it simply imposes conditions on an existing relationship.

[**20] Finally, the liberty of contract argument stumbles insofar as it presumes that only the supplier will suffer if, to avoid application of Law 75, the parties refrain from dealing until they have reached final agreement on all terms to govern their long-term relationship. The manufacturer and the dealer share an interest in maximizing sales of the product, and it would be no more to the dealer's advantage than to the manufacturer's for a market to slip away while the parties are engaged in protracted negotiations. We therefore disagree with the district court's view that dealers will gain unfair advantage in bargaining if Law 75 is triggered as soon [*485] as the parties start dealing. Both sides have an incentive to reach agreement at the earliest possible time. To the extent a supplier's future flexibility is diminished by its choice to begin dealing before all issues have been resolved, this is a result intended by the legislators who enacted Law 75.

In short, the practical effect of activating the Dealers' Act as soon as the parties start conducting business as supplier and dealer is to ensure that, right from the start, the relationship is marked by a certain level of commitment from [**21] the supplier. This does not entirely deprive suppliers of the opportunity to evaluate the suitability of a particular match through a "test period." It simply means that the relationship can be severed without consequence only for just cause, i.e., if the dealer fails a meaningful test. This should not trouble suppliers engaged in good-faith negotiations, for their goal is to produce a long-term working agreement. If, on the other hand, a preliminary "understanding" disintegrates into impasse over essential terms, a finding of "just cause" seems likely. Law 75 is not intended to extend unworkable relationships, but only to prevent arbitrary terminations. See Medina & Medina, 858 F.2d at 823-24.

Of course, whether or not statutes of this kind are sound policy is not our concern. Perhaps a case can be made for having a fixed period during which the relationship is probationary and the statutory rights under Law 75 do not vest; this is typical for tenure arrangements in government employment and in the academic world. But the legislature has not enacted such a window, as we read the present statute, and it is not for us to amend the statute in the guise [**22] of construction.

Welch's effort to bolster its position through reliance on *Medina & Medina* and another case involving a novel Law 75 question, Nike Int'l Ltd. v. Athletic Sales, Inc., 689 F. Supp. 1235 (D.P.R. 1988), is unavailing. In *Medina & Medina*, the Puerto Rico Supreme Court held that HN6⁵] a supplier may withdraw from the Puerto Rico market without consequence under Law 75 if "the parties have bargained in good faith but have not been able to reach an agreement as to price, credit, or some other essential element of the dealership," 858 F.2d at 824. Welch contends that the district court's ruling, allowing the company to call off the protracted, unsuccessful negotiations with R.W., is faithful to that decision.

In *Medina & Medina*, however, the Puerto Rico Supreme Court did not rule that a temporary relationship pending completion of negotiations is outside the scope of Law 75, but it held that the failed negotiations over price and credit terms provided *just cause* for the supplier's decision to terminate the distributorship a year after it began.⁵

⁴ *Medina & Medina* is not precisely on point because it involved a supplier's decision to totally withdraw from the Puerto Rico market following good-faith negotiations that failed to achieve agreement between the parties. There is no indication here that Welch intended to leave the market rather than find a new dealer. Nevertheless, we believe the principle underlying *Medina & Medina* is equally applicable in these circumstances, i.e., that a supplier has *just cause* to terminate if it has bargained in good faith but has not been able "to reach an agreement as to price, credit, or some other essential element of the dealership," 858 F.2d at 824. This would be true at least where, as here, the supplier's market in Puerto Rico was well established before the current dealer relationship and the supplier's action therefore "is not aimed at reaping the good will or clientele established by the dealer," *id.*

⁵ The dealership contract between *Medina & Medina* and Country Pride contained no time limit. Product prices were set periodically by mutual agreement. 858 F.2d at 818.

Until that case, it was unclear whether a supplier could **[**23]** terminate without consequence for any reason other than the dealer's adverse actions. *Medina & Medina* does help Welch, in that it allows an argument that failed negotiations may support a finding of "just cause," but it does not bolster the company's argument that preliminary dealings fall outside Law 75.

In *Nike*, a federal district court permitted termination of a dealer who failed to give the contractually required written notice to the supplier of its intent to renew the contract. [689 F. Supp. at 1239](#). According to Welch, *Nike* stands for the principle that dealers may not avoid the express terms of agreements to which they willingly subscribe. Consequently, the company argues, the district court properly held appellants to their own characterization of the arrangement as a preliminary **[**24]** test period.

This argument stretches *Nike* far beyond its legitimate boundaries. *Nike* addressed only whether Law 75 released a dealer from an explicit renewal procedure contained in the distributorship contract. Noting that the statute's purpose was to protect against unjustified termination by *the principal*, the court ruled that it had no effect on mutual agreements specifying the manner in which a dealer must notify a supplier of its desire to continue their relationship. See [689 F. Supp. at 1239](#). In other words, while Law 75 takes **[*486]** away from the supplier the right to make a subjective decision to terminate, other than for "just cause," the parties may agree to a contractual procedure that gives *the dealer* the power either to end or to continue the relationship after a given period of time. *Nike* holds that Law 75 does not protect the dealer from its own failure to follow that procedure.

This case is simply not equivalent to *Nike*. Welch, in essence, claims that the parties agreed that Welch would have the power to terminate their relationship after a preliminary test period, without regard to just cause. This, however, is precisely **[**25]** the imbalance of power to which Law 75 was directed, and the statute invalidates such an agreement. Under Law 75, a principal may not wield unilateral authority to terminate a dealership relationship for other than just cause.

In sum, we find no basis upon which to exclude the ongoing commercial dealings between Welch and R.W. from the embrace of Law 75. The district court's grant of summary judgment therefore must be reversed so that the court may consider whether Welch had "just cause" for terminating the relationship.⁶ Because summary judgment on the claim for tortious interference with a contractual relation was premised on the Law 75 holding, that decision also must be vacated and remanded for further consideration. The remand on the tortious interference claim is without prejudice to any argument Welch may be making that, regardless of the existence of a relationship protected by Law 75, there was no contract protected against tortious interference.

[26] III. Antitrust Claims**

In January 1989, R.W. introduced a new Donald Duck bottled grape juice into the market with an intensive promotional campaign. Plaintiffs allege that defendants' reaction to the new product, and R.W.'s representation of it, violated [sections 1 and 2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2](#), as well as Commonwealth [antitrust law](#), P.R. Laws Ann. tit. 10, §§ 258, 260. The principal actions cited by plaintiffs in their amended complaint were (1) discussions in which Welch and Magna expressed "anger ('molestia'), discomfort and preoccupation with Plaintiffs' handling of the 'Donald Duck' bottled grape juice," Amended Complaint at P 78; (2) a "massive promotional campaign" for Welch's own bottled grape juice, and a price cutting war, "in order to block out the entrance [of] the 'Donald Duck' bottled grape juice into the Puerto Rican market," [id. at PP 82, 91](#); and (3) the decision of Welch to terminate its relationship with plaintiffs because R.W. did not drop representation of the Donald Duck juice, [id. at P 81.](#)

The district court granted summary judgment on these claims, concluding that plaintiffs had failed to demonstrate **[**27]** a genuine issue of material fact as to whether defendants' actions constituted either a conspiracy in restraint of trade in violation of [§ 1](#) of the Sherman Act,⁷ or an unlawful conspiracy to monopolize the

⁶We recognize that Welch conceded that R.W. was performing as a dealer only for purposes of its summary judgment motion, and that, consequently, this issue also may surface again on remand.

bottled grape juice market in violation of [§ 2](#).⁸ Of greatest significance to the court was a declaration from one of Magna's principals, Francisco Gil, stating that Donald Duck bottled products had reached, within a short period of time, at least 80 percent of the stores typically carrying such products. The court found that summary judgment was proper because "plaintiffs never responded to Welch's claim that [] competition has not been injured, and that the Donald Duck bottled grape juice was successfully introduced into the Puerto Rico market."

[**28] Plaintiffs claim on appeal that the court improperly and prematurely dismissed their [*487] antitrust claims. Much of their brief on this issue, however, is devoted to an off-the-mark argument concerning the court's failure to treat the allegations in their complaint liberally. The court did not dismiss the antitrust claims based on the pleadings, but ruled that plaintiffs had failed to substantiate in any way their conclusory allegations in response to defendants' summary judgment motion and accompanying declaration. Our review of the district court's decision consequently focuses solely on the appropriateness of summary judgment.

Section 1 of the Sherman Act. As argued by plaintiffs in their appellate brief, the unreasonable restraint of trade underlying their [§ 1](#) claim was an alleged threat by Welch (as part of a conspiracy with *Magna*) to terminate plaintiffs' dealership and the subsequent actual termination of the relationship. These actions presumably were alleged to violate the antitrust laws based on their impact in pressuring plaintiffs to drop the Donald Duck line of products, thereby suppressing competition among grape juice manufacturers.

HNG Heavy-handed competitive tactics [**29] alone do not constitute an antitrust violation, however. To survive defendants' motion for summary judgment, plaintiffs needed to demonstrate a genuine dispute as to whether defendants' actions caused an injury to *competition*, as distinguished from impact on themselves. See, e.g., *Spectrum Sports, Inc. v. McQuillan*, 122 L. Ed. 2d 247, 113 S. Ct. 884, 892 (1993) ("The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n.14, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984) ("The antitrust laws . . . were enacted for "the protection of *competition*, not *competitors*."") (citations omitted) (emphasis in original); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988) ("Anticompetitive' . . . refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process."). Once defendants presented a declaration averring that the Donald Duck products successfully entered the market during the [**30] relevant period of time -- indicating a lack of injury to competition -- plaintiffs were obliged to counter that statement with more than the bare allegations contained in their complaint. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

Plaintiffs responded with a statement from R.W. owner Ward, which stated, in relevant part:

2. During the last months of 1988 R.W. International Corp. became the broker of Donald Duck bottled grape juice.
3. Shortly after the introduction in the market of the Donald Duck bottled grape juice, Welch's began an intensive promotion of their bottled grape juice products.
4. This intensive promotion of the Welch's Grape bottled products caused [] the introduction of the Donald Duck bottled grape juice be severely suppressed.
5. Upon information and belief [sic], this intensive promotion was carried out in conjunction with Magna Trading Corporation to eliminate the Donald Duck bottled grape juice from [the] Puerto Rico market.

⁷ Section 1 HNT makes unlawful "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 . . ." [15 U.S.C. § 1](#).

⁸ Section 2 HN8 makes it an offense for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . ." [15 U.S.C. § 2](#).

The district court concluded that this statement was insufficient to generate a genuine factual dispute because it left unchallenged [**31] defendants' assertion that the Donald Duck bottled juice had deeply penetrated the Puerto Rico market during the period of defendants' allegedly unlawful conspiracy. The court observed:

As the Puerto Rico Supreme Court has recognized, distributors are in contact with the retailers, consumers, and the different components of the trade. [Medina, 858 F.2d at 823 n.6](#). Plaintiffs were in the position to show, based on their knowledge of the Puerto Rico market, the effects of Welch's conduct on the market However, other than the conclusory allegation that their line had been "severely suppressed," plaintiffs never responded to Welch's claim that the competition has not been injured, and that the Donald Duck bottled grape juice was successfully introduced into the Puerto Rico market.

[*488] The district court's decision and explanation are unimpeachable. Plaintiffs may have felt pressured to drop the Donald Duck products in order to preserve the Welch dealership, and may have suffered economic consequences from Welch's decision to terminate, but these circumstances are irrelevant insofar as an antitrust violation is concerned. Plaintiffs' failure to [**32] rebut defendants' assertion that Donald Duck bottled grape juice had no problem entering the market -- an implicit assertion that competition was *not* affected -- fully justifies the district court's decision to grant summary judgment for defendants.

Plaintiffs take issue with the significance of defendants' penetration figure, arguing that each of the stores carrying Donald Duck juice may have had only a single bottle of that brand while displaying shelves full of Welch products. We agree with the district court, however, that such information, if true, could have been obtained easily by plaintiffs, and its absence is thus not a proper basis upon which to withhold summary judgment from defendants.⁹ See *infra* [slip op.] at 24-25 (denial of discovery).

[**33] *Section 2 of the Sherman Act.* Plaintiffs' § 2 claim characterizes defendants' promotional campaign, in which Welch reduced prices on its bottled grape juice, as an impermissible effort to gain monopoly control of the bottled grape juice market in Puerto Rico. In light of R.W.'s success in introducing the Donald Duck juice, this claim is wholly without merit.

The Supreme Court repeatedly has recognized that [HN10](#)↑ "cutting prices in order to increase business often is the very essence of competition," [Matsushita, 475 U.S. at 594](#). See also [Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2586 \(1993\)](#) (". . . Congress did not intend to outlaw price differences that result from or further the forces of competition."); [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#) ("It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.") (citations omitted). There was little basis for believing that Welch was engaged in below-cost pricing as opposed to mere price reduction, although even [HN11](#)↑ below-cost [**34] pricing is not automatically an antitrust violation if competition is not threatened. See [Brook Group, 113 S. Ct. at 2588](#). Where, in addition, a new product is able to deeply penetrate the market during the challenged price-cutting period, it is evident that competition is unharmed and "summary disposition of the case is appropriate," [id. at 2589](#).

Request for Discovery. Plaintiffs suggest that their inability to respond with particularity to defendants' motion for summary judgment is attributable to the district court's refusal to lift a stay of discovery that had been imposed on the antitrust claims. [HN12](#)↑ The decision whether to allow discovery while a summary judgment motion is pending rests within the discretion of the district court, [Sheinkopf v. Stone, 927 F.2d 1259, 1263 \(1st Cir. 1991\)](#), and "the party seeking additional time for discovery . . . must show that the facts sought 'will, if obtained, suffice to engender an issue both genuine and material,'" *id.* (citation omitted).

⁹ We have not considered Magna's argument that the § 1 claim fails because the requirement for joint action by *independent* entities is not fulfilled here in light of Magna's and Welch's unified economic interest. The argument does seem to have some force, however. See [Copperweld, 467 U.S. at 776](#) (holding that "the coordinated behavior of a parent and its wholly owned subsidiary falls outside the reach of § 1"); [Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313, 1316-17 \(8th Cir. 1986\)](#) (corporate agents may lack "the independent economic consciousness" necessary to be conspirators separate from their principal).

As the district court observed, plaintiffs were well situated to explore Welch's impact on competition [**35] in the bottled grape juice market, and they had an obligation to use their knowledge and connection with the market to develop some basis to justify further inquiry.¹⁰ Plaintiffs, however, "never articulated how discovery from Welch would provide insight on the impact of Welch's conduct on the market." District Court Opinion, at 23-24. Their failure to do so negates their claim that the district court erred in denying discovery.

[**36] [*489] Accordingly, we conclude that the district court properly dismissed plaintiffs' claims under [sections 1](#) and [2](#) of the Sherman Act, as well as under the analogous provisions of Puerto Rico law.

IV. Conclusion

For the foregoing reasons, we vacate the summary judgment for defendants on the Law 75 and tortious interference claims, and remand those issues for further proceedings consistent with this opinion. We affirm dismissal of the antitrust claims. We have not considered in any fashion defendants' argument to the district court that dismissal of all claims alternatively is appropriate based on [Fed. R. Civ. P. 41](#) and the court's inherent powers to control the proceedings before it. The district court explicitly sidestepped this issue, and it is not properly before us.

Affirmed in part, and vacated and remanded in part. Each party to bear its own costs.

End of Document

¹⁰ For example, plaintiffs could have done a sampling of stores to compare prices and shelf life between the Welch and Donald Duck products. If bottles of Donald Duck juice remained on the shelves for long periods while Welch products enjoyed a quick turnover, and Welch's prices were substantially lower, plaintiffs may have been able to persuade the district court to grant discovery into the possibility that Welch was engaged in predatory pricing. See [Brook Group, 113 S. Ct. at 2587](#) (predatory pricing involves pricing products "in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market").

Stamatakis Indus. v. Beatrice Foods Co.

United States District Court for the Northern District of Illinois, Eastern Division

January 24, 1994, Decided ; January 25, 1994, Docketed

Case No. 83 C 6461

Reporter

1994 U.S. Dist. LEXIS 550 *

STAMATAKIS INDUSTRIES, INC., a Delaware corporation, and PREMIER ENGRAVING, INC., an Illinois corporation, Plaintiffs, v. BEATRICE FOODS CO., a foreign corporation, J. WALTER THOMPSON U.S.A., INC., a foreign corporation, KING GRAPHICS, INC., an Illinois corporation, FREDERICK KING, DONALD GREIFENKAMP, KENNETH E. TODD, and KIEFFER-NOLDE, INC., an Illinois corporation, Defendants.

Core Terms

antitrust, sanctions, group boycott, reasonable inquiry, allegations, competitors, color

LexisNexis® Headnotes

Civil Procedure > Attorneys > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN1[ Civil Procedure, Attorneys

Fed. R. Civ. P. 11 is aimed at curtailing abuses of the judicial system. Fed. R. Civ. P. 11 provides in relevant part, that: The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law.

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN2[ Sanctions, Baseless Filings

What constitutes a reasonable inquiry into the factual and legal basis of a document is not a subjective good faith standard, but one of reasonableness under the circumstances. Although no distinction is drawn between the state of mind of attorneys and parties, what constitutes a "reasonable inquiry" for an attorney, as opposed to a represented party, can differ.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

[**HN3**](#) [] **Antitrust & Trade Law, Sherman Act**

Counsel should be aware of the requirement of showing an antitrust injury.

Civil Procedure > Sanctions > Baseless Filings > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

[**HN4**](#) [] **Sanctions, Baseless Filings**

A motion to dismiss merely tests the legal sufficiency of the allegations in the pleading, not the actual grounds for those allegations. The fact that a motion to dismiss is denied does not determine whether sanctions are appropriate against an attorney. A claim, which survives dismissal nonetheless warrants sanctions when no credible evidence is subsequently presented to support the allegations.

Civil Procedure > Sanctions > Baseless Filings > General Overview

Civil Procedure > Sanctions > General Overview

[**HN5**](#) [] **Sanctions, Baseless Filings**

A client is not immune from [Fed. R. Civ. P. 11](#) sanctions because of its status as a represented party. A trial court's discretion includes the power to impose sanctions on the client alone, solely on the counsel, or both. However, the Business Guides standard of "reasonableness under the circumstances" acknowledges that a client has a lesser ability to ascertain the legal foundation of a claim or a pleading.

Civil Procedure > Sanctions > Baseless Filings > Bad Faith Motions

Governments > Courts > Rule Application & Interpretation

Legal Ethics > Professional Conduct > Frivolous Claims & Conduct

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

[**HN6**](#) [] **Baseless Filings, Bad Faith Motions**

[Fed. R. Civ. P. 11](#) provides that the amount of sanctions imposed by the court may include reasonable expenses including attorney's fees incurred because of the filing of the frivolous pleading, motion, or other paper. Compensation for defending against a frivolous action is an important function of [Rule 11](#) sanctions, but an even more important purpose is deterrence. The purpose of [Rule 11](#) is not reimbursement but sanction to bring home to the individual signer his personal, nondelegable responsibility.

Civil Procedure > Sanctions > Baseless Filings > General Overview

Legal Ethics > Sanctions > General Overview

Civil Procedure > Sanctions > General Overview

[HN7](#) Sanctions, Baseless Filings

Precisely because deterrence is the principal objective of [Fed. R. Civ. P. 11](#) sanctions, equitable concerns often mitigate the amount of the sanction. For example, the assets of the sanctioned attorney are highly relevant to the determination of an appropriate award. Other equitable considerations include the magnitude of frivolousness and general culpability of the sanctioned attorney. The "degree of frivolousness" is factor in determining amount of the sanction. There are other mitigating factors such as: whether attorney believed he was correct; whether the lawyer is a neophyte in need of education or an attorney with an outstanding ethical record; and whether strong sanctions would chill this type of litigation.

Judges: [*1] BUCKLO

Opinion by: ELAINE E. BUCKLO

Opinion

REPORT AND RECOMMENDATION

This action was originally brought by Stamatakis Industries, Inc. ("Stamatakis") and its acquired subsidiary Premier Engraving, Inc. ("Premier"), alleging an antitrust violation by King Graphics, Inc. ("KGI"), Frederick King ("Mr. King"), Beatrice Foods Co. ("Beatrice"), J. Walter Thompson U.S.A., Inc. ("JWT"), Donald Greifenkamp, Kenneth E. Todd, and Kieffer-Nolde, Inc. ("K-N"). In the complaint, Stamatakis alleged that the defendants conspired to restrain trade by eliminating Premier from the market that produces color separations for the advertising industry. Summary judgment was entered on behalf of the defendants on October 11, 1990,¹ [*2] and affirmed by the Seventh Circuit on June 15, 1992. See [Stamatakis Industries, Inc. v. King, 965 F.2d 469 \(7th Cir. 1992\)](#). The sole issue before this court is Mr. King's motion to impose [Rule 11](#) sanctions against Stamatakis and its attorneys, John C. Stiefel ("Mr. Stiefel") and Lionel G. Gross ("Mr. Gross").²

[HN1](#)

[Rule 11, FED. R. CIV. P.](#), is aimed at curtailing "abuses of the judicial system." [Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 397, 110 L. Ed. 2d 359, 110 S. Ct. 2447 \(1990\)](#). [FED. R. CIV. P. 11](#) provided, at the time of the actions complained of,³ in relevant part, that:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law.

[HN2](#)  What constitutes a reasonable inquiry into the factual and legal basis of a document is not a subjective good faith standard, but "one of reasonableness under the circumstances." [Business Guides v. Chromatic](#)

¹ Judge Norgle adopted the July 31, 1990 Report and Recommendation ("R & R") of this court which concluded that defendants were entitled to summary judgment.

² In their reply memorandum on this motion, Mr. King asserts that plaintiffs' counsel is also liable to pay attorneys' fees pursuant to [28 U.S.C. § 1927](#). This contention was not previously raised and cannot be considered at this late date.

³ [Rule 11](#) was amended December 1, 1993.

Communications Ent., 498 U.S. 533, 549-51, 112 L. Ed. 2d 1140, 111 S. Ct. 922 (1991), [*3] quoting Advisory Committee's Note to Fed. R. Civ. P. 11, 28 U.S.C. App., p. 576. Although no distinction is drawn between the state of mind of attorneys and parties, what constitutes a "reasonable inquiry" for an attorney, as opposed to a represented party, can differ. Business Guides v. Chromatic Communications Ent., *supra*, 498 U.S. at 550-51.

The facts underlying this controversy may be briefly summarized. Prior to Stamatakis' acquisition of Premier in 1976, Mr. King was Chairman of Premier and responsible for its day-to-day operations. R & R, p. 3. When Stamatakis acquired Premier, Mr. King stayed on to manage Premier and assented to an employment contract with a non-compete covenant which prohibited him from competing against Premier for two years after he left Premier. *Id.*, p. 4. In the early 1980's, computer technology transformed the color separation process, and Mr. King was unsuccessful in his efforts [*4] to persuade Stamatakis to invest in the new equipment. Consequently, Mr. King left Premier in April, 1982. He briefly worked as a graphics consultant for a competitor, Beatrice. In October, 1982, Mr. King established KGI in space leased from JWT, Premier's largest client. Stamatakis Industries, Inc. v. King, *supra*, 965 F.2d at 471. In August, 1982, Premier lost the JWT account, and soon thereafter, three key employees also left to work for competitors of Premier. R & R, pp. 13-15.

Stamatakis filed this federal action pursuant to Section 1 of the Sherman Act, 15 U.S.C. § 1, contending that the defendants inflicted an antitrust injury by conspiring to terminate Premier as a color separator for its largest client, JWT, and divide Premier's business among K-N and Beatrice.⁴ Because Stamatakis had no evidence of antitrust injury, this court and the Seventh Circuit both held that there was no triable issue regarding Stamatakis' Section 1 claim. See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (antitrust plaintiff alleging Section 1 violation must show both [*5] antitrust injury and conspiracy).

The Seventh Circuit concluded that Stamatakis was merely complaining that the defendants conspired to "steal Premier's business." Stamatakis Industries, Inc. v. King, *supra*, 965 F.2d at 471. The court characterized the complaint as "substantively silly," holding that Premier did not establish an antitrust injury, because such losses arise only "from acts that reduce output or raise prices to consumers." *Id.* at 470-71, citing Chicago Professional Sports Limited Partnership v. National Basketball Ass'n, 961 F.2d 667, 670 (7th Cir. 1992). The court further held that plaintiffs were actually complaining of "too much competition (injuring producers) [*6] rather than too little (injuring consumers)." *Id.* The court concluded that "it is an abuse of the Sherman Act to depict cooperative efforts to establish a new firm as a forbidden reduction of competition." *Id.* at 472.

There is no question that HN3[] counsel should have been aware of the requirement of showing an antitrust injury. E.g., Local Beauty Supply, Inc. v. LaMaur, Inc., 787 F.2d 1197, 1200-03 (7th Cir. 1986), and the various Supreme Court decision cited therein; S.W. Suburban Board of Realtors v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1377 (7th Cir. 1987). In response to the motion for summary judgment, plaintiffs argued that they satisfied the requirement because they suffered the loss of JWT as a client. Counsel should have understood, however, that a producer's loss is not the same thing as antitrust injury.

Stamatakis argued, alternatively, that it satisfied the antitrust injury requirement because it was the victim of a "group boycott" or a "horizontal market allocation." Both of these practices are considered so manifestly anticompetitive that they fall within the category of practices presumed to be [*7] per se violative of the antitrust laws. See, e.g., United States v. Topco Associates, 405 U.S. 596, 608, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972) (agreement among competitors at same market level to allocate territories) Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959) (group boycott or concerted refusal to deal by manufacturers and distributors eliminated small retailer from the market); Mid-West Underground Storage, Inc. v. Porter, 717 F.2d 493, 497-98 n.2 (10th Cir. 1983) ("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"). However, before per se treatment is justified, the court -- and counsel bringing a case -- must give "considerable

⁴ Stamatakis' amended complaint included an additional claim, which was subsequently dropped, alleging an attempt by the defendants to monopolize the market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

inquiry into market conditions." *E.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 297, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985).

The Report and Recommendation noted that the *sine qua non* of a group boycott is the denial of access to a relevant market. R & R, p. 29, citing *Northwest Stationers v. Pacific Stationery*, *supra*, 472 U.S. at 294. [*8] Stamatakis never seriously contended that Premier was effectively denied access to a significant section of the advertising industry as a result of the loss of JWT. In addition, Stamatakis provided no indirect evidence that the alleged conspirators had the requisite market power to force JWT into terminating Premier, or alternatively, that JWT could coerce the other color separators into controlling prices or otherwise reducing competition.

In opposition to the motion for sanctions, counsel point to *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477 (9th Cir. 1988). However, in *Harkins*, plaintiff sought to prove that he was excluded from the first-run theater market, a relevant market for antitrust purposes. Here there was no evidence that plaintiff was excluded from any market other than JWT's business, which was not shown to be a relevant market.

Mr. Gross and Mr. Stiefel point to the fact that Stamatakis survived defendants' motion to dismiss as proof that the antitrust claim was colorable under existing law. However, [HN4](#) [↑] a motion to dismiss merely tests the legal sufficiency of the allegations in the pleading, not the actual [*9] grounds for those allegations. See *Brandt v. Schal Associates, Inc.*, 121 F.R.D. 368, 377 (N.D. Ill. 1988). In rejecting dismissal of Stamatakis' *Section 1* claim, the court drew all favorable inferences from Stamatakis' allegation of "a conspiracy to support a horizontal group boycott which was aimed at reducing the demand for Premier's product." Order of Nov. 24, 1986, p. 2 (citations omitted).⁵ However, survival of the dismissal motion fails to negate the fact that Mr. Stiefel knew, or should have known, that the essence of Stamatakis' claim was that Premier simply lost a valuable client, JWT, to its competitors because of the desertion of Mr. King. A reasonable inquiry into the proof requirements for a "group boycott" would have charged Mr. Stiefel with the knowledge that Premier was not "boycotted," or otherwise denied meaningful access to vie for clients in the advertising industry, either in Chicago or across the country. Accordingly, the fact that the motion to dismiss was denied does not determine whether sanctions are appropriate against Mr. Stiefel. Cf. *Kapco Manufacturing Co., Inc. v. C & O Enterprises, Inc.*, 886 F.2d 1485, 1494 (7th Cir. 1989) [*10] (claim which survived dismissal nonetheless warranted sanctions when no credible evidence was subsequently presented to support the allegations). It also has no effect on the [Rule 11](#) motion against Mr. Gross, who opposed defendants' motion for summary judgment after discovery had shown that plaintiffs' theory was unsupported by facts.

[*11] Counsel do not appear to have prosecuted this action for an improper purpose, and they were seemingly genuine in their belief that their theories were viable applications of existing *antitrust law*. Furthermore, prospective litigants should not be deterred from seeking redress under the Sherman Act for injuries from concerted efforts to restrain competition. Nonetheless, Mr. Gross and Mr. Stiefel did make an unreasonable attempt to make a federal antitrust case out of a factual scenario that was, in essence, an alleged violation of a restrictive covenant. Their theory was objectively unreasonable, or as the Seventh Circuit indicated, "substantively silly." I conclude that appropriate sanctions under [Rule 11](#) should be imposed upon Mr. Gross and Mr. Stiefel because the attorneys unreasonably advanced an antitrust claim they should have known was unwarranted.

Mr. King also seeks sanctions against Stamatakis. [HN5](#) [↑] Stamatakis is not immune from [Rule 11](#) sanctions because of its status as a represented party. See *Business Guides v. Chromatic Communications Ent.*, *supra*, 498 U.S. at 549-51; CHARLES A. WRIGHT & ARTHUR R. MILLER, 5A FEDERAL PRACTICE AND PROCEDURE § [*12] 1336 at 104 (1990 ed.) ("court's discretion includes the power to impose sanctions on the client alone, solely on the counsel, or both"). However, the *Business Guides* standard of "reasonableness under the circumstances"

⁵ In fact, in their objections to Magistrate Judge Balog's Report and Recommendation, plaintiffs stated that their "antitrust claims involve a horizontal group boycott engineered by Premier's non-aligned competitors in order to drive Premier out of business." Objections and Exceptions at 3. They went on to say that Beatrice "induced the group of Premier's biggest customers to boycott Premier." *Id.* No evidence was ever submitted that anyone took any business away from Premier, or attempted to do so, apart from one client, JWT. While these statements were not made in a memorandum signed by either Mr. Stiefel or Mr. Gross, they formed at least part of the basis upon which Judge Norgle denied the motion to dismiss.

acknowledges that a client has a lesser ability to ascertain the legal foundation of a claim or a pleading. [Business Guides v. Chromatic Communications Ent., supra, 498 U.S. at 550.](#)

Given the complexity and subtlety of **antitrust law**, it is unlikely that Stamatakis, which had no in-house counsel, could conduct a reasonable inquiry that would avail it of the meaning of legal terms of art such as "anticompetitive effect," "rule of reason," "per se violation," "group boycott," "horizontal allocation," and "relevant market." Stamatakis' antitrust claim was premised on its own belief that the defendants competed unfairly against it. As Stamatakis contends, its only objective was to recover damages for what it construed as a violation of Mr. King's non-compete covenant and tortious interference in its business relations with JWT. In his motion for [Rule 11](#) sanctions, Mr. King does not allege that Stamatakis made false factual allegations, [*13] or allegations that it should have known were false. The antitrust theory alleged in the complaints was developed by Mr. Stiefel, and the subsequent claims of per se violations were generated by Stamatakis' attorneys. Stamatakis had no reason to believe, under the circumstances, that the theory was unwarranted under existing law.

HN6 [Rule 11](#) provides that the amount of sanctions imposed by the court may include "reasonable expenses [including attorney's fees] incurred because of the filing of the [frivolous] pleading, motion, or other paper." [FED. R. CIV. P. 11](#). Mr. King and KGI claim they have "spent in excess of \$ 100,000," and seek reimbursement for "their costs and attorneys' fees incurred in defense of this action, to be proved up hereafter." Motion for Sanctions, PP 15-16. Compensation for defending against a frivolous action is an important function of [Rule 11](#) sanctions, but "an even more important purpose is deterrence." [Brown v. Federation of State Medical Boards of U.S., 830 F.2d 1429, 1438 \(7th Cir. 1987\)](#), accord [Pavelic & LeFlore v. Marvel Entertainment, 493 U.S. 120, 126, 107 L. Ed. 2d 438, 110 S. Ct. 456 \(1989\)](#) (purpose of [Rule 11](#) "is not reimbursement [*14] but sanction . . . to bring home to the individual signer his personal, nondelegable responsibility").

HN7 Precisely because deterrence is the principal objective of [Rule 11](#) sanctions, equitable concerns often mitigate the amount of the sanction. See [Brown v. Federation of State Medical Boards of U.S., supra, 830 F.2d at 1439](#). For example, the assets of the sanctioned attorney are highly relevant to the determination of an appropriate award. *Id.*, citing [Oliveri v. Thompson, 803 F.2d 1265, 1281 \(7th Cir. 1986\)](#) (collecting cases). Other equitable considerations include the magnitude of frivolousness and general culpability of the sanctioned attorney. See [Automatic Liquid Packaging, Inc. v. Dominik, 909 F.2d 1001, 1006 \(7th Cir. 1990\)](#), citing [Colorado Chiropractic Council v. Porter Memorial Hospital, 650 F. Supp. 231, 243 \(D. Colo. 1986\)](#) ("degree of frivolousness" is factor in determining amount of sanction); see generally [Eastway Construction Corp. v. City of New York, 637 F. Supp. 558, 571 \(E.D.N.Y. 1986\)](#) (identifying other mitigating [*15] factors such as: whether attorney believed he was correct; whether lawyer is a neophyte in need of education or an attorney with outstanding ethical record; and whether strong sanctions would chill this type of litigation).

Mr. King has 20 days after the time when objections to this report must be filed, if none are filed, or 20 days following a decision to accept the recommendation of sanctions, if objections are filed, in which to submit a detailed declaration of his attorneys' fees and costs incurred to defend this antitrust action against Mr. Stiefel and Mr. Gross up until the time Mr. Stiefel and Mr. Gross withdrew from the case. Within 20 days thereafter Mr. Gross and Mr. Stiefel may provide this court with any additional information consistent with the mitigating factors expressed above, as well as objections to the amount of fees.

ELAINE E. BUCKLO

United States Magistrate Judge

Dated: January 24, 1994.



Balaklaw v. Lovell

United States Court of Appeals for the Second Circuit

September 29, 1993, Argued ; January 26, 1994, Decided

Docket No. 93-7484

Reporter

14 F.3d 793 *; 1994 U.S. App. LEXIS 1392 **; 1994-1 Trade Cas. (CCH) P70,497

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

Prior History: [\[**1\]](#) Anesthesiologist appeals summary judgment denying his antitrust claims against defendant hospital.

Disposition: Affirmed for lack of standing.

Core Terms

anesthesiologists, anesthesiology, antitrust, exclusive contract, anti trust law, competitors, staff privileges, group boycott, Sherman Act, anticompetitive, terminate, patients, relevant market, Clayton Act, proceedings, proposals, alleges, compete, buyers

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 > ... > Private Actions > Costs & Attorney Fees > 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, Costs & Attorney Fees**

14 F.3d 793, *793LÁ1994 U.S. App. LEXIS 1392, **1

See [15 U.S.C.S. § 15.](#)

Antitrust & Trade Law > Clayton Act > General Overview

[HN3](#) Antitrust & Trade Law, Clayton Act

See [15 U.S.C.S. § 26.](#)

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

[HN4](#) Standing, Requirements

In order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an injury. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

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

[HN5](#) Private Actions, Remedies

Antitrust laws were enacted for the protection of competition, not competitors.

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

[HN6](#) Private Actions, Standing

A two-pronged analysis determines whether a plaintiff has antitrust standing. As a necessary first step, courts must determine whether the plaintiff suffered an antitrust injury. If the answer to that question is yes, they must then determine whether any of the other factors, largely relating to how direct and identifiable the plaintiff's injury is, prevent the plaintiff from being an efficient enforcer of the antitrust laws.

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

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

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

[HN7](#) [down] Private Actions, Remedies

The relevant market definition must encompass the realities of competition.

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

Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.

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

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

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

[HN9](#) [down] Practices Governed by Per Se Rule, Boycotts

Group boycotts, which generally consist of agreements by two or more persons not to do business with other individuals, or to do business with them only on specified terms may in some limited circumstances constitute per se violations of the Sherman Act, [15 U.S.C.S. § 1](#).

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

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

[HN10](#) [down] Practices Governed by Per Se Rule, Boycotts

For standing purposes, whether there was or was not a per se antitrust violation is irrelevant.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

14 F.3d 793, *793L^A 1994 U.S. App. LEXIS 1392, **1

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 > General Overview

HN11[] **Clayton Act, Claims**

Regardless of any substantive violation of the Sherman Act, [15 U.S.C.S. § 1, sections 4](#) and [16](#) of the Clayton Act, [15 U.S.C.S. §§ 15, 26](#), still require plaintiffs to establish that the defendants engaged in anticompetitive conduct that caused them an antitrust injury.

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

HN12[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

"Per se violations" of the Sherman Act, [15 U.S.C.S. § 1](#), include that limited class of cases where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination.

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

HN13[] **Business Administration & Organization, Peer Review**

[42 U.S.C.S. § 11151\(9\)](#) limits the term "professional review action" to actions based on the competence or professional conduct of an individual physician.

Counsel: WHITNEY NORTH SEYMOUR, JR., New York, NY, for Plaintiff-Appellant.

FRANCES A. CIARDULLO, Syracuse, NY, (Costello, Cooney & Fearon), for Defendants-Appellees.

Judges: Before: CARDAMONE, McLAUGHLIN, and LAY, * Circuit Judges.

Opinion by: LAY

Opinion

[*795] LAY, Senior Circuit Judge:

* Honorable Donald P. Lay, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Borrowing themes from the Supreme Court's opinions in *Jefferson Parish*¹ [**3] and *Summit Health*², Dr. Lee A. Balaklaw, an anesthesiologist practicing in Cortland, New York, brought suit under section 1 of the Sherman Act, 15 U.S.C. § 1 (1988),³ [**4] and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1988),⁴ for an alleged "group boycott" and unreasonable restraint of trade preventing him from rendering anesthesiology services at Cortland Memorial Hospital ("CMH" or "the Hospital"). Balaklaw, rather than asserting a claim of an illegal tie-in, as Dr. Hyde did in *Jefferson Parish*, or alleging [**2] an illegal disciplinary-review process as Dr. Pinhas had in *Summit Health*, urges that CMH violated the Sherman Act by entering into an exclusive contract with a group of anesthesiologists of which Dr. Balaklaw was not a member. Dr. Balaklaw alleges a conspiracy among the hospital, the successful bidding group of anesthesiologists (the "King group"), and others.⁵ The district court⁶ rejected these claims, and we affirm.

[**5] I. BACKGROUND

Prior to the commencement of this lawsuit, Dr. Balaklaw served as president of Anesthesia Associates of Cortland, P.C., ("AAC") a private physicians' group, and Chief of Cortland Memorial Hospital's Department of Anesthesiology. Although there was no written contract governing the relationship between AAC and the Hospital, the entire Department of Anesthesiology consisted of AAC members, and AAC was solely responsible [*796] for meeting the Hospital's anesthesia requirements. AAC had what the district court described as a "de facto exclusive contract with

¹ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). In *Jefferson Parish*, an anesthesiologist was denied admission to the defendant hospital's medical staff because the hospital had entered into an exclusive contract with a firm of anesthesiologists requiring that all anesthesiology services for the hospital's patients be performed by the contracting firm. *Id. at 7*. The rejected doctor sued under § 1 of the Sherman Act on the grounds that the users of the hospital's operating rooms were compelled to purchase the hospital's anesthesiology services, and that as such, an illegal "tying arrangement" existed. *Id. at 4-5*. The court of appeals agreed, finding the contract to be a *per se* violation of the Sherman Act. *Id. at 8*. The Supreme Court reversed and held that even though the patients were required to purchase two services that would otherwise be purchased separately, there was no illegal tying arrangement or violation of the Sherman Act because there was no restraint on competition. *Id. at 32*. Justice Stevens concluded for the Court that "without a showing of actual adverse effect on competition" there could be no case under the antitrust laws. *Id. at 31*.

² *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 114 L. Ed. 2d 366, 111 S. Ct. 1842 (1991). The plaintiff in *Summit Health*, an ophthalmologist, asserted that the defendant hospital and its medical staff had violated § 1 of the Sherman Act by conspiring to drive him out of business in order to increase their competitive market share. 111 S. Ct. at 1844. The plaintiff alleged that the conspirators used sham professional peer-review proceedings to terminate his privileges and that they took other measures to prevent him from obtaining work elsewhere. *Id. at 1845-46*. The Court held that the claim satisfied the interstate commerce requirement of federal antitrust jurisdiction, and its analysis indicated that the offense charged would violate the Sherman Act. *Id. at 1848-49*.

³ Section 1 of the Sherman Act provides, in pertinent part, that HN1 [**] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988 & Supp. IV 1992).

⁴ Section 4 of the Clayton Act provides that HN2 [**] "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1988). Section 16 in part allows HN3 [**] "any person, firm, corporation, or association . . . to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26 (1988).

⁵ Defendants include Cortland Memorial Hospital, Inc.; the C.M.H. Group, Inc., the Hospital's corporate parent; Robert M. Lovell, the hospital administrator and its chief executive officer; and members of the Hospital's Board of Trustees. Dr. Delf King, head of the King group, was named as a co-conspirator but not as a defendant to this action.

⁶ The Honorable Frederick J. Scullin, Jr., United States District Judge for the Northern District of New York.

the Hospital." Plaintiff rejects this characterization, testifying that throughout this period, any qualified competitor "could have come in from the outside and competed with us at any point in time."

Dr. Balaklaw's arrangement with CMH came to an end when CMH decided to solicit proposals from outside for a written exclusive contract for anesthesiology services.⁷ CMH sent a formal Request for Proposals to practicing anesthesiologists in New York, Vermont, Massachusetts, Connecticut, New Jersey, Pennsylvania, and Ohio. Nine proposals were received in return, including one from AAC. An ad hoc selection committee [**6] consisting of members of the Board of Trustees, Hospital administration, and medical and nursing staffs then interviewed four of the applicant groups, including the group headed by Dr. Balaklaw. The committee unanimously recommended that the Board award the exclusive contract to a group headed by Dr. Delf King, and the Board of Trustees subsequently announced its intent to enter into such a contract.

Pursuant to the Hospital's Medical Staff By-Laws, Dr. Balaklaw sought a hearing to review this decision. The hearing committee unanimously supported the Board's intent to award the contract to Dr. King, and on appeal the full Board upheld the hearing committee's decision. [**7] The Hospital then executed a formal written agreement with Dr. King.

Under the terms of the contract, Dr. King and his group became the exclusive providers of anesthesia services to all patients at CMH. The initial term of the contract was three years, but either party could terminate the contract without cause upon six-months' notice. Dr. Balaklaw's clinical privileges were not terminated. He asserts, however, that the nature of the contract effectively ousted him from his practice at CMH and that because other hospitals request information about any prior diminutions in privileges, he has been rendered unable to secure another full-time position.

The complaint alleges that the Hospital's and Dr. King's actions in entering into the exclusive anesthesiology contract constituted a conspiracy to engage in an illegal group boycott of, and a concerted refusal to deal with, Dr. Balaklaw. Dr. Balaklaw claims that he has been driven from the practice of his profession, not only at CMH, but nationwide. He alleges that the proceedings that led to the contract between CMH and Dr. King were anti-competitive and a *per se* violation of the Sherman Act. As compensation, Dr. Balaklaw seeks treble [**8] damages under section 4 of the Clayton Act, 15 U.S.C. § 15, and declaratory and injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26.

The district court held that the plaintiff lacked standing to assert his antitrust claims. The court reasoned that the injury plaintiff alleged did not appear "to be the type of injury the antitrust laws were intended to prevent." In addition, the court held that even if the plaintiff did possess the requisite standing, summary judgment for the defendants would still be warranted because the plaintiff had not established the substantive elements of his claims. The court concluded that CMH's effort to change the anesthesia services at CMH did not hinder competition, but rather, it fostered it by awarding the contract to the organization that offered to provide the services needed by the Hospital at the lowest price. The court thus entered its order granting defendants' motion for summary judgment, from which the plaintiff appeals.⁸

[**9] [*797] We affirm the district court's dismissal of the complaint for lack of standing.

⁷The parties dispute the reasons for this decision. Dr. Balaklaw contends that he had become "the target of an economic vendetta" at CMH because of "years of independent, reform-minded patient advocacy." Defendants claim that the Board of Trustees was motivated by "many complaints about inadequate anesthesia services from members of its Medical Staff."

⁸In addition, the district court found no actionable conspiracy between the hospital and members of its medical staff because they constituted a single entity for purposes of antitrust litigation. The court likewise rejected a conspiracy theory based simply on the fact that Dr. King and his group had entered into a contract with the hospital. The court further found there was no unreasonable restraint of trade or *per se* violation of the Sherman Act. In this regard, the court found that the relevant market area for anesthesiologist services was nationwide. The court found no evidence that the contract foreclosed competition within this market.

II. DISCUSSION

It is now well settled that [HN4](#) in order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an injury. [Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters](#), 459 U.S. 519, 535 n.31, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); [Eastway Constr. Corp. v. City of New York](#), 762 F.2d 243, 250 (2d Cir. 1985), cert. denied, 484 U.S. 918, 98 L. Ed. 2d 226, 108 S. Ct. 269 (1987); [Todorov v. DCH Healthcare Auth.](#), 921 F.2d 1438, 1448 (11th Cir. 1991). "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.](#), 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977); see [R.C. Bigelow, Inc. v. Unilever N.V.](#), 867 F.2d 102, 107 [**10] (2d Cir.), cert. denied, 493 U.S. 815 (1989). This antitrust injury requirement underscores the fundamental tenet that [HN5](#) "the antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" [Brunswick](#), 429 U.S. at 488 (quoting [Brown Shoe v. United States](#), 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)). It follows from the purposes of the antitrust laws that injuries resulting from competition alone are not sufficient to constitute antitrust injuries. See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* P 334.2 (Supp. 1993). Thus, in *Brunswick*, the Supreme Court found no antitrust injury where the defendant had preserved, rather than dampeden, competition by acquiring a number of the plaintiff's bowling alley competitors that would otherwise have gone out of business. [429 U.S. at 488](#). The Court responded to the plaintiff's claim that the defendant's actions deprived it of profits it would have received had its competition been allowed to fail by stating, "It is inimical to the purposes of [the antitrust] laws to award damages for the type [**11] of injury claimed here." *Id.*; see also [Cargill, Inc. v. Monfort of Colorado , Inc.](#), 479 U.S. 104, 116-117, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986) (extending antitrust injury requirement to equitable actions under *section 16* of the Clayton Act and stating that "the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury").

In the case before us, even if we assume that the plaintiff suffered a direct and readily identifiable injury caused by the defendants' actions, there is no evidence that this injury was "of the type the antitrust laws were intended to prevent." ⁹ We agree with the [*798] district court that Dr. Balaklaw's claimed injury came as a result of his losing out in the competition for an exclusive anesthesiology contract at CMH, and nothing more.

[**12] A. Exclusive Dealing

Dr. Balaklaw claims that the exclusive contract between CMH and the King group led to an antitrust injury because it "unreasonably foreclosed a significant amount of competition in the relevant market without pro-competitive justification." We disagree. The Supreme Court in [Jefferson Parish Hospital District No. 2 v. Hyde](#), 466 U.S. 2, 80 L.

⁹The Court in *Cargill* pointed out that even an antitrust injury, while necessary to establish standing under *section 4* of the Clayton Act, may not always be sufficient to confer standing, "because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons." [479 U.S. at 110 n.5](#). In *Associated General*, the Court discussed some of the "other reasons" that might affect whether a party has antitrust standing. See [459 U.S. at 537-45](#). The Court mentioned: (1) the causal connection between the alleged antitrust violation and the harm to the plaintiff; (2) the existence of an improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness of the connection between the injury and alleged restraint in the relevant market; (5) the speculative nature of the damages; and (6) the risk of duplicative recoveries or complex apportionment of damages. *Id.*; see [South Dakota v. Kansas City Indus.](#), 880 F.2d 40, 45-46 (8th Cir. 1989) (analyzing and applying these factors), cert. denied, 493 U.S. 1023, 107 L. Ed. 2d 745, 110 S. Ct. 726 (1990).

Over time, courts have developed [HN6](#) a two-pronged analysis to determine whether a plaintiff has antitrust standing. As a necessary first step, courts must determine whether the plaintiff suffered an antitrust injury. If the answer to that question is yes, they must then determine whether any of the other factors, largely relating to the directness and identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws. See [Todorov](#), 921 F.2d at 1449. In this appeal, since we conclude that Dr. Balaklaw has not suffered an antitrust injury, we do not reach this second question.

Ed. 2d 2, 104 S. Ct. 1551 (1984), disposed of a similar argument on the merits. The Court observed with respect to an exclusive contract between the defendant hospital and an anesthesiology group headed by Dr. Kermit Roux:

There is . . . insufficient evidence in this record to provide a basis for finding that the Roux contract, as it actually operates in the market, has unreasonably restrained competition. The record sheds little light on how this arrangement affected consumer demand for separate arrangements with a specific anesthesiologist. The evidence indicates that some surgeons and patients preferred respondent's services to those of Roux, but there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would **[**13]** provide him with the anesthesiologist of his choice.

In sum, all that the record establishes is that the choice of anesthesiologists at East Jefferson has been limited to one of the four doctors who are associated with Roux and therefore have staff privileges. Even if Roux did not have an exclusive contract, the range of alternatives open to the patient would be severely limited by the nature of the transaction and the hospital's unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges. If respondent is admitted to the staff of East Jefferson, the range of choice will be enlarged from four to five doctors, but the most significant restraints on the patient's freedom to select a specific anesthesiologist will nevertheless remain.

Id. at 29-30 (footnotes omitted). We reach a similar assessment of the allegations here.

The relevant markets even arguably affected by the exclusive contract granted to Dr. King and his group are (1) the consumers of anesthesiology services, and (2) the providers of anesthesiology services. See Jefferson Parish, 466 U.S. at 7. **[**14]** From the consumers' point of view, nothing about the market has changed. As the Tenth Circuit noted on similar facts in Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992), "it is clear that what occurred after the implementation of the [exclusive] contract . . . was only a reshuffling of competitors," id. at 1393.¹⁰ **[**15]** Although Dr. Balaklaw claims that other qualified competitors could have come in from the outside at any time to compete with him and his group, the evidence shows that prior to the agreement with Dr. King, Dr. Balaklaw's group had exclusive control over anesthesiology services at CMH.¹¹ Cf. Jefferson Parish, 466 U.S. at 6 **[*799]** 104 S. Ct. at 155 (noting that despite deleting contract clause excluding other anesthesiologists from practice, hospital continued to regard itself as committed to a closed anesthesiology department). After CMH entered into the agreement with Dr. King, anesthesiology services remained exclusive. Only the provider changed.

[16]** From the standpoint of the providers of anesthesiology services, the market remains similarly unaltered. The relevant market here is the market in which anesthesiologists compete for jobs. See Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 478 (7th Cir. 1988), cert. denied, 488 U.S. 852, 102 L. Ed. 2d 110, 109 S. Ct. 137 (1988). While the precise dimensions of this market are not clearly defined, "the market is not necessarily the same as the market in which hospitals compete in offering services to patients; it may encompass competition among anesthesiologists for exclusive contracts . . . and might be statewide or merely local." Jefferson Parish, 466 U.S. at 29 (footnote omitted). The basic principle is that HNT[↑] "the relevant market definition must encompass the

¹⁰ In Coffey, as here, the plaintiff group of physicians once had an exclusive, though not always written, arrangement with a hospital to provide, in that case, radiological services, but was replaced when the hospital entered into an exclusive contract with another group. 955 F.2d at 1390. The court affirmed summary judgment granted against the plaintiffs. Id. at 1395.

¹¹ The evidence also suggests that prior to CMH's entering into the contract with Dr. King, Dr. Balaklaw strongly supported the "single group" concept. He spoke at meetings and wrote three separate memoranda to the Board of Trustees endorsing the view that the Hospital should have only one anesthesia group providing anesthesia services to patients. On appeal, he argues that he never advocated an exclusive contract; rather, "what he advocated was administration of the department by a single group--with no express restriction on membership." We find this a distinction without a difference. Whether "administered" by a single group or contractually delegated to a single group, the department would not be freely open to non-group members or other, competing groups. Additional doubt is cast on Dr. Balaklaw's willingness to operate the department "with no restrictions on membership" by the fact that, as he testified at his deposition, he actively enforced non-competition clauses in the employment contracts of Dr. Abbassi and Dr. Jeffrey, former members of Dr. Balaklaw's group, to prevent them from practicing at CMH. Joint App. at A-213 - A-214.

realities of competition." *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991) (en banc), cert. denied, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992); see *United States v. Grinnell Corp.*, 384 U.S. 563, 572-73, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). The evidence shows that in this case, CMH solicited proposals [**17] from anesthesiologists in seven states, tangibly indicating that anesthesiologists compete in a multi-state, if not national, market. Plaintiff has provided no evidence that this competition has been hampered by the exclusive contract entered into at CMH. Even if the contract between CMH and Dr. King excluded Dr. Balaklaw from the local Cortland-area market, there is no evidence to suggest that the contract caused Dr. Balaklaw (or other anesthesiologists) to be excluded from, or substantially limited in, the broader market for employment. See *Collins*, 844 F.2d at 479.¹²

[**18] Even at CMH, opportunities for competition remain, since the contract with Dr. King has a term of only three years and may be cancelled without cause upon six-months' notice. In *Konik v. Champlain Valley Physicians Hospital Medical Center*, 733 F.2d 1007, 1014-15 (2d Cir.), cert. denied, 469 U.S. 884, 83 L. Ed. 2d 190, 105 S. Ct. 253 (1984), we rejected an antitrust challenge to an anesthesiology contract in part because the parties were free at the end of any six-month period to terminate the agreement. Here, as there, "the Hospital [is] free at the end of six months to enter into a new arrangement either with [the current group] or with any other anesthesiologist." *Id.* at 1015. Such a situation may actually encourage, rather than discourage, competition, because the incumbent and other, competing anesthesiology groups have a strong incentive continually to improve the care and prices they offer in order to secure the exclusive positions. See, e.g., *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346, 1353-54 (7th Cir. 1982); *Drs. Steuer & Latham, P.A. v. National Medical Enters., Inc.*, 672 F. Supp. 1489, 1516 (D.S.C. 1987). [**19] aff'd, 846 F.2d 70 (4th Cir. 1988) (table). We thus see no "foreclosure of competition" in either of the two relevant markets, and consequently, we find no antitrust injury.¹³

[**20] [*800] This is not to say that under proper pleading and proof exclusive-dealing contracts could not still be scrutinized under the antitrust laws. As Justice O'Connor expressed in her concurring opinion in *Jefferson Parish*:

Exclusive-dealing arrangements may, in some circumstances, create or extend market power of a supplier or the purchaser party to the exclusive-dealing arrangement, and may thus restrain horizontal competition. Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods, or by allowing one buyer of goods unreasonably to deprive other buyers of a needed source of supply. In determining whether an exclusive-dealing contract is unreasonable, the proper focus is on the structure of the market for the products or services in question--the number of sellers and buyers in the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others. *HN8*¹⁴ Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal. [**21] *Standard Oil Co. of California v. United States*, 337 U.S. 293, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949).

¹² Although this analysis parallels the district court's substantive discussion of the relevant market area, it also is relevant to the failure of the plaintiff to demonstrate a cognizable antitrust injury showing an actual adverse effect on competition. See *Jefferson Parish*, 466 U.S. at 31 (noting after analysis of relevant market that "without a showing of actual adverse effect on competition, respondent cannot make out a case under the antitrust laws, and no such showing has been made").

¹³ Dr. Balaklaw also alleges that there is no "pro-competitive justification" for the exclusive contract with Dr. King. While such considerations are more relevant to a "rule of reason" analysis on the merits, we note that in addition to the generally pro-competitive effects short-term exclusive contracts for medical services may have, the defendants here did provide "evidence of the pro-competitive 'redeeming virtues' of their combination." See *Capital Imaging v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 543 (2d Cir.), cert. denied, 126 L. Ed. 2d 337, 114 S. Ct. 388 (1993) (citation omitted). The evidence shows that the ad hoc advisory committee chose to recommend an exclusive contract with Dr. King's group because his "proposal was most responsive to the needs of our Hospital as identified through the request for proposals." Joint App. at A-445. The committee's report details how Dr. King's proposal was most responsive, particularly in the staffing and financing areas. *Id.* Under such circumstances, the contract appears to best meet the needs of the purchaser, the hospital, and by extension its patients, and therefore it is clearly justified on pro-competitiveness grounds.

466 U.S. at 45. In this case, Dr. Balaklaw has alleged no threat of "adverse economic consequences" to anyone but himself.

B. Group Boycott

Dr. Balaklaw contends that under the Supreme Court's decision in Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 114 L. Ed. 2d 366, 111 S. Ct. 1842 (1991), CMH's actions constitute a group boycott against him and thus are a *per se* violation of the Sherman Act. He alleges that CMH used its peer review proceedings to "exclude the victim from the entire national market for employment by putting an indelible black mark on the doctor's record."

HN9[¹⁴] Group boycotts, which generally consist of agreements by two or more persons not to do business with other individuals, or to do business with them only on specified terms, Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council, 857 F.2d 55, 73 (2d Cir. 1988), may in some limited circumstances constitute *per se* violations of the Sherman Act.¹⁴ See Capital Imaging v. Mohawk Valley Medical Assocs., 996 F.2d 537, 542 [**22] (2d Cir.) cert. denied, 126 L. Ed. 2d 337, 114 S. Ct. 388 (1993); see also FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986) (noting that the "*per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor"). **HN10**[¹⁵] For standing purposes, however, whether there was or was not a *per se* violation is irrelevant. See Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1419 (7th Cir. 1989). **HN11**[¹⁶] Regardless of any substantive violation of the Sherman Act, sections 4 and 16 of the Clayton Act still require plaintiffs to establish that the defendants engaged in anticompetitive conduct that caused them an antitrust injury. *Id.*; Newman v. Universal Pictures, 813 F.2d 1519, 1522-23 (9th Cir. 1987) ("Although the *per se* rule relieves plaintiff of the burden of demonstrating an anticompetitive effect, which is assumed, it does not excuse a [*801] plaintiff from showing that his injury was caused by the anticompetitive acts."), cert. denied, 486 U.S. 1059, 100 L. Ed. 2d 931, 108 S. Ct. 2831 (1988). [**23] Dr. Balaklaw has demonstrated no such conduct, and *Summit Health* is of little assistance.

It is true that in *Summit Health*, the Supreme Court held that federal jurisdiction did exist over antitrust claims that a hospital had used its peer-review proceedings to effect an illegal group boycott of a physician, but the facts of that case make it inapposite here. The defendant hospital in *Summit Health* used "sham" disciplinary proceedings to terminate the plaintiff ophthalmologist's staff privileges, and it planned to distribute an adverse [**24] report about the plaintiff to all the hospitals where he was a member or where he might apply for similar positions. 111 S. Ct. at 1845-46. Here, by contrast, Dr. Balaklaw's staff privileges at CMH have not been terminated,¹⁵ [**25] he has not been subjected to any disciplinary peer-review proceedings,¹⁶ and there is nothing to suggest that an adverse report is being circulated or that any other "indelible black mark" has been placed on Dr. Balaklaw's record. He claims that being rejected at CMH will stigmatize him in his efforts to obtain new employment. Yet at the hearing to

¹⁴ The so-called **HN12**[¹⁷] "*per se* violations" of the Sherman Act include that "limited class of cases where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are 'conclusively presumed illegal without further examination.'" Capital Imaging, 996 F.2d at 542 (citation omitted) (quoting Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)).

¹⁵ We recognize, though, that even though Dr. Balaklaw was reappointed to the Medical Staff in December, 1991, and his membership was subject to renewal in December, 1993, as a result of the contract with the King group, Dr. Balaklaw may not now actually practice at CMH.

¹⁶ The peer-review proceedings at issue in *Summit Health* were those contained in the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 (1988), which **HN13**[¹⁸] limits the term "professional review action" to actions "based on the competence or professional conduct of an individual physician," *id.* § 11151(9). Here, there were no charges against Dr. Balaklaw relating to his professional competence or conduct. The hearing at which Dr. Balaklaw appealed the Board's decision to enter into the contract with Dr. King was authorized by the Hospital's by-laws as an internal grievance procedure for any decision that affected a member of the medical staff's clinical privileges. Such proceedings are not "professional review actions" under the terms of the Health Care Quality Improvement Act.

consider plaintiff's motion for a preliminary injunction, Dr. Balaklaw admitted that when asked on employment applications whether his prior staff privileges had ever been revoked or terminated, he would add an explanation, but always answer "no." Joint App. at A-680. It appears that far from being permanently stigmatized and excluded from his profession, Dr. Balaklaw, like seven of the other eight anesthesiology groups that submitted proposals, simply failed to win the exclusive contract to practice anesthesiology at CMH.¹⁷

[**26] III. CONCLUSION

"It is the nature of competition that at some point there are winners and losers, and the losers are excluded." *Konik v. Champlain Valley Physicians Hosp. Medical Center*, 733 F.2d 1007, 1015 (2d Cir.), cert. denied, 469 U.S. 884, 83 L. Ed. 2d 190, 105 S. Ct. 253 (1984). Here, Dr. Balaklaw entered the competition for an exclusive contract, he interviewed for it, and he lost. He was therefore excluded from further practice at CMH during the term of the contract. Especially in light of the Supreme Court's recognition that a hospital has the "unquestioned right to exercise some control over the identity and [*802] the number of doctors to whom it accords staff privileges," *Jefferson Parish*, 466 U.S. at 30, and the frequently expressed judicial approval of exclusive contracts for medical services, see , e.g., *id. at 43-44* (O'Connor, J., concurring); *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992); *Beard v. Parkview Hosp.*, 912 F.2d 138, 140 (6th Cir. 1990); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 478-79 (7th Cir. 1988); [**27] *Coastal Neuro-Psychiatric Assocs. v. Onslow Memorial Hosp.*, 795 F.2d 340, 342 (4th Cir. 1986), such exclusion is not enough to constitute an antitrust injury. As we said in *Konik*, "the Hospital is not required to open its operating rooms to any and all anesthesiologists who wish to practice there." *733 F.2d at 1015*. By closing it doors to Dr. Balaklaw in favor of one of his competitors, CMH did nothing to inflict an injury of the type the antitrust laws were intended to prevent.

Because Dr. Balaklaw's factual allegations, when considered in a light most favorable to him, establish only that he has been harmed as an individual competitor, we conclude that Dr. Balaklaw has suffered no antitrust injury and therefore lacks standing to prosecute his antitrust claims. Accordingly, the district court's order granting summary judgment to the defendants is affirmed.

End of Document

¹⁷ Dr. Balaklaw alleges that, like the plaintiff in *Summit Health*, he was displaced by the Hospital for retaliatory reasons. Even if it is true, as he alleges, that the Hospital was motivated by an "economic vendetta" against him, absent "proof of harm to the whole market," *Capital Imaging*, 996 F.2d at 543, that is not properly the subject of an antitrust action. "Were the law construed otherwise, routine disputes between business competitors would be elevated to the status of an antitrust action, thereby trivializing the Act because of its too ready availability." *Id.* Indeed, were we to characterize the harm to Dr. Balaklaw as an "antitrust injury," conceivably every competitor who ever lost a contract through a competitive bidding process could come to court claiming violations of the Sherman Act. Even if their claims proved meritless, the drawn-out proceedings necessary to evaluate them could chill competitive market forces, a prospect directly at odds with the purposes for which the antitrust laws were enacted. See *id. at 541* (noting that summary judgment is a vital tool in the antitrust area to prevent wasteful trials that may chill competitive market forces) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)).



Davis v. Southern Bell Tel. & Tel. Co.

United States District Court for the Southern District of Florida

February 1, 1994, Decided ; February 1, 1994, Filed

Case No. 89-2839-CIV-NESBITT

Reporter

1994 U.S. Dist. LEXIS 13257 *; 1994-1 Trade Cas. (CCH) P70,510

LINDA DAVIS, et al., Plaintiffs, v. SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, a Georgia corporation, Defendant.

Core Terms

Plaintiffs', solicitations, Counterclaim, enterprise, customers, contracts, consumers, Counts, inside wire, advertising, competitors, repair, motion to dismiss, damages, barrier, offers, summary judgment, corrective, telephone, monopolization, notice, antitrust, summary judgment motion, monopoly power, misrepresentations, criminal activity, class member, notifications, allegations, questions

LexisNexis® Headnotes

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

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

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

Civil Procedure > Pretrial Matters > Continuances

HN1[] Summary Judgment, Supporting Materials

Fed. R. Civ. P. 56(f) provides that should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN2[] Expert Witnesses, Daubert Standard

The court must make a preliminary assessment whether the principles upon which a scientific expert proposes to base his or her testimony are scientifically valid. These principles, not the expert's conclusions, must be the focus of the court's inquiry. The inquiry envisioned by [Fed. R. Evid. 702](#) is a flexible one. Its overarching subject is the scientific validity of the principles that underlie the proposed submission. The focus must be solely on principles and methodology, not on the conclusions that they generate. The following factors often bear on the inquiry: 1) whether the principle has been tested; 2) whether the principle has been subject to peer review; 3) whether the known or potential rate of error associated with the principle is excessive; and 4) whether the principle has achieved widespread acceptance in the scientific community.

Evidence > Admissibility > Scientific Evidence > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > ... > Testimony > Expert Witnesses > Qualifications

[HN3](#) Admissibility, Scientific Evidence

[Fed. R. Evid. 702](#) governs the admissibility of expert evidence and provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

[HN4](#) Expert Witnesses, Daubert Standard

In the context of a consumer survey, [Fed. R. Evid. 702](#) requires the court to conduct a preliminary assessment of the reliability of the principles upon which the expert relied to select the universe, to ensure that the consumers surveyed accurately represent the universe, to construct the survey questions, and to analyze the data gathered through the survey.

Evidence > ... > Testimony > Expert Witnesses > General Overview

[HN5](#) Testimony, Expert Witnesses

[Fed. R. Evid. 703](#) governs the facts or data upon which an expert may rely when testifying. The rule provides that the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN6 **Testimony, Expert Witnesses**

In the context of a consumer survey, the party seeking admission of an expert opinion based upon the survey must demonstrate that: 1) the data in the survey is of the type generally relied upon by experts in the field; and 2) their reliance on such data is reasonable.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN7 **Testimony, Expert Witnesses**

In order to assess the reasonableness of reliance on the survey data, the court must assess the manner in which the expert gathered and analyzed the data. In making this assessment, the court must examine: 1) whether the universe of the survey was properly defined; 2) whether the individuals questioned in the survey constitute a representative sample of the universe; 3) whether the survey questions were framed in a clear precise and non-leading manner; 4) whether sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted; 5) whether the data gathered was accurately reported; 6) whether the data was analyzed in accordance with accepted statistical principles; and 7) whether the objectivity of the entire process was assured.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN8 **Testimony, Expert Witnesses**

In order to sustain a claim for monopolization, plaintiffs must prove that the company: 1) willfully acquired or maintained anticompetitive conduct prong, 2) monopoly power in the relevant market and, 3) utilized that power to cause an injury cognizable under the antitrust laws.

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

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

HN9 **Monopolies & Monopolization, Actual Monopolization**

In order to prove that a company possesses monopoly power in the market for inside wire maintenance and repair, plaintiffs must prove that the company has the power to unilaterally raise price and restrict output without substantial loss of market share. Plaintiffs must also prove that the company used this power to cause an injury cognizable under the antitrust laws. Proof of antitrust injury requires proof of injury to competition. A mere showing of injury or loss by a plaintiff without a showing of injury to competition in the market, is not sufficient to state a cause of action for restraint of trade.

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

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

HN10 **Monopolies & Monopolization, Actual Monopolization**

The determination whether an alleged monopolist possesses monopoly power in a particular market involves two steps: 1) definition of the relevant market; and 2) assessment of the alleged monopolist's power in that market.

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

HN11[] **Monopolies & Monopolization, Actual Monopolization**

The principal measure of actual monopoly power is market share. The existence of monopoly power ordinarily may be inferred from the predominant share of the market. Market share of as low as approximately 66 percent has been held to constitute monopoly power. Market share in excess of 70 percent has regularly been held to constitute such power.

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

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

HN12[] **Regulated Practices, Market Definition**

A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors. Where entry barriers are low, market share does not accurately reflect the party's market power.

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

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

Evidence > Burdens of Proof > Allocation

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

HN13[] **Monopolies & Monopolization, Actual Monopolization**

Because evidence revealing the absence of market entry barriers rebuts a *prima facie* case of monopoly power, the absence of such barriers constitutes a defense. Accordingly, the defendant has the burden of persuasion at trial to demonstrate the absence of such barriers. This burden fixes the scope of its burden of production as the party moving for summary judgment. In order to satisfy this burden, the defendant cannot simply point out deficiencies in the plaintiffs proof. Rather, the defendant must affirmatively produce evidence of its own demonstrating the absence of market entry barriers. If the moving party will bear the burden of persuasion at trial, that party must support its motion with credible evidence--using any of the materials specified in [*Fed. R. Civ. P. 56\(c\)*](#)--that would entitle it to a directed verdict if not controverted at trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

HN14 [blue icon] **Summary Judgment, Evidentiary Considerations**

Where the party opposing summary judgment bears the burden of persuasion at trial on a particular issue, the party moving for summary judgment need only demonstrate that the opposing party's evidence is insufficient to enable the opposing party to prevail on the issue.

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

HN15 [blue icon] **Summary Judgment, Burdens of Proof**

The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Evidence > ... > Testimony > Lay Witnesses > General Overview

Evidence > Types of Evidence > Testimony > General Overview

HN16 [blue icon] **Testimony, Lay Witnesses**

Fed. R. Evid. 701 provides that if the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

HN17 [blue icon] **Attempts to Monopolize, Elements**

In order to sustain a claim for attempted monopolization under *§ 2* of the Sherman Act, plaintiffs must prove that: 1) the company possessed the specific intent to achieve monopoly power by predatory or exclusionary conduct; 2) the company in fact committed that conduct; and 3) there exists a dangerous probability that the company might have succeeded in its attempt to achieve monopoly power. Plaintiffs must also demonstrate that they have standing to bring an attempted monopolization claim. In order to demonstrate standing, plaintiffs must demonstrate that the company caused an injury cognizable under the antitrust laws.

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 > Scope > General Overview

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

HN18 [L] **Monopolies & Monopolization, Actual Monopolization**

Monopoly leveraging is the use of monopoly power in one market to acquire a monopoly in another market. Where a single firm is involved, monopoly leveraging does not constitute a claim distinct from monopolization or attempted monopolization. Section 2 of the Sherman Act, 15 U.S.C.S. § 2, makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. The anticompetitive dangers that implicate the Sherman Act are not present when a monopolist has a lawful monopoly in one market and uses it to gain a competitive advantage in the second market. By definition, the monopolist had failed to gain, or attempt to gain, a monopoly, in the second market. Thus, such activity fails to meet the second element necessary to establish a violation of §2.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

HN19 [L] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) authorizes the court to dismiss a claim on the basis of a dispositive issue of law.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN20 [L] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

See Fla. Stat. Ann. § 772.103.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

HN21 [L] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

In the absence of authoritative guidance concerning the meaning of the Florida statute, Florida courts rely on interpretations of the federal statute.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN22 [blue document icon] **Pleadings, Rule Application & Interpretation**

Under [Fed. R. Civ. P. 9\(b\)](#), plaintiffs need only aver intent generally.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN23 [blue document icon] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

See [Fla. Stat. Ann. § 772.102\(4\)](#).

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN24 [blue document icon] **Shareholder Duties & Liabilities, Piercing the Corporate Veil**

[18 U.S.C.S. § 1962\(c\)](#) makes it unlawful for any person employed by or associated with an enterprise to conduct that enterprise through a pattern of racketeering activity. The statutory language clearly envisions a relationship between a "person" and an "enterprise" as an element of the offense. Only a person employed by or associated with an enterprise, not the enterprise itself, may violate [§ 1962\(c\)](#). Because a corporation cannot logically be "employed by or associated with itself, imposing liability on the corporate enterprise would require the courts to disregard the limitations inherent in the statutory language.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN25 [blue document icon] **Racketeer Influenced & Corrupt Organizations Act, Elements**

A subsidiary of the defendant corporation, or an association in fact composed of entities related to the defendant corporation, cannot constitute the enterprise for purposes of [18 U.S.C.S. § 1962\(c\)](#) absent allegations indicating that the defendant corporation played some role in the alleged racketeering independent of those of the entities acting on its behalf.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

HN26 [blue document icon] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

[Fla. Stat. Ann. § 772.104](#) creates a civil right of action for any person who proves by clear and convincing evidence that he has been injured by reason of any violation of the provisions of [Fla. Stat. Ann. § 772.103](#).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

[HN27](#) Consumer Protection, Deceptive & Unfair Trade Practices

See [Fla. Stat. Ann. § 817.061\(1\)](#).

Business & Corporate Compliance > ... > Contract Formation > Acceptance > General Overview

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Material Misrepresentations

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

[HN28](#) Contract Formation, Acceptance

If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient. If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

[HN29](#) Consideration, Detrimental Reliance

The materiality of misrepresentation is determined from the viewpoint of the maker, while the justification of reliance is determined from the viewpoint of the recipient. The requirement of materiality may be met in either of two ways. First, a misrepresentation is material if it would be likely to induce a reasonable to manifest his assent. Second, it is material if the maker knows that for some special reason it is likely to induce the particular recipient to manifest his assent.

Business & Corporate Compliance > ... > Acceptance > Apparent Acceptance > General Overview

Business & Corporate Compliance > ... > Contract Formation > Acceptance > General Overview

[HN30](#) Acceptance, Apparent Acceptance

Under certain circumstances, silence or inaction can constitute acceptance of a contractual offer. Inaction does not always constitute acceptance. In particular, where the offeree does not intend his inaction to operate as an acceptance, it does not.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Energy & Utilities Law > Oil, Gas & Mineral Interests > Implied Covenants > General Overview

HN31 [] **Types of Contracts, Covenants**

The covenant of good faith and fair dealing imposes upon each party the duty to do nothing destructive of the other party's right to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to accomplish its purpose.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN32 [] **Types of Contracts, Covenants**

Florida law recognizes an independent cause of action for breach of the implied covenant of good faith.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

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

Contracts Law > ... > Damages > Measurement of Damages > Reliance Damages

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Trials > Separate Trials

HN33 [] **Consideration, Detrimental Reliance**

The presence of individual questions concerning reliance and damages does not preclude the treatment of issues related to liability on a class basis. The court can simply sever trial of the issues of liability from trial of the issues of reliance and damages.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN34 [] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

In order to prove that the company engaged in a pattern of criminal activity, plaintiffs must prove that the company engaged in at least two incidents of criminal activity that had the same or similar intents, results, accomplices, victims or methods of commission. *Fla. Stat. Ann. § 772.102(4)*. The latest incident must fall within no more than five years of at least one other incident. These incidents form the so-called "predicate acts."

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Criminal Law & Procedure > ... > Fraud > False Pretenses > General Overview

[**HN35**](#) [] Consumer Protection, False Advertising

Fla. Stat. Ann. §§ 817.06, 817.40, 817.41 prohibit misleading advertising and require a plaintiff to satisfy the elements of common law criminal fraud. These elements include: 1) a false statement of material fact; 2) known by the defendant to be false at the time it was made; and 3) made for the purpose of inducing the plaintiff to act in reliance thereon. The elements of fraud thus all focus on the conduct and state of mind of the defendant.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

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

[**HN36**](#) [] Consumer Protection, False Advertising

A fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for a separate determination of damages suffered by individuals within the class. On the other hand, although having a common core, a fraud case may be unsuited for treatment for a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. *Fed. R. Civ. P. 23*, advisory committee's note.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

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

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

[**HN37**](#) [] Consumer Protection, False Advertising

Written misrepresentations disseminated to all of the members of the class have often been held to be sufficiently similar. In contrast, oral misrepresentations have generally been held to be insufficiently similar to warrant class treatment. The same has generally been true of cases involving a mix of oral and written misrepresentations. *Id.* In mixed cases, however, class treatment is appropriate where the plaintiff can demonstrate that no material variation existed among the oral statements made to class members and between the oral and written statements.

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

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

Civil Procedure > ... > Pleadings > Counterclaims > Permissive Counterclaims

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN38 [blue icon] Counterclaims, Compulsory Counterclaims

Until the motion to dismiss is ruled upon it is not known whether the plaintiff has a claim. Without a valid claim, there can be no counterclaim, compulsory or permissive. A motion to dismiss pursuant to [Fed R. Civ. P. 12\(b\)](#) is not a pleading as defined in [Fed. R. Civ. P. 7](#). There is no reason for a party to file a pleading while a motion to dismiss is pending.

Civil Procedure > Parties > Capacity of Parties > General Overview

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

HN39 [blue icon] Parties, Capacity of Parties

Absent class members are parties within the meaning of [Fed. R. Civ. P. 13](#).

Judges: [*1] NESBITT

Opinion by: LENORE C. NESBITT

Opinion

ORDER

This cause comes before the Court upon all pending motions with the exception of Defendant Southern Bell Telephone & Telegraph Company's ("Southern Bell") Motion For Partial Reconsideration Of Order Certifying Class As To Certain Procedural Issues.

BACKGROUND

Plaintiffs, customers of Southern Bell, initiated this action seeking monetary damages and injunctive relief for violations of the antitrust laws, Florida Civil Remedies for Criminal Practice Act ("Florida RICO"), restitution, breach of duty of good faith and fair dealing, and other statutory violations under Florida law.¹ The only federal claims presented are for monopolization and attempted monopolization in violation of [§ 2](#) of the Sherman Act, [15 U.S.C. § 2](#).

[*2] The suit arises out of the terms upon which Southern Bell furnished inside wire maintenance service ("IWMS") to its residential and simple business customers in the State of Florida since 1983. The facts underlying the suit are recited in the Court's Order of February 4, 1991. A brief summary of the recent procedural history follows.

Between January and June of 1993, the parties filed cross motions for summary judgment as to various claims in Plaintiffs' First Amended Complaint. During the same period, Southern Bell filed motions to strike the three expert affidavits Plaintiffs offered in opposition to Southern Bell's motion for summary judgment on Plaintiffs' antitrust claims. In an Order dated November 19, 1993, the Court rejected several of the grounds upon which Southern Bell

¹ Plaintiffs seek treble damages for violations of [§ 2](#) of the Sherman Act and Florida Antitrust Act of 1980, [Fla. Stat. § 542.19](#) (1987), treble damages for violations of the Florida RICO laws, and treble damages for violations of [Fla. Stat. § 817.061](#).

sought to have the affidavits stricken, but deferred final ruling pending an evidentiary hearing pursuant to [Rule 56\(f\)](#).²

[*3] In an Order dated December 23, 1993, the Court certified an injunctive class under [Rule 23\(b\)\(2\)](#) and a damages class under [Rule 23\(b\)\(3\)](#). Each class includes all residential and simple business consumers in the State of Florida who currently subscribe to Southern Bell's IWMS and who paid for Southern Bell's IWMS between December 31, 1986 and December 23, 1993.

The Court has conducted two hearings on Southern Bell's Motion For Summary Judgment On Plaintiffs' Antitrust Claims-held on January 7, 1994 and January 14, 1994, respectively.

SOUTHERN BELL'S MOTION FOR SUMMARY JUDGMENT

The procedures applicable to resolution of a summary judgment motion are well-established. A party seeking summary judgment must demonstrate that "there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law." [Fed.R.Civ.P. 56\(c\)](#). The movant bears the initial responsibility of informing the court of the basis for its motion and of identifying those materials which demonstrate the absence of a genuine issue of material fact. [Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#).

[*4] In response to a properly supported motion for summary judgment, the non-moving party may not rest on the allegations or denials of his or her pleadings. Rather, the non-moving party must set forth specific facts which show a genuine issue of material fact. [Fed.R.Civ.P. 56\(e\)](#). In order to create such an issue, the non-moving party must produce evidence upon which a reasonable jury could find in its favor with respect to each element essential to his or her case upon which it bears the burden of proof at trial. *Id.* If the non-moving party fails to make a sufficient showing on any such element, then the Court must enter summary judgment for the moving party. *Id.* The Court is not to resolve factual issues, but to determine whether factual issues exist, and must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#).

Southern Bell's motion for summary judgment is directed at Plaintiffs' federal and state antitrust claims. The First Amended Complaint asserts the following four causes of action [*5] pursuant to the antitrust laws: 1) monopolization and leveraging of monopoly power in violation of [§ 2](#) of the Sherman Act, [15 U.S.C. § 2](#) (Count I); 2) attempt to monopolize in violation of [§ 2](#) of the Sherman Act, [15 U.S.C. § 2](#) (Count II); 3) monopolization and leveraging of monopoly power in violation of the Florida Antitrust Act of 1980, [Fla. Stat. Ann. § 542.19](#) (Count III); and 4) attempt to monopolize in violation of the Florida Antitrust Act of 1980, [Fla. Stat. Ann. § 542.19](#) (Count IV).

Both the Florida Legislature and the Florida courts have made clear that the Florida Antitrust Act was modelled after the Sherman Act and is to be interpreted in accordance with the precedents construing the Sherman Act. See [Fla. Stat. Ann. § 542.32](#) (1987) ("It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to the comparable antitrust statutes. . ."); see also, [Day v. Le-Jo Enterprises, Inc., 521 So. 2d 175 \(Fla. 3rd Dist. Ct. App. 1988\)](#).

Southern Bell asserts specific objections [*6] to Plaintiffs' monopolization, attempted monopolization, and monopoly leveraging claims. In addition, Southern Bell contends that Plaintiffs lack standing to bring any of these claims because they have failed to demonstrate antitrust injury.

² [HN1](#) [1] [Rule 56\(f\)](#) provides that:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

The crux of Plaintiffs' antitrust theory is that Southern Bell's marketing and sales techniques--particularly those associated with the company's 1987, 1988, and 1989 solicitations--either coerced customers into purchasing IWMS or misled them into believing that they needed IWMS and that Southern Bell was the only company that could provide the service effectively. As a result, Southern Bell was able to capture 85% of the market for inside wire repair--a much larger share than it would have captured absent coercion or deception.

Consumer misunderstanding of IWMS, coupled with Southern Bell's domination of the market, creates two barriers to entry into the market. Consumer misunderstanding prevents consumers from canceling their subscriptions to IWMS and thus raises a barrier to consumer entry into the market. It also deters potential third party repair vendors from entering the market by creating the need for "corrective advertising"--advertising [*7] designed to overcome the effect of Southern Bell's misleading marketing, to inform customers that other companies can provide inside wire repair services, and to persuade those customers to cancel their subscriptions to IWMS. The need for corrective advertising deters entry for three reasons. First, corrective advertising is expensive. Second, a company that engages in corrective advertising cannot ensure that it will capture all of the business diverted away from Southern Bell by the advertising. Rather, *other* competitors will capture much of that business. Finally, those competitors offering inside wire repair on a case by case basis, rather than through a service plan, cannot recoup the cost of corrective advertising within an acceptable period of time due to the low rate at which inside wires fail. These market entry barriers have enabled Southern Bell to acquire monopoly power in the market for inside wire repair and to exploit that power by charging monopolistic prices for IWMS.

In order to sustain this theory, Plaintiffs must prove that: 1) the marketing and sales techniques employed by Southern Bell since December 31, 1986 were misleading or coercive; 2) these techniques [*8] caused a substantial number of customers to believe that they need IWMS and that Southern Bell is the only company capable of providing the service; 3) the consumer misunderstanding created by these techniques require current and potential competitors in the IWMS market to engage in corrective advertising; 4) the need for corrective advertising deters competitors from entering the IWMS market and thus acts as a barrier to entry into that market; and 5) Southern Bell has exploited this barrier by charging prices for IWMS above those that it could charge in a fully competitive market. As noted, Plaintiffs need not produce conclusive proof of each of these links at this stage; they need only produce evidence upon which a reasonable jury, viewing the evidence in the light most favorable to them, could find in their favor.

In order to support this theory, Plaintiffs rely extensively on the affidavits of three expert witnesses--Professors Robert Cialdini, Ivan Ross, and Steven Salop. Southern Bell's motion to strike these affidavits raises several issues that must be resolved before the substantive matters presented by Southern Bell's summary judgment motion can be addressed.

Cialdini [*9] Affidavit

Plaintiffs offer Professor Robert Cialdini as an expert in the psychology of influence and persuasion. Southern Bell moves to strike Professor Cialdini's affidavit on the ground that he: 1) relies on the opinions of other experts; 2) relies for his conclusions on Southern Bell's pre-1987 conduct, for which the Court has immunized Southern Bell of liability; 3) ignores record evidence, draws conclusions unsupported by the record, and takes inconsistent positions; and 4) utilizes a scientific methodology which fails to satisfy the standards specified in Rule 702 of the Federal Rules of Civil Procedure for the presentation of expert evidence. In its Order of November 19, 1993, the Court rejected Southern Bell's first three contentions and deferred ruling on the fourth pending an evidentiary hearing.

As noted in the Order of November 19, 1993, the Supreme Court's interpretation of Rule 702 of the Federal Rules of Evidence obligates the Court to HN2 make a preliminary assessment whether the principles upon which a scientific expert proposes to base his or her testimony are scientifically valid.³ Daubert v. Merrell Dow

³ HN3 Rule 702 governs the admissibility of expert evidence and provides that:

Pharmaceuticals, Inc., 125 L. Ed. 2d 469, 113 S. Ct. 2786, 2796-97 (1993). [*10] Daubert emphasized that these principles, not the expert's conclusions, must be the focus of the Court's inquiry. 113 S. Ct. at 2797 ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity. . . . of the principles that underlie the proposed submission. *The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.*") (emphasis added). While the Court declined to set out an exhaustive list of factors governing the validity of a scientific principle, the Court did emphasize that the following factors often bear on the inquiry: 1) whether the principle has been tested; 2) whether the principle has been subject to peer review; 3) whether the known or potential rate of error associated with the principle is excessive; and 4) whether the principle has achieved widespread acceptance in the scientific community.

[*11] In paragraphs 8, 9, 9(a), 9(b), and 10 of his affidavit, Professor Cialdini articulates the principles upon which he relied to prepare the affidavit. At the hearing, Professor Cialdini testified that each of the principles set out in these paragraphs has been tested, has been endorsed in peer-reviewed literature in the field of social psychology, and has achieved widespread acceptance in that literature. Plaintiffs submitted copies of much of this literature in support of Professor Cialdini's testimony.

Southern Bell did not inquire about the validity of these principles at the hearing, but questioned him repeatedly on his failure to perform an independent scientific experiment designed to test whether Southern Bell's marketing and sales techniques are misleading. That failure may bear on the reliability of the *conclusions* expressed in Professor Cialdini's affidavit. It does not bear on the validity of the principles he relied on to reach those conclusions and is thus not relevant to the Court's inquiry under Rule 702. The Court finds that the principles upon which Professor Cialdini relied meet the validity standard imposed by Rule 702 and rejects Southern Bell's motion to strike [*12] his affidavit under the rule.

Ross Affidavit

Plaintiffs offer Ivan Ross as an expert in the fields of consumer psychology and survey design. Southern Bell moves to strike Professor Ross's affidavit on the ground that he: 1) ignores record evidence that contradicts his conclusions and fails to support those conclusions with citations to record evidence; 2) relies on Southern Bell's pre-1987 conduct, for which the Court has immunized Southern Bell of antitrust liability; and 3) relies on a consumer survey which fails to satisfy the requirements of either Rule 702 or Rule 703 of the Federal Rules of Civil Procedure. The Court rejected Southern Bell's first two contentions in its Order of November 19, 1993 and entertained testimony concerning the third at the hearing held on December 10, 1993.

HN4 [↑] In the context of a consumer survey, Rule 702 requires the Court to conduct a preliminary assessment of the reliability of the *principles* upon which the expert relied to select the universe, to ensure that the consumers surveyed accurately represent the universe, to construct the survey questions, and to analyze the data gathered through the survey. See Daubert, 113 S. Ct. at 2797. [*13] At the hearing, Southern Bell directed its inquiry on cross-examination to issues covered by Rule 703, not Rule 702. Upon review of Professor Ross's testimony, the Court is satisfied that his methodology meets the standards for scientific validity imposed by Rule 702.

HN5 [↑] Rule 703 governs the facts or data upon which an expert may rely when testifying.⁴ The rule provides that: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at the hearing. If of a type reasonably relied upon by experts in the

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed.R.Civ.Pro. 702.

⁴ For a discussion of the relationship between Rule 702 and Rule 703, see Edward J. Imwinkelreid, The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony, 67 N.C.L. Rev. 1 (1988).

particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Fed.R.Evi. 703. HN6 In the context of a consumer survey, the party seeking admission of an expert opinion based upon the survey must demonstrate that: 1) the data in the survey is of the type generally relied upon by experts in the field; and 2) their reliance on such data is reasonable. *Id. HN7* In order to assess the reasonableness of reliance on the survey data, the Court must assess the *manner* in which the expert gathered and analyzed the data. In making this assessment, [*14] the Court must examine: 1) whether the universe of the survey was properly defined; 2) whether the individuals questioned in the survey constitute a representative sample of the universe; 3) whether the survey questions were framed in a clear precise and non-leading manner; 4) whether sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted; 5) whether the data gathered was accurately reported; 6) whether the data was analyzed in accordance with accepted statistical principles; and 7) whether the objectivity of the entire process was assured. See *Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983).

At the December 10, [*15] 1993 hearing, Professor Ross testified extensively concerning the steps that he took to comply with each of these requirements. Professor Ross testified that he designed his survey to measure the awareness, beliefs, opinions, and knowledge concerning IWMS among residential telephone consumers in the State of Florida who subscribe to the service. According to Professor Ross, the universe of the survey consists of all households to which Southern Bell telephone lines run. Each respondent was screened to ensure that he or she was a residential consumer, that his or her household subscribed to IWMS, and that he or she handled the purchase of telephone services for the household.

Professor Ross also testified that he took steps to ensure the potential respondents were selected randomly and that a sufficient number of respondents were contacted to enable extrapolation to the universe to within a five percent rate of error in either direction. He further testified that he designed the format of the questionnaire to ensure its substantial accuracy and objectivity. He went to great lengths to eliminate bias from the survey questions and to ensure that the questions were not leading.⁵ He [*16] also took steps to ensure that sound interview procedures were followed.

In order to minimize the possibility of fraud in the interviewing process, Professor Ross engaged a separate entity, Wats Room, to call each of the respondents for whom PRCC submitted completed questionnaires. Wats Room asked each of the respondents about whether he or she had been interviewed and about the nature of the interview. All of the respondents stated that they had been interviewed. Several, however, failed to properly identify the nature of the interview. Professor Ross disregarded for purposes of his analysis the questionnaires of these respondents.

Upon receipt [*17] of the completed questionnaires, Professor Ross used a coding frame he developed to translate the response data into a coded language. He then engaged Matrix--a data processing company--to perform a statistical analysis of the coded data. Matrix employed a widely-used computer package called Uncle to perform this analysis. Professor Ross presented the results of this analysis in the material he submitted at the hearing.

Southern Bell's cross-examination of Professor Ross reveal several concerns about his administration of the survey and conduct thereafter, including that he failed: 1) to personally supervise the interviews or train the interviewers; 2) to produce his coding frame to Southern Bell upon its request; 3) to determine whether the interviewers were paid on a salary basis or on a quota basis (under which they were compensated based on the number of interviews successfully completed); and 4) to design the survey screener to ensure that any of the respondents who participated actually received at least some of the marketing or sales materials at issue in this case.

⁵ Professor Ross also took steps to ensure the accuracy of the Spanish translation. He had Marcy Mendoza of Princeton Research and Consulting Center ("PRCC"), a native speaker of Spanish, prepare a Spanish translation of the questionnaire. In order to ensure the accuracy of Ms. Mendoza's translation, he then had another native speaker prepare a second translation independently.

There is no factual basis to warrant exclusion of the survey based on any of Southern Bell's first three concerns. [*18] Moreover, the fact that the survey screener included no questions designed to ensure that the respondents received the marketing or sales materials at issue bears on the relevance of testimony based on the survey, and the weight to be accorded to that testimony, not on the reliability of the survey itself. The survey was designed to probe the understanding of IWMS among current residential telephone service purchasers and the screener included questions designed to ensure that the respondents handled the purchase of telephone services. The survey revealed widespread misunderstanding among those purchasers. The existence of this misunderstanding forms an important link in Plaintiffs' antitrust theory and the survey thus bears on the validity of that theory.

Salop Affidavit

Plaintiffs offer Professor Steven Salop as an expert in competition and antitrust economics, information economics, and industrial organization economics. Southern Bell moves to strike Professor Salop's affidavit on the ground that he: 1) relies for his conclusions on the opinions of Plaintiffs' other experts; 2) ignores record evidence contradicting its conclusions and fails to cite record for many of those conclusions; [*19] and 3) asserts inadmissible legal conclusions and opinions. The Court rejected the first two of these contentions in its Order of November 19, 1993. In the same Order, the Court struck certain paragraphs of Professor Salop's affidavit on the ground that he expressed legal, not economic, conclusions in those paragraphs. The Court also deferred ruling on the admissibility of those portions of Professor Salop's affidavit concerning classical, informational, and exclusionary monopoly power pending a hearing on whether the theories are legal or economic in nature, and, if economic, whether they satisfy the validity standards imposed by Rule 702.

At the hearing, Professor Salop cited extensive literature indicating that the theories are well-established in the field of economics. The Court concludes that the theories are economic in nature and that they satisfy the requirements of Rule 702.

Based on the foregoing, it is hereby ORDERED and ADJUDGED that Southern Bell's motions to strike the affidavits of Professors Cialdini, Ross, and Salop are DENIED.

1) Monopolization

The affidavits of these experts form much of the foundation for each element of Plaintiffs' monopolization claim. [HN8](#) In [*20] order to sustain a claim for monopolization, Plaintiffs must prove that Southern Bell: 1) willfully acquired or maintained ("anticompetitive conduct prong"); 2) monopoly power in the relevant market ("monopoly power prong"); and 3) utilized that power to cause an injury cognizable under the antitrust laws ("antitrust injury prong"). See [Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336, 1341 \(11th Cir. 1987\)](#); [Nat'l Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution, 748 F.2d 602, 607 \(11th Cir. 1985\)](#).

(i) Anticompetitive Conduct

According to Plaintiffs, Southern Bell used three basic techniques to improperly expand and solidify customer enrollment in its IWMS. First, Southern Bell sent misleading billing inserts to its customers in 1987, 1988, and 1989 seeking "re-enrollment" in IWMS. Second, sales supervisors at Southern Bell applied intense pressure upon the company's sales representatives to generate sales of IWMS. As a result, many sales representatives simply enrolled customers in IWMS without their consent. Finally, Southern Bell's sales representatives, with the [*21] approval and encouragement of their supervisors, actively impeded customer attempts to cancel their subscriptions to the service.

The evidence supporting Plaintiffs' contention that the 1987, 1988, and 1989 solicitations were misleading consists primarily of the solicitations themselves and a pre-1987 study commissioned by Southern Bell and prepared by

Lennox Research, Inc.⁶ [*22] The Lennox Study examined the responses of participants in nine focus groups to a variety of notification/solicitation materials concerning IWMS. The study warned that a diagram included in some of the materials frequently mislead the study participants to believe that IWMS covers the phone, as well as the phone jack and inside wiring.⁷ The study also identified a general lack of consumer understanding concerning the frequency with which inside wires fail and emphasized that this information was of great concern to consumers.⁸ Finally, the study noted that a focus group consisting of elderly residential customers complained "loudly and often" about "small print".

Southern Bell's 1987 solicitation form nonetheless contains many of these defects. The form, for example, includes the same diagram analyzed in the study. The form also emphasizes the expense associated with inside wire repair work, but does not include any information concerning the frequency of inside wire failure. Moreover, the exemptions and exclusions section appears in minuscule print at the bottom of the form. Finally, the form promises no increase in the rate of charge for IWMS, despite the fact that the company's internal memoranda indicate that the company was contemplating a price increase at the time the solicitation was issued.

Southern Bell issued the 1988 and 1989 solicitations immediately prior to price increases that went into effect in those years. The solicitations contain many of the same defects found in the 1987 solicitation form. On May 1, [*23] 1989, for example, Southern Bell sent out a solicitation to its IWMS subscribers with the following language:

IMPORTANT NOTICE

AS YOU KNOW, YOU CURRENTLY SUBSCRIBE TO EITHER SOUTHERN BELL'S INSIDE WIRE MAINTENANCE PLAN OR ITS COMBINED PLAN FOR INSIDE WIRE MAINTENANCE AND TROUBLE ISOLATION PROTECTION. UNDER THESE PLANS, SOUTHERN BELL MAINTAINS THE TELEPHONE WIRE INSIDE YOUR HOME OR OFFICE. EFFECTIVE WITH BILLS DATED ON OR AFTER JUNE 1, 1989, THE RATE FOR INSIDE WIRE MAINTENANCE SERVICE, UNDER EITHER OF THESE PLANS, WILL INCREASE 50 CENTS PER MONTH. WITHOUT THIS SERVICE, SOUTHERN BELL'S MINIMUM CHARGE TO REPAIR YOUR INSIDE WIRING WOULD BE NO LESS THAN \$ 87.00 FOR THE FIRST FULL HOUR. THESE PLANS CAN REPRESENT A SAVINGS IN THE EVENT OF A PROBLEM WITH THE TELEPHONE WIRING INSIDE YOUR PREMISES. THANK YOU FOR CONTINUING TO SUBSCRIBE TO THIS VALUABLE SERVICE.⁹

Like the 1987 solicitation form, this notice emphasizes the cost associated with inside wire repair, but fails to provide any information concerning the frequency of inside wire breakdown. Moreover, the notice juxtaposes the 50 cent per month increase with the \$ 87.00 per hour rate for spot repairs. This juxtaposition makes [*24] IWMS appear to be quite bargain. Without information concerning the rate at which inside wires fail, however, the customer is in no position to assess the real value of the service.¹⁰

The notice fails to inform customers that they can discontinue subscription to the service and thanks them for continuing to subscribe. The notice thus implies that customers have no choice but to subscribe. The notice also appears on page four of the telephone bill without any language, graphic, or other design to distinguish [*25] it from

⁶ See Exhibit 27 in Volume 3 of Exhibits to Aff. of Professor Steven C. Salop; see also, Exhibit 8 in Volume 1 of Exhibits to Plaintiffs' Opposition To Southern Bell's Motion For Summary Judgment On Plaintiffs' Antitrust Claims ("the Lennox Study").

⁷ See the Lennox Study at 18.

⁸ *Id.* at 3 ("One the definition of simple inside wire is understood, many customers assert that it never breaks! They question the frequency of wire failure and wonder about their odds").

⁹ See Exhibit 28 in Volume 3 of Affidavit of Steven Salop.

¹⁰ If, for instance, there is only a 10% chance that a customer's inside wires will fail in a given year, and the failure will likely require no more than one hour to repair, then the probable expense of failure absent IWMS is .10 x \$ 87.00; or \$ 8.70. At current rates, however, the customer will pay as much as \$ 2.50 per month, or \$ 30.00 per year, for IWMS. Under this hypothetical, purchase of the service would thus not make economic sense.

the remainder of the bill--except the title "important notice"--despite the fact that the Lennox Study indicated the need to use color, special type, and other visual devices to draw attention to notices concerning IWMS.¹¹ Finally, Southern Bell sent all of the 1988 and 1989 solicitations in English, despite the large segment of the Dade County population fluent only in Spanish.

Professors Cialdini and Ross independently assessed the 1987, 1988, and 1989 solicitation materials and concluded that those materials are misleading. Although neither expert performed a scientific study designed to determine specifically whether IWMS is misleading, both experts applied well established, general principles in their respective fields to the materials reviewed above and concluded that those materials are misleading. While not conclusive, their opinions are entitled to some weight.

In addition to the 1987, 1988, and 1989 solicitation materials, Plaintiffs have produced other evidence [*26] indicating that Southern Bell used improper marketing and sales techniques to enroll customers in IWMS during the period covered by this lawsuit. In particular, Plaintiffs have attached as exhibits to their response the affidavits of several of Southern Bell's former customer service representatives.¹² [*27] Each of these individuals states that Southern Bell training staff trained him or her to use pressure customers into purchasing IWMS, to ignore refusals to purchase, and to assume that customers had agreed to purchase unless they declined to purchase explicitly. The following passage from the affidavit of Deborah Fiore is demonstrative:

(One supervisor at Southern Bell) trained me to assume that a customer wanted a particular optional service if the customer did not come right out and say that they did not want it. I was instructed to say word to this effect: "Okay, I will go ahead and add that service to your order and you can call me back if you do not want it."¹³

These former service representatives also state that Southern Bell's supervisors instructed them to use many of the same misleading techniques used in the written solicitations mailed to customers.¹⁴ Several also state that service representatives often added IWMS to customers bills without the customers' knowledge or consent and that Southern Bell's supervisors failed to stop this practice after becoming aware of it.¹⁵ Many of the representatives assert that they were trained to discourage and impede customer attempts to cancel their subscriptions to IWMS.¹⁶

[*28] The foregoing represents a summary and is not an exhaustive description of the evidence Plaintiffs have produced to demonstrate that the techniques that Southern Bell used to market IWMS were deceptive. The summary is sufficient to demonstrate that a reasonable jury could find that Southern Bell's marketing and sales techniques were deceptive.

In order to sustain their antitrust theory, however, Plaintiffs must also demonstrate that Southern Bell's marketing and sales techniques caused widespread confusion among consumers concerning their need for IWMS and their ability to purchase it from sources other than Southern Bell. Professor Ross's survey was designed to reveal the extent to which Florida consumers understand IWMS. His affidavit describes in detail how he conducted the survey. The Court has admitted the affidavit, with the exceptions specified in the Court's Order of November 19, 1993, for the reasons discussed above.

¹¹ See the Lennox Study at iv.

¹² See Exhibit 15 to Plaintiffs' Response, Affidavit of Laura Lucas; Exhibit 16 to Plaintiffs' Response, Affidavit of Deborah Fiore; Exhibit 17 to Plaintiffs' Response, Affidavit of Susan Castro; Exhibit 18 to Plaintiffs' Response, Affidavit of Ralph Brown.

¹³ Exhibit 16 to Plaintiff's Response, Affidavit of Deborah Fiore at 8.

¹⁴ See, e.g., *Id.* at 9-11.

¹⁵ See, e.g., Exhibit 15 to Plaintiffs' Response; Affidavit of Laura Lucas at 5; Exhibit 17 to Plaintiffs Response, Affidavit of Susan Castro at 7.

¹⁶ Exhibit 15 to Plaintiffs' Response, Affidavit of Laura Lucas at 8; Exhibit 16 to Plaintiffs' Response, Affidavit of Deborah Fiore at 12, 13.

Based on his analysis of the results of the survey, Professor Ross concludes that almost one third of the IWMS consumers in Florida do not even know that IWMS exists (31%), that over one half (approximately 55.9%) do not know that they are being billed for the [*29] service, and that, among those who know that they are enrolled, there is significant misunderstanding concerning the items covered by IWMS. According to the survey, for example, 33% of Florida's IWMS subscribers who know that they subscribe to the service believe that the service covers phone cord repair, while 47% believe that the service covers repair of damage to inside wires caused by fire, flood, or hurricane.

Professor Ross's survey provides evidence upon which a reasonable jury could conclude that there is widespread confusion concerning among Florida subscribers to IWMS concerning the existence, scope of, and need for, the service. The survey does not demonstrate by itself that Southern Bell's marketing and sales techniques *caused* that confusion, however. The screener to the survey includes no questions concerning whether the respondent either received any of the 1987, 1988, or 1989 solicitation materials or subscribed to IWMS after an oral sales presentation including the misrepresentations used in the written solicitations.

Based on the evidence in the record, however, a reasonable jury could reach the following three conclusions. First, Southern Bell used misleading [*30] and coercive marketing and sales techniques when presenting IWMS to customers. Second, there is widespread confusion among IWMS subscribers in Florida concerning the existence of IWMS, the need for IWMS, and the scope of coverage provided by IWMS. Third, Florida consumers received most, if not all of their information concerning IWMS from Southern Bell. The third conclusion is critical as it minimizes the probability of an alternative cause. Without evidence of an alternative cause, a reasonable jury could conclude that Southern Bell's marketing and sales techniques caused consumer confusion.

(ii) Monopoly Power

HN9[] In order to prove that Southern Bell possess monopoly power in the market for inside wire maintenance and repair, Plaintiffs must prove that Southern Bell has the power to unilaterally raise price and restrict output without substantial loss of market share. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2081 (1992). Plaintiffs must also prove that Southern Bell used this power to cause an injury cognizable under the antitrust laws. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990). [*31] Proof of antitrust injury requires proof of injury to competition. See, e.g., *Florida Monument Builders v. All Faiths Memorial Gardens*, 605 F. Supp. 1320, 1323 (S.D.Fla. 1984) ("a mere showing of injury or loss by a plaintiff without a showing of injury to competition in the market, is not sufficient to state a cause of action for restraint of trade"). Assessment of the adequacy of Plaintiffs proof with respect to these elements turns on a single issue--whether Plaintiffs have produced evidence upon which a reasonable could find that the need for corrective advertising acted as a barrier to entry into the market for inside wire repair.

HN10[] The determination whether an alleged monopolist possesses monopoly power in a particular market involves two steps: 1) definition of the relevant market; and 2) assessment of the alleged monopolist's power in that market. Plaintiffs contend that the relevant product market consists of: 1) the market for inside wire maintenance service; and 2) the market for insurance for inside wire maintenance service.¹⁷ Plaintiffs also contend that potential competitors in the market include all those persons and business entities [*32] capable of repairing inside wires. There are three principal groups of such competitors, consisting of: 1) companies capable of offering insurance plans covering inside wire repair; e.g. Southern Bell's Inside Wire Maintenance Service ("IWMS"); 2) companies capable of offering to repair inside wires an a case by case, or "spot", basis; and 3) individual telephone consumers capable of repairing their own inside wires. Although Southern Bell disputes Plaintiffs' characterization of the relevant product market, it concedes the issue for purposes of its summary judgment motion.

The next question is whether Southern Bell possesses monopoly power in this market. As the Eleventh Circuit noted recently, **HN11**[] "the principal measure of actual monopoly power is market share. . .". *U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 999 (11th Cir. 1993); see also, *Grinell*, 86 S. Ct. at 1704 ("The

¹⁷ See Plaintiffs' First Amended Complaint at P 63.

existence [*33] of . . . (monopoly) power ordinarily may be inferred from the predominant share of the market."). Market share of as low as approximately 66% has been held to constitute monopoly power. See [American Tobacco Co. v. U.S., 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 \(1946\)](#). Market share in excess of 70% percent has regularly been held to constitute such power. See, e.g., [Heattransfer Corp. v. Volkswagen, A.G., 553 F.2d 964, 981 \(5th Cir. 1977\)](#).

In the present case, Plaintiffs have produced credible evidence to indicate that the percentage of Southern Bell's residential and simple business telephone customers has remained at approximately at 85% since the service was unbundled beginning January 1, 1987.¹⁸ This figure raises an inference that Southern Bell exercises monopoly power in the market for inside wire repair.

The inference can be rebutted by evidence [*34] indicating that barriers to entry into the market are low or non-existent. The Ninth Circuit has explained that:

Time after time, we have recognized this basic fact of economic life:

[HN12](#)[] A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors. . .

The explanation is simple; where entry barriers are low, market share does not accurately reflect the party's market power. . .

[U.S. v. Syufy Enterprises, 903 F.2d 659, 664, 664 n.6 \(9th Cir. 1990\)](#) (quoting [Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 366 \(9th Cir. 1988\)](#)). In this case, Plaintiffs contend that the need for corrective advertising acts as this barrier.

[HN13](#)[] Because evidence revealing the absence of market entry barriers *rebuts* a *prima facie* case of monopoly power, the absence of such barriers constitutes a defense. Accordingly, the defendant has the burden of persuasion at trial to demonstrate the absence of such barriers. This burden fixes the scope of its burden of production [*35] as the party moving for summary judgment. In order to satisfy this burden, the defendant cannot simply point out deficiencies in the plaintiffs proof. [Celotex, 106 S. Ct. at 2557](#). Rather, the defendant must affirmatively produce evidence of its own demonstrating the absence of market entry barriers. *Id.* ("If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence--using any of the materials specified in [Rule 56\(c\)](#)--that would entitle it to a directed verdict if not controverted at trial.") (emphasis in original). Southern Bell is therefore obligated to produce such evidence in order to carry its burden in this case. In the event Southern Bell makes such a showing, the burden shifts to Plaintiffs to produce evidence upon which a reasonable jury could find that market entry barriers do exist.

The respective burdens under *Celotex* differ importantly with respect to the issue of antitrust injury. Plaintiffs have the burden of persuasion at trial on this issue. Thus, in this case, *Plaintiffs* bear the burden at trial to demonstrate that Southern Bell's [*36] conduct injured competition in the market for inside wire repair. See [Florida Monument Builders, 605 F. Supp. at 1323](#). Plaintiffs attempt to make this showing by demonstrating that the need for corrective advertising prevented competitors from entering that market. Plaintiffs therefore bear the burden at trial to demonstrate that corrective advertising acted as a market entry barrier.

This fact significantly effects Southern Bell's burden of production as the party moving for summary judgment. It is well established that, [HN14](#)[] where the party opposing summary judgment bears the burden of persuasion at trial on a particular issue, the party moving for summary judgment need only demonstrate that the opposing party's evidence is insufficient to enable the opposing party to prevail on the issue. [Celotex, 106 S. Ct. at 2557](#). Thus, with regard to the issue of antitrust injury, Southern Bell can meet its summary judgment burden by pointing to the

¹⁸ See Attachment 2 to Affidavit of Professor Steven Salop.

absence of credible evidence in the record indicating that the need for corrective advertising acts as a market entry barrier. If Southern Bell meets its burden, [*37] the burden shifts to Plaintiffs to produce evidence upon which a reasonable jury could find that corrective advertising did act as a barrier.

The Court will examine the parties submissions in light of the burdens applicable to the issue of antitrust injury. The Court must first consider the kind of evidence upon which Plaintiffs may rely to satisfy their burden. According to Plaintiffs, the Supreme Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* creates a presumption that information costs can act as a market entry barrier. Plaintiffs allege that this "presumption" excuses Plaintiffs from any requirement that they produce evidence of actual market conditions in order to demonstrate that the need for corrective advertising acts as a market entry barrier. Rather, they allege that this "presumption" enables them to satisfy their burden under *Rule 56(e)* merely by demonstrating that their corrective advertising theory "makes economic sense".

In the Court's view, Plaintiffs misread *Kodak*. *Kodak* concerned a group of independent companies providing service for Kodak equipment [*38] who sued Kodak under sections 1 and 2 of the Sherman Act. *Kodak, 112 S. Ct. at 2078*. The plaintiffs alleged, among other things, that Kodak used its power in the market for the sale of its equipment to monopolize the markets for the sales of parts and service for its equipment. *Id. at 2077-78*. Kodak moved for summary judgment on the ground that it could not have charged monopoly prices in the parts and services markets because doing so would have deterred many potential customers from purchasing its equipment in the first place and would therefore have caused the company to suffer ruinous losses in the market for its equipment. *Id. at 2081*.

Kodak produced no evidence supporting the connection between prices in the parts and services markets and sales volume in the equipment market. *Id. at 2082*. Rather, the company argued that, because this connection "made economic sense", the Court should adopt a presumption that "equipment competition precludes any finding of monopoly power in the derivative after markets." *Id.*

The Supreme Court rejected this argument. The Court found that Kodak failed to produce evidence supporting the [*39] connection between the equipment market and the parts and service markets and had thus failed to carry its initial burden of production on summary judgment. The Court repeatedly emphasized that economic theory alone, absent evidence of actual market conditions, was not sufficient to satisfy this burden. The Court explained, for example, that:

Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in *antitrust law*. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record." . . . In determining the existence of market power . . . this Court has examined closely the economic reality of the market at issue.

Kodak, 112 S. Ct. at 2082. Later in the opinion, the Court stated that:

The dissent disagrees based on its hypothetical case of a tie between equipment and service. "The only thing lacking" to bring this case within the hypothetical case, states the dissent, "is concrete evidence that the restrictive parts policy was . . . generally known." . . . *But the dissent's "only thing lacking" [*40] is the crucial thing lacking--evidence*. . . . Far from being "anomalous", . . . requiring Kodak to provide evidence on this factual question is completely consistent without prior precedent. . . .

Id. at 2087 n.24. The Court decision is fully consistent with its prior, and subsequent, precedent. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1565-67, 80 L. Ed. 2d 2 (1984)*; *Brooke Group v. Brown & Williamson Tobacco, 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2598 (1993)* ("When an expert opinion is not supported by sufficient to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. . . . Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them. . . . As we observed in *Matsushita*, "expert opinion evidence . . . has little probative value in comparison with economic factors" that may dictate a particular conclusion. . . .")

The Court found that the evidence in the record contradicted [*41] the presumption that Kodak urged it to adopt. In particular, the Court emphasized that the record evidence indicated that parts and service prices had risen in the past without any drop in the volume of sales of Kodak equipment. [Kodak, 112 S. Ct. at 2085](#). To explain the absence of a connection between the markets, the Court suggested that consumers in the equipment market might lack information concerning prices in the parts and services markets. This information deficit, and the costs associated with overcoming it, might enable Kodak to raise prices in the parts and services markets without suffering any decline equipment sales. [Id. at 2087](#).

The Court offered this only as an explanation for an observable market phenomenon. It did not articulate a general presumption that information costs act as a market entry barrier or always serve to preserve an incumbent's market power. Moreover, the Court did not find that economic theory concerning information costs was sufficient, by itself, to satisfy any summary judgment burden requiring the affirmative production of evidence. Rather, as noted, the Court found that the plaintiffs' theory of [*42] information costs was consistent with direct evidence concerning actual market conditions. [Id. at 2085](#) (no decline in volume equipment sales increases in service and parts prices).

In the present case, Plaintiffs must prove that Southern Bell used its monopoly to cause injury to competition in order to prove antitrust injury. Plaintiffs' theory of antitrust injury is that Southern Bell's coercive and deceptive sales techniques required potential competitors to engage in corrective advertising. Plaintiffs allege that the need for corrective advertising deterred potential competitors from entering the market for inside wire repair because of the high cost associated with such advertising and the low rate at which those costs could be recouped. The adequacy of Plaintiffs' theory turns on the adequacy of the evidence supporting this allegation. As Plaintiffs bear the burden to prove this allegation at trial, Southern Bell need only challenge the adequacy of Plaintiffs evidence in order to satisfy its burden as the party moving for summary judgment. The burden then shifts to Plaintiffs to produce evidence upon which a reasonable jury could find in their favor. If Plaintiffs cannot [*43] produce such evidence, the Court must enter summary judgment against them.

Plaintiffs have produced three kinds of evidence in support of their theory--expert evidence; circumstantial evidence; and direct evidence. Southern Bell has attacked the adequacy of this evidence extensively. The burden therefore rests on Plaintiffs to demonstrate the adequacy of the evidence.

Plaintiffs' expert evidence consists of the affidavit of Professor Steven Salop. In his affidavit, Professor Salop cogently presents Plaintiffs' theory, but cites little record evidence to support that theory. Under the Supreme Court precedents reviewed above, expert evidence unsupported by citation to evidence of actual market fact, is not sufficient to satisfy Plaintiffs' burden. See [Brooke Group, 113 S. Ct. at 2598](#); [Kodak, 112 S. Ct. at 2082](#).

Plaintiffs contend, however, that circumstantial evidence is sufficient to satisfy this burden. In support of this contention, Plaintiffs rely on several Supreme Court decisions for the proposition that direct evidence from potential competitors is difficult to obtain and therefore that [*44] circumstantial evidence is sufficient. See [U.S. v. Marine Bancorporation, Inc., 418 U.S. 602, 624, 41 L. Ed. 2d 978, 94 S. Ct. 2856 \(1974\)](#); [U.S. v. Falstaff Brewing Co., 410 U.S. 526, 533 n.13, 35 L. Ed. 2d 475, 93 S. Ct. 1096 \(1973\)](#). Both of these cases involved attempts by the Justice Department to use [section 7](#) of the Clayton Act to block mergers by potential competitors into oligopolistic markets. In such cases, direct evidence of a potential competitor's intent to enter the market directly is indeed difficult to obtain for the simple reason that the potential competitor would rather enter the market via a merger.¹⁹

[*45] The present case stands on different facts. Potential competitors deterred from entry into the market for inside wire repair by the costs of corrective advertising have every incentive to give evidence to this effect since they will benefit from the elimination, or mitigation, of these costs. Thus, if the need for corrective advertising does act as a market entry barrier, direct evidence from competitors should be easy to gather. The Court concludes that

¹⁹ Moreover, as the Court explained in *Marine Bancorporation*, actual entry into the market, and the intent to do so, are irrelevant since the threat of entry, rather than entry itself, constitutes the primary procompetitive effect associated with such potential competitors. [418 U.S. at 624](#). Evidence concerning the potential competitors' capacity to enter the market is far more important than evidence concerning the competitors' intent to do so.

there is no presumption that the presentation of circumstantial evidence is sufficient to discharge Plaintiffs' burden in this case.

Plaintiffs integrate their circumstantial evidence into the following five-step argument. First, Southern Bell makes extraordinary profits on IWMS. Second, under ordinary circumstances, the potential for high profits induces many competitors to enter the market. Third, the fact that few competitors have actually entered the market indicates that there must be some barrier to entry. Fourth, there are no "classical" barriers to entry.²⁰ Therefore, the need for corrective advertising constitutes the only plausible entry barrier.

[*46] Southern Bell sharply contests the first and fourth premises. The argument fails even if all four premises are granted, however, because those premises do not compel Plaintiffs' conclusion. Plaintiffs' premises compel the conclusion that *something* prevents many potential competitors from entering the market. That something might be corrective advertising, as Plaintiffs suggest, or it might be the low rate of failure of inside wires, and consequent low return associated with the spot market for inside wire repair, as Southern Bell suggests. Plaintiffs' circumstantial evidence is therefore insufficient, on its own, to demonstrate that the need for corrective advertising deterred entry into the market for inside wire repair.

Plaintiffs have produced direct evidence, however. This evidence consists of excerpts from the depositions of representatives from ten companies whom Plaintiffs believe could compete with Southern Bell, primarily by offering spot repairs for inside wire maintenance failures.²¹ Several of these competitors testified that the cost of advertising to compete in the market for inside wire repair was prohibitive and that it deterred them from entering that market. [*47]²²

Southern Bell has exposed flaws in the competitors' testimony.²³ The competitors have presented what amounts to conclusory opinion evidence. As a consequence, the question whether the need for corrective advertising acts as a market barrier is a close one on the present record.

²⁰ "Classical" market entry barriers include, for example, high start-up costs.

²¹ See Deposition of Dave Graveline ("Graveline"); Deposition of Don Van Ver Laan ("Van Der Laan"); Deposition of M. Ford Pollard ("Pollard"); Deposition of Herbert Morris ("Morris"); Deposition of Bruce F. Williams ("Williams"); Deposition of Herbert Bornack ("Bornack"); Deposition of Valentine Sellati, Sr. ("Sellati"); Deposition of Steve Alpert ("Alpert"); Deposition of David Joseph Hansen ("Hansen"); Deposition of Barbara Guncheon ("Guncheon").

²² See Graveline at 71, 72, 74, 138; Van Der Laan at 80, 124; Morris at 107, 118; Bornack at 131, 134, 140, 143; Alpert at 76, 81, 83; Hansen at 64, 65; Guncheon at 166, 169.

²³ For example, while several competitors testified that advertising costs were prohibitive, only two of the competitors testified that the *extra* advertising costs imposed by the need to overcome the misperceptions created by Southern Bell prevented them from entering the market. See Graveline at 70-72, 139-144; Guncheon at 84-88, 169-170. The competitors thus generally failed to distinguish between corrective and competitive advertising.

This distinction is critical to Plaintiffs' case. The fact that potential competitors must invest in advertising, and are deterred from entry by the cost of that advertising, causes no antitrust injury except to the extent that Southern Bell's anticompetitive conduct created the need for such advertising. See, e.g., *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 377 (7th Cir. 1986) ("Brand-new firms are expected to make their own way in the market, by advertising or other means of promotion."). Thus, the competitors' failure to identify the extra expense imposed by the need to overcome the misunderstanding created by Southern Bell severely undercuts the probative value of their testimony.

Moreover, none of the competitors attempted to estimate the cost of advertising in the inside wire repair market by extrapolating from costs associated with advertising in other markets. Nor did any of the competitors attempt to project advertising costs based on their past experience with prospective inside wire customers. In fact, the competitors generally had no information in the form of documents, reports, or market studies or analysis to support their claims concerning advertising costs.

Further, not a single competitor identified any "free rider" problems associated with corrective advertising. Free rider problems arise when a competitor's advertising redounds to the benefit of another competitor.

[*48] The competitors have been actively engaged in business in similar markets, however, and their testimony thus has some probative value.²⁴ Moreover, although the flaws in the competitors' testimony are significant, it would be inappropriate to discount their testimony at this stage of the proceedings. *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 \(1986\)](#) [HN15[↑]] "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). Accordingly, while the Court has been sorely tempted to grant summary judgment, the Court has concluded that the wisest course is to deny Southern Bell's motion and to have Plaintiffs' case tried on a fuller record to a jury.

[*49] 2) Attempted Monopolization

[HN17[↑]](#) In order to sustain a claim for attempted monopolization under [section 2](#) of the Sherman Act, Plaintiffs must prove that: 1) Southern Bell possessed the specific intent to achieve monopoly power by predatory or exclusionary conduct; 2) Southern Bell in fact committed that conduct; and 3) there exists a dangerous probability that Southern Bell might have succeeded in its attempt to achieve monopoly power. *U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, [7 F.3d 986, 993 \(1993\)](#). Plaintiffs must also demonstrate that they have standing to bring an attempted monopolization claim. *In Re Air Passenger Computer Reservation Systems*, [727 F. Supp. 564 \(C.D. Cal. 1989\)](#). In order to demonstrate standing, Plaintiffs' must demonstrate that Southern Bell's caused an injury cognizable under the antitrust laws--i.e., injury to competition. *Id.*

At least one court has held that consumers do not have standing to bring claims for attempted monopolization. In *Air Passenger*, the United States District Court for the Central District of California stated that:

As explained by Areeda and Hovenkamp, when defendants [*50] engage in predatory pricing and other anticompetitive acts in an attempt to gain a monopoly, the competitor who is being driven out of the market is the party with standing. Only when the defendants achieve a monopoly and are in a position to harm consumers by engaging in monopoly overcharging, is there harm to consumers.

[*Id.* at 568-69.](#)

The Court adopts the reasoning of *Air Passenger* and hold that Plaintiffs lack standing as a matter of law to bring a claim for attempted monopolization.

3) Monopoly Leveraging

Plaintiffs' monopoly leveraging fails, however. [HN18[↑]](#) Monopoly leveraging is the use of monopoly power in one market to acquire a monopoly in another market. The Supreme Court has recently explained that, where a single firm is involved, monopoly leveraging does not constitute a claim distinct from monopolization or attempted monopolization. *Spectrum Sports, Inc. v. McQuillan*, [122 L. Ed. 2d 247, 113 S. Ct. 884, 892 \(1993\)](#) ("Section 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."); see also, *Alaska Airlines, Inc. v. United Airlines, Inc.*, [948 F.2d 536, 541 \(9th Cir. 1984\)](#) [*51] ("the anticompetitive dangers that implicate the Sherman Act are not present when a monopolist has a lawful monopoly in one market and uses it to gain a competitive advantage in the second market. By definition, the monopolist had failed to gain, or attempt to gain, a monopoly, in the second market. Thus, such activity fails to meet the second element necessary to establish a violation of [§2](#).").

Finally, Plaintiffs produced no other direct evidence. For example, they did not present a study designed to measure what the cost of corrective advertising would likely have been for a typical potential competitor.

²⁴ The Court has considered the designated competitors as lay witnesses who may give testimony in the form of opinions or inferences under [Rule 701 of the Federal Rules of Evidence](#). [HN16[↑]](#) [Rule 701](#) provides that:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Based on the foregoing, it is hereby ORDERED and ADJUDGED that the Southern Bell's motion for summary judgment on Plaintiffs' antitrust claims is DENIED with respect to Plaintiffs' monopolization claims in Counts I and III and GRANTED with respect to Plaintiffs' monopoly leveraging claims in Counts I and III and with respect to Plaintiffs' attempted monopolization claims in Counts II and IV.

SOUTHERN BELL'S MOTION TO DISMISS STATE CLAIMS

In the motion to dismiss, or in the alternative, motion for summary judgment that it filed on February 16, 1990, Southern Bell moved to dismiss all of Plaintiffs' claims. In its Order of February 4, 1991, the Court granted partial summary judgment with respect to Plaintiffs' antitrust claims and deferred ruling on Plaintiffs' remaining state law claims. These [*52] claims include: 1) four claims brought under Florida's Civil Remedies for Criminal Practices Act ("Florida RICO") (Counts V-VIII); 2) a claim for violation of Florida's statute prohibiting misleading payment of money without a required statutory warning, brought under [section 817.061 of the Florida Statutes](#) ("Solicitation") (Count IX); 3) a claim brought under the Florida common law doctrine of money had and received ("Money Had And Received") (Count X); 4) a claim for restitution of monies paid under void or voidable contracts, brought under Florida common law ("Void And Voidable Contracts") (Count XI); and 5) a claim for breach of the implied duty of good faith and fair dealing, brought under Florida common law ("Good Faith And Fair Dealing") (Count XII).

Prior to examining the merits of Southern Bell's motion to dismiss, it is instructive to review the standards governing disposition of a motion to dismiss. [HN19](#)[ Rule 12(b)(6) of the Federal Rules of Civil Procedure] authorizes the Court to dismiss a claim on the basis of a dispositive issue of law. See [Neitzke v. Williams, 490 U.S. 319, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338 \(1989\)](#). [*53] The Court, however, is confined to a review of the First Amended Complaint, must accept the allegations of the First Amended Complaint as true, and must resolve any factual issues in a manner favorable to the nonmovant. See [Quinones v. Durkis, 638 F. Supp. 856, 858 \(S.D.Fla. 1986\)](#).

The Court also notes that, in order to resolve a motion to dismiss claims brought under Florida law, the Court must interpret Florida law as the would the Florida Supreme Court. [Erie Railroad v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 \(1938\)](#); [Wammock v. Celotex Corp., 835 F.2d 818 \(11th Cir. 1988\)](#). In the absence of controlling precedent, the Court must examine existing authority and must predict how the Florida Supreme Court would apply that authority to the circumstances of the instant action. [Wammock, 835 F.2d at 820](#).

1) Florida RICO claims

In Counts V through VIII, Plaintiffs assert four claims under [section 772.103\(1\)-\(3\)](#) of Florida's Civil Remedies for Criminal Practices Act ("Florida RICO").²⁵ Those sections provide that:

[HN20](#)[ It is unlawful [*54] for any person:

- (1) Who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of criminal activity or through collection of unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.
- (2) Through a pattern of criminal activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.
- (3) Employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity or the collection of an unlawful debt.

[Fla. Stat. Ann. § 772.103](#).

[*55] Florida's civil RICO statute is patterned closely after the federal civil RICO statute. See [18 U.S.C. §§ 1962\(a\)-\(d\)](#). [HN21](#)[ In the absence of authoritative guidance concerning the meaning of the Florida statute,

²⁵ Count V alleges a violation of [section 772.103\(1\)](#). Count VI alleges a violation of [section 772.103\(2\)](#). Counts VII and VIII allege violations of [sections 772.103\(3\)](#).

Florida courts rely on interpretations of the federal statute. See, e.g., [Flanagan v. State, 566 So. 2d 868, 869 \(Fla. 2d Dist. Ct. App. 1990\)](#); see also, [Banderas v. Banco Central del Ecuador, 461 So. 2d 265, 269 \(Fla. 3d Dist. Ct. App. 1985\)](#) ("The Florida RICO Act . . . is nearly identical to the federal RICO statute. . . Thus, we can look to a wealth of material on the federal RICO statute for guidance on this issue.").

Southern Bell moves to dismiss Plaintiffs' Florida RICO claims on the ground that imposing liability on Southern Bell under the act would contravene the purpose of the act because Southern Bell is not a professional or career criminal and that Plaintiffs have failed to plead: 1) criminal intent with the requisite degree of specificity; 2) a "pattern of criminal activity" within the meaning of the statute; 3) the existence of a separate and distinct "enterprise" [*56] as required by the statute; and 5) a causal link between their injuries and Southern Bell's alleged RICO violations.

(i) Scope Of Florida Civil RICO

Southern Bell relies on a number of cases for the proposition that the Florida legislature intended Florida RICO to apply only to career or professional criminals. See, e.g., [Bowden v. State, 402 So. 2d 1173 \(Fla. 1981\)](#); [State v. Russo, 493 So. 2d 504 \(Fla. 4th Dist. Ct. App. 1986\)](#); see also, [Chisholm & Co. v. Bank of Jamaica, 643 F. Supp. 1393 \(S.D.Fla. 1986\)](#). As Plaintiffs have failed to allege that Southern Bell is a career or professional criminal, Southern Bell urges that Plaintiffs' pleading is deficient.

The cases upon which Southern Bell relies are not apposite to the present case. Two of those cases involved the application of Florida's *criminal* RICO statute in the context of a *criminal* prosecution. [Bowden, 402 So. 2d at 1174](#) ("By requiring a continuity of criminal activity as well as similarity and interrelatedness between these activities, *the target of RICO prosecutions will be . . . the professional* [*57] *or career criminal. . .*") (emphasis added); [Russo, 493 So. 2d at 505](#) ("*the proper target of RICO prosecutions will be the career criminal.*") (emphasis added). No Florida state court, however, has held that the same restriction limits the scope of Florida's *civil* RICO statute. To the contrary, at least one of the Florida District Courts of Appeal has held that plaintiff need not establish a nexus to organized crime in order to obtain damages under the statute. [Banderas, 461 So.2d at 269](#).

The legislature could easily have included a requirement that a RICO defendant be a professional or career criminal. It chose not to do so and the Court declines to read the requirement into the statute.

(ii) Criminal Intent

Southern Bell also moves to dismiss Plaintiffs' RICO claims on the ground that Plaintiffs' have failed to allege that Southern Bell acted with specific intent to commit a RICO violation. Of the four subsections delineating the civil causes of action available under Florida RICO, only [section 772.103\(1\)](#) requires proof of intent. Plaintiffs assert their only claim under this section in Count V and plead intent generally [*58] in that count. Southern Bell's contention thus applies only on Count V.

This contention lacks merit. [HN22](#)[] Under [Rule 9\(b\) of the Federal Rules of Civil Procedure](#), Plaintiffs need only aver intent generally. See [Fed.R.Civ.Pro. 9\(b\)](#) ("Malice, intent, knowledge, and other condition of mind may be averred generally."). The case authorities upon which Southern Bell relies to contend that [Rule 9\(b\)](#) requires enhanced pleading in the context of RICO actions either affirm that the plain language of the rule applies to RICO cases or are distinguishable. See, [Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46 \(2d Cir. 1987\)](#) (affirming applicability of [Rule 9\(b\)](#)'s general intent provision and enhancing requirement in particular case before court because defendant's motive not obvious); [United States v. O'Malley, 707 F.2d 1240, 1246 \(11th Cir. 1983\)](#) (proof of mail fraud requires proof of specific intent *at trial*; no reference to any enhanced pleading requirement); [Banco de Desarrollo Agropecuario v. Gibbs, 640 F. Supp. 1168 \(S.D.Fla. 1986\)](#). In Gibbs, for example, this Court interpreted language [*59] in the federal RICO statute requiring proof of at least two *indictable* offenses as predicate acts to show a pattern of criminal activity to require a plaintiff to include allegations sufficient to support "probable cause of intent to defraud." [640 F. Supp. at 1175](#). The Florida statute includes no requirement that the predicate acts be "indictable offenses". The Court therefore concludes that the probable cause requirement does not apply to the Florida statute and that Plaintiffs' allegations in Count V are thus adequate to satisfy the pleading requirements imposed by [Rule 9\(b\)](#).

(iii) Pattern Of Criminal Activity

Southern Bell also moves to dismiss Plaintiffs' Florida RICO claims on the ground that Plaintiffs' allegations fail to show that Southern Bell has engaged in a "pattern of criminal activity". [HN23](#)[↑] Under [section 772.102\(4\)](#), the term "pattern of criminal activity" means:

engaging in at least two incidents of criminal activity that the same or similar intents, results, accomplices, victims, or methods of commission or that are otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided that the last of such [*60] incidents occurred within 5 years after a prior incident of criminal activity. For the purposes of this chapter, the term "pattern of criminal activity" shall not include two or more incidents of fraudulent conduct *arising out of a single contract or transaction against one or more related persons.*

[Fla.Stat.Ann. § 772.102\(4\)](#) (emphasis added). Southern Bell asserts that its provision of IWMS to Plaintiffs represents a "single contract or transaction" within the meaning of the statute and that Plaintiffs are all "related" because they are all Southern Bell customers.

In support of its position, Southern Bell relies on [Gordon v. Etue, Wardlaw & Co., P.A., 511 So. 2d 384, 389 \(Fla. 1st Dist. App. Ct. 1987\)](#). In *Gordon*, a group of investors sued an accounting firm for damages incurred through reliance on an improper audit and included a count under Florida's civil RICO statute. *Id.* Florida's First District Court of Appeals dismissed the RICO count on the ground that the accounting firm's conduct did not constitute a pattern of racketeering activity. [Id. at 388](#). In so doing, the court rejected the plaintiffs' contention [*61] that, because the audit effected multiple investors, it was sufficient to constitute a pattern. *Id.*

Gordon is distinguishable from the present case, however. As noted *Gordon* involved only a *single* audit. This case involves *multiple* solicitations for a single product. Southern Bell used different, though related, materials in each of these solicitations. Moreover, because the 1988 and 1989 solicitations requested customer consent to *price* modifications, and price cannot be altered without the formation of a new agreement, those solicitations may have represented separate contractual offers. The Court concludes that Southern Bell's 1983, 1987, 1988, and 1989 solicitations each represents a separate "incident" within the meaning of [section 772.102\(4\)](#) and that these incidents do not form part of single transaction. See [H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 \(1989\)](#) (allegations that telephone company and some of its employees gave members of the Minnesota Public Utilities Commission numerous bribes at different times over the course of at least a six-year [*62] period, with the objective of causing the commissioners to approve unfair and unreasonable rates for the company were sufficient to plead a pattern of racketeering activity under federal RICO statute).

(iv) Separate And Distinct Enterprise

Southern Bell also moves to dismiss all of Plaintiffs' RICO claims on the ground that Plaintiffs' allegations fail to establish the existence of an enterprise separate and distinct from Southern Bell. As noted above, Plaintiffs assert four, separate RICO claims.

In Counts V and VI, Plaintiffs assert claims pursuant to [sections 772.103\(1\)](#) and [772.103\(2\)](#) of the Florida Statutes, respectively. [Section 772.103\(1\)](#) corresponds to [section 1962\(a\)](#) of the federal RICO statute, while [section 772.103\(2\)](#) corresponds to [section 1962\(b\)](#) of the federal statute. See [18 U.S.C. §§ 1962\(a\), 1962\(b\)](#). The language of the federal and state statutes is nearly identical.

No court has considered the issue whether a plaintiff is required to plead an enterprise separate and distinct from the person (defendant) charged with the violation. The authorities interpreting [sections 1962\(a\)](#) and [1962\(b\)](#) have uniformly held that a plaintiff need [*63] not make such a pleading and that the person charged can also serve as the RICO enterprise. See, e.g., [Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1306 \(7th Cir. 1987\)](#) ([section 1962\(b\)](#) does not require an enterprise separate and distinct from the person charged); [Haroco v. American National Bank & Trust Co. of Chicago, 747 F.2d 384, 402 \(7th Cir. 1984\)](#). The Court concludes that [sections 772.103\(1\)](#) and

772.103(2) do not require Plaintiffs in this case to plead a separate and distinct enterprise from Southern Bell and that Southern Bell's objection to these Counts V and VI on this ground must fail.

The situation is rather different with respect to Counts VII and VIII. In both of those counts, Plaintiffs allege that Southern Bell violated section 772.103(3). The section is nearly identical to section 1962(c) of the federal RICO statute.

Once again, no court has considered whether the Florida statute requires a plaintiff to plead the existence of an enterprise separate and distinct from the entity charged with the RICO violation. Virtually all of the circuits have construed section 1962(c) of the federal statute to require [*64] the plaintiff to plead a separate and distinct enterprise. See, e.g., Board of County Commissioners v. Liberty Group, 965 F.2d 879, 885 (10th Cir. 1992); Glessner v. Kenny, 952 F.2d 702 (3rd Cir. 1991); Haroco, 747 F.2d at 402. However, in United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), the Eleventh Circuit took the opposite position. The Eleventh Circuit was the first to decide the issue; the other circuits have declined to follow its lead. Moreover, a close reading of the statute supports the majority view. A leading treatise explains that:

HN24[] Section 1962(c) makes it unlawful for any person employed by or associated with an enterprise to conduct that enterprise through a pattern of racketeering activity. The statutory language clearly envisions a relationship between a "person" and an "enterprise" as an element of the offense. Only a person employed by or associated with an enterprise, not the enterprise itself, may violate section 1962(c). . . Since a corporation cannot logically be "employed by or associated with" itself, imposing liability [*65] on the corporate enterprise would require the courts to disregard the limitations inherent in the statutory language. . . The majority position also finds support in RICO's legislative history. If the primary purpose of RICO is to cope with the infiltration of legitimate businesses, "it is logical that Congress would have designed section 1962(c) so that it reached the criminal but protected the victimized enterprise from liability."

David B. Smith, Civil RICO P 3.07 (1993).

As noted above, the Court is obligated to interpret Florida law as would the Florida Supreme Court. Based on the foregoing, the Court finds that, although the Eleventh Circuit has taken a contrary position, the Florida Supreme Court would adopt the majority view expressed above and would require a RICO plaintiff proceeding under section 772.103(3) to plead the existence of an enterprise separate from the "person" alleged to have violated the section.

In Counts VII and VIII, Plaintiffs have pleaded the existence of separate enterprises. In Count VII, Plaintiffs allege that the enterprise is Southern Bell Telephone and Telegraph Company-Florida, Southern Bell's unincorporated division operating in the State [*66] of Florida. First Amended Complaint at P 94. In Count VIII, Plaintiffs allege that the enterprise is an association in fact comprised of: 1) BellSouth Corporation ("BellSouth")--Southern Bell's parent corporation; 2) Southern Bell; 3) Southern Bell Telephone & Telegraph Company-Florida ("Southern Bell Florida")--Southern Bell's unincorporated division operating in the State of Florida; and 4) the individual officers of BellSouth, Southern Bell, and Southern Bell Florida. Id. at P 98.

The circuits are split concerning whether a subsidiary of the corporation charged with the RICO violation, or an association in fact composed of entities related to that corporation, can serve as an enterprise under section 1962(c). See Haroco, 747 F.2d at 402 (subsidiary of parent charged with RICO violation can serve as enterprise); Brittingham v. Mobil Corp., 943 F.2d 297, 302-03 (3d Cir. 1991) ("Without additional allegations . . . a subsidiary corporation cannot constitute the enterprise through which a defendant parent corporation conducts racketeering activity"); NCNB Nat'l Bank of North Carolina v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987) [*67] (bank could not be liable under section 1962(c) where its holding company and sole shareholder were alleged as the enterprise); see also Glessner v. Kenny, 952 F.2d 702 (3d Cir. 1991).

Under the majority view now prevailing, **HN25**[] a subsidiary of the defendant corporation, or an association in fact composed of entities related to the defendant corporation, *cannot* constitute the enterprise for purposes of section 1962(c) absent allegations indicating that the defendant corporation played some role in the alleged

racketeering independent of those of the entities acting on its behalf. The Third Circuit aptly summarized the rationale for this rule in *Brittingham*, explaining that:

When a defendant is a collective entity, it is more likely that the alleged enterprise is in reality no different from the association of individuals or entities that constitute the defendant or carry out its actions. Unlike individual defendants, a corporation can only act through its employees and agents . . . A plaintiff cannot circumvent this holding merely by alleging that the enterprise is an association in fact consisting of the defendant and individuals or entities [*68] acting on its behalf. Without allegations or evidence that the defendant had a role in the racketeering activity that was distinct from the undertakings of those acting on its behalf, the distinctiveness requirement is not satisfied.

[943 F.2d at 302](#). The Court finds this reasoning persuasive and believes that the Florida Supreme Court will apply the rule articulated by the Third Circuit to actions under [section 772.103\(3\)](#) in the event that the Florida Supreme Court considers the issue.

A review of Plaintiffs' allegations in Counts VII and VIII reveals that Plaintiffs have failed to plead that Southern Bell had a role in the alleged RICO violations distinct from those played by the other parties to the enterprises identified. Thus, both counts will be dismissed in accordance with the *Brittingham* rule.

(V) Link Between Plaintiffs' Injuries And Southern Bell's Use Or Investment Of Proceeds From Sale Of IWMS

Southern Bell moves to dismiss Counts V and VI on the ground that Plaintiffs' fail to allege in those counts that they were injured by reason of the fact that Southern Bell engaged in the activities prohibited by [sections 772.103\(1\)](#) and [772.103\(2\)](#). [*69] Southern Bell's argument is based on the language in [sections 772.103\(1\)](#), [772.103\(2\)](#), and [772.104](#). [Section 772.103\(1\)](#) prohibits the use or investment of proceeds derived from a pattern of criminal activity in the establishment or operation of any enterprise, while [section 772.103\(2\)](#) prohibits the acquisition or maintenance of any interest in or control of any enterprise through a pattern of criminal activity. [Fla.Stat.Ann. §§ 772.103\(1\), \(2\)](#). [HN26\[↑\]](#) [Section 772.104](#) creates a civil right of action for;

Any person who proves by clear and convincing evidence that he has been injured by reason of any violation of the provisions of s. 772.103. . .

Id. at [§ 772.104](#).

With respect to [section 772.103\(1\)](#), Southern Bell contends that because [section 772.104](#) provides a remedy for any injury suffered by reason of a violation of [section 772.103](#), and because [section 772.103\(1\)](#) makes a violation the use or investment of racketeering proceeds in a specified manner, Plaintiffs must allege that they have been injured by Southern Bell's use or investment of the proceeds it received from the sale of IWMS. Similarly, with respect to [section 772.103\(2\)](#), Southern Bell contends that Plaintiffs [*70] must allege that they were injured by its acquisition of an interest or control in a RICO enterprise.

No court has considered the issue whether a plaintiff must plead injury stemming from the defendant's use or investment of the proceeds at issue under [section 772.103\(1\)](#) and stemming from the defendant's acquisition or maintenance of an interest in or control of a RICO enterprise under [section 772.103\(2\)](#). A number of courts have considered these issues in connection with [sections 1962\(a\)](#), [1962\(b\)](#) and [1964](#), the federal RICO equivalents of [sections 772.103\(1\)](#), [772.103\(2\)](#), and [772.104](#). Once again, the circuits are split. Several courts have adopted the position taken by Southern Bell. See *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir. 1989) (plaintiff must plead injury stemming from the use or investment of racketeering income); *In Re Sahlen & Associates, Inc. Securities Lit.*, 773 F. Supp. 342 (S.D.Fla. 1991). Other courts have adopted the opposite view. See *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990) (plaintiff need not plead special injury stemming from use or investment [*71] of racketeering income) *Avirgan v. Hull*, 691 F. Supp. 1357 (1988).

Fortunately, the Court need not resolve this conflict because Plaintiffs have alleged the requisite injuries under both [sections 772.103\(1\)](#) and [772.103\(2\)](#). In paragraph 87 of the First Amended Complaint, Plaintiffs allege both that Southern Bell violated [section 772.103\(1\)](#) by using or investing in an enterprise proceeds of the type covered by the

section.²⁶ In paragraph 88, Plaintiffs allege that they were injured by reason of this violation.²⁷ Similarly, in paragraph 91, Plaintiffs allege that Southern Bell violated [section 772.103\(2\)](#) by acquiring or maintaining an interest in or control of an enterprise through a pattern of criminal activity.²⁸ [*72] In paragraph 92, Plaintiffs allege that they were injured by reason of this violation.²⁹ The Court finds that these allegations are sufficient to satisfy the requirement that Plaintiffs plead injuries stemming from the violations covered by [sections 772.103\(1\)](#) and [772.103\(2\)](#).

Based on the foregoing, Southern Bell's motion to dismiss is denied with respect to Counts V and VI and granted with respect to Counts VII and VIII.

2) Solicitation

In Count IX, Plaintiffs allege that Southern Bell violated [section 817.061 of the Florida Statutes](#). That section prohibits the solicitation of the payment of money for services not yet performed or ordered, absent the inclusion of certain language in the solicitation. The section provides specifically that:

HN27 [↑] (1) It is unlawful for any . . . corporation . . . to solicit payment of money by another by means of a statement or invoice, or any writing that would reasonably be interpreted as a statement or invoice, for goods not yet ordered or services not yet performed and not yet ordered, unless there appears on the face of the statement or invoice or writing in 30 point boldface type the following warning:

"This is a solicitation for the order of goods or services, and you are under no obligation to make payment unless you accept the offer contained herein."

[Fla.Stat.Ann. § 817.061\(1\).](#)

Plaintiffs' allege [*73] that Southern Bell failed to include the required warning in the material used to solicit IWMS in 1983, 1988, and 1989. Southern Bell moves to dismiss Plaintiffs' claim on the ground that Plaintiffs ordered IWMS prior to 1982, when the service was included in the basic telephone package and therefore purchased by all of Southern Bell's telephone consumers.

In paragraph 13 of the First Amended Complaint, Plaintiffs allege that, in 1982, the Florida Public Service Commission ordered Southern Bell to separate IWMS from its basic telephone package of telephone services and to "give consumers a choice of repair providers."³⁰ Construed in the light most favorable to Plaintiffs, this order terminated any existing contracts between Plaintiffs and Southern Bell for the provision of IWMS. Thus, Southern Bell was required to solicit new contracts for the service after 1982. Southern Bell's failure to include the warning on its post-1982 solicitations could therefore constitute a violation of [section 817.061](#).

[*74] Southern Bell contends, however, that its 1988 and 1989 merely announced price increases and therefore did not constitute solicitations for services not yet ordered. Modification of a material term in a contract amounts to the formation of a separate contract. Fla.Jur.2d § 159. Price can be a material term. Thus, Southern Bell's 1988 and 1989 notification of price increases may have amounted to offers to form whole new contracts. Until Plaintiffs accepted those offers, the services offered had not been ordered or performed. Southern Bell was therefore obligated to include the [section 817.061](#) warning in these offers.

²⁶ First Amended Complaint at P 87.

²⁷ [Id. at P 88.](#)

²⁸ [Id. at P 91.](#)

²⁹ [Id. at P 92.](#)

³⁰ First Amended Complaint at 13.

Based on the foregoing, Southern Bell's motion to dismiss Count IX is denied.

3) Money Had And Received

In Count X, Plaintiffs assert a claim under the equitable of money had and received. The doctrine provides for the restitution of money to an aggrieved party by "one who has (the) money in his hands. . . . , which in equity and good conscience, he ought to pay over to that other." *Moore Handley, Inc. v. Major Realty Corp.*, 340 1238, 1239 (Fla. 4th Dist. Ct. App. 1976). Plaintiffs allege that Southern Bell induced them to pay for IWMS by using the deceptive and [*75] coercive marketing and sales techniques discussed above and that Southern Bell therefore holds the money that they paid for the service inequitably. Plaintiffs demand restitution of that money.

Southern Bell moves to dismiss Plaintiffs' claim on the ground that it is duplicative of Plaintiffs' claim in Count XI for the restitution of monies paid under void or voidable contracts. Counts X and XI do request the same relief. The legal theories upon the respective requests are based are distinct. The Court declines to resolve the issue whether there are circumstances under which the contracts between Plaintiffs and Southern Bell for the provision of IWMS are valid, but under which it would be inequitable to allow Southern Bell to retain all or some of the monies paid to the company by Plaintiffs under those contracts. Southern Bell's motion to dismiss Count X is therefore denied.

4) Void Or Voidable Contracts.

In Count XI, Plaintiffs assert that their contracts with Southern Bell for the provision of IWMS are void or voidable and demand restitution of the monies they paid to Southern Bell pursuant to those contracts. Plaintiffs advance two theories in support of this position. First, [*76] Plaintiffs claim that Southern Bell's omitted some material terms from its contractual offers and misrepresented other material terms in those offers. Second, Plaintiffs contend that, even if the solicitations constitute valid offers, they never accepted these offers.

In its motion to dismiss, Southern Bell argues that both of these theories are inadequate. The company contends that none of the omitted terms Plaintiffs about which Plaintiffs complain are material, that its solicitations contained all of the material terms necessary to form a contract, and that it did not misrepresent any of those terms. The company also contends that Plaintiffs failed to decline IWMS and that their continued payment of their phone bills after receipt of its solicitations constitutes acceptance as a matter of law.

Plaintiffs theory of material misrepresentations and omissions is based on *section 164 of the Restatement (Second) of Contracts*. That section provides that:

(1) [HN28](#)[[↑]] If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

(2) If a [*77] party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.

Restatement (Second) of Contracts § 164. The question whether a particular misrepresentation or omission is material or fraudulent focuses on the defendant. The Restatement explains that:

[HN29](#)[[↑]] The materiality of misrepresentation is determined from the viewpoint of the maker, while the justification of reliance is determined from the viewpoint of the recipient. The requirement of materiality may be met in either of two ways. First, a misrepresentation is material if it would be likely to induce a reasonable to manifest his assent. Second, it is material if the maker knows that for some special reason it is likely to induce the particular recipient to manifest his assent.

Id. at § 162, comment c.

In the present case, Plaintiffs allege that Southern Bell omitted numerous items [*78] of material information, including that the IWMS plan did not include repairs to telephone sets or cords, that a substantial "trouble location" charge would be imposed in the event that the problem reported by a customer was in the customer's telephone set, not in the inside wire, and that subscribers would be billed for an additional inside wire maintenance charge for each additional telephone access line in their homes or businesses.³¹ The Court believes that a reasonable person could find these omissions to be material. Accordingly, dismissal of Plaintiffs' material omissions and misrepresentations theory would be inappropriate.

Dismissal of Plaintiffs' non-acceptance theory would also be inappropriate. It is well established that, [HN30](#)[ under certain circumstances, silence or inaction can constitute acceptance of a contractual offer. See Robert A. Lord, 2 Williston On Contracts § 6:52, 5th Ed. (1993) ("Williston # 1"). It is equally clear, however, that inaction does not always [*79] constitute acceptance. In particular, where the offeree does not intend his inaction to operate as an acceptance, it does not. Williston explains that:

When an offer has been made to an offeree who remains silent, the silence may be due to a variety of causes. The offeree may have made a mental determination to reject the offer or to accept it; or he may have made no determination with respect to the offer whatsoever. It is clear that, whatever the offeree may be thinking, no contract can be made unless the offer stated that the offeror would assume assent in the case the offeree did not reply, or the offeror in some other manner has led the offeree to believe that he may accept by remaining silent. *Even under those circumstances, the offeree's silence is ambiguous and may be shown not to have been intended as an assent to the offeree's proposal; the offeror cannot merely by indicating that he will take silence to mean assent, cast the burden to speak on the offeree, and the offeree may keep silent if he chooses without becoming liable on the express contract.*

Id. (emphasis added).

In the present case, the fact that Plaintiffs continued to pay their telephone bills [*80] after receipt of Southern Bell's solicitations regarding IWMS is as consistent with Southern Bell's allegation that they intended to accept the company's offers as it is with Plaintiffs' allegation that they did not intend to accept. Many of Plaintiffs might not have read, or understood, Southern Bell's solicitations and thus not have even known of the company's offers. They certainly could not have intended to accept the offers without knowledge of these offers. The Court therefore does not find as a matter of law that Plaintiffs' continued payment of their phone bills constituted acceptance.

Based on the foregoing, Southern Bell's motion to dismiss Count XI is denied.

5) Breach Of The Implied Duty Of Good Faith And Fair Dealing

In Count XII, Plaintiffs contend that Southern Bell breached the implied covenant of good faith and fair dealing created by the contracts between the parties. [HN31](#)[ The covenant "imposes upon each party the duty to do nothing destructive of the other party's right to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to accomplish its purpose." [*Scheck v. Burger King Corp., 798 F. Supp. 692, 694 n.5 \(S.D.Fla. 1992\)*](#) [*81] (quoting [*Conoco, Inc. v. Inman Oil Co., 774 F.2d 895, 908 \(8th Cir. 1985\)*](#)).

Southern Bell moves to dismiss this claim on the ground that Florida does not recognize an independent cause of action for breach of the implied duty of good faith and fair dealing. Florida does recognize such a cause of action, however. [*Burger King Corp. v. Austin, 805 F. Supp. 1007, 1013 \(1992\)*](#); [*Scheck, 798 F. Supp. at 695*](#) ([HN32](#)[] "Florida law recognizes an independent cause of action for breach of this implied covenant of good faith."). Southern Bell's motion to dismiss Count XII is therefore denied.

By way of summary, it is hereby ORDERED and ADJUDGED that Southern Bell's motion to dismiss is DENIED with respect to Counts V, VI, IX, X, XI, and XII of the First Amended Complaint and GRANTED with respect to Counts VII and VIII of the First Amended Complaint.

³¹ First Amended Complaint at P 37.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON CONTRACT AND STATE LAW STATUTORY CLAIMS

Plaintiffs move for entry of summary judgment in their favor with respect to their solicitation and restitution claims--Counts IX and XI, respectively.

1) Count XI--Restitution

[*82] In support of their motion for summary judgment as to Count XI, Plaintiffs assert that the undisputed facts demonstrate that the contracts between Plaintiffs and Southern Bell in 1987, 1988, and 1989 for the provision of IWMS are void or voidable. Plaintiffs contend that the contracts formed pursuant to Southern Bell's 1987 solicitations are void because those solicitations promised that Southern Bell would not increase the price of IWMS and failed to disclose three essential terms, including: 1) that the price of IWMS would increase; 2) the amount of any increase; and 3) that Southern Bell reserved the right to increase price via negative-option notice. Alternatively, it is Plaintiffs' position that Southern Bell terminated or breached these contracts when it increased prices for IWMS in 1988 and 1989.

Further, Plaintiffs take the position that the contracts formed pursuant to the 1988 and 1989 price increase notifications are also voidable because Southern Bell failed to secure express customer assent to these increases. More specifically, Plaintiffs state that the 1988 and 1989 notifications either constituted new contractual offers, or that the notifications constituted offers [*83] to modify the existing IWMS contracts. Under either circumstance, Plaintiffs contend that they never accepted those offers.

Southern Bell presents several responses to Plaintiffs' claims. Southern Bell: 1) urges the Court to defer ruling on Plaintiffs' motion pending resolution of the issues concerning class certification and resolution of its motion for summary judgment with respect to Plaintiffs' antitrust claims; 2) contends that its failure to reserve the right to increase the price of IWMS unilaterally was not a material omission; and 3) asserts that there is at least an issue of material fact concerning whether Plaintiffs accepted its 1988 and 1989 solicitations.

The Court has resolved Southern Bell's motion for summary judgment and certified two classes in an Order dated December 23, 1993. The Court declines to postpone consideration of Plaintiffs' motion pending final resolution of Southern Bell's motions to reconsider aspects of the December 23, 1993 Order.

The 1987 Solicitations

The Court also declines to find as a matter of law that the omissions from the 1987 solicitations were material. Plaintiffs have cited no authority indicating that the failure to disclose the reservation [*84] of a right to increase price via notice constitutes a material omission as a matter of law. Further, whether Southern Bell intended its 1988 price notification to *terminate* or *modify* the contracts formed pursuant to the 1987 solicitations bears importantly on the question whether the omissions in the 1987 solicitations were material. Southern Bell's promise in the 1987 solicitation to refrain from price increases was implicitly limited to the duration of the contract. The 1987 solicitations contained no such language. Therefore, the contracts formed pursuant to those solicitations were terminable at will under Florida law. *Malver v. Sheffield Indus., Inc.*, 462 So. 2d 567, 568 (Fla. 3d Dist. Ct. App. 1985). If Southern Bell intended the 1988 notification to *terminate*, not modify, the 1987 contracts, then Southern Bell's failure to reserve its right to *modify* those contracts through price increases does not appear to be material. The questions whether Southern Bell had this intent and whether the 1988 notification terminated or modified the 1987 contracts must be resolved by the fact finder.

The 1988 and 1989 Solicitations

Questions of material [*85] fact also exist with respect to the 1988 and 1989 solicitations. The parties have produced conflicting evidence concerning both whether those solicitations contained material omissions and misrepresentations and whether Plaintiffs treated the solicitations as contractual offers and accepted them.

The Court reviewed Plaintiffs' evidence concerning misrepresentations and omissions in the 1988 and 1989 solicitations. See pp. 17-19, *supra*. Southern Bell has submitted some counter-evidence, however. Court Lantaff, Southern Bell's Assistant Vice President for Corporate and External Affairs, testified in deposition that Southern Bell took steps to draw customer attention to the 1988 and 1989 price notifications.³² Mr. Lantaff testified, for example, that Southern Bell placed the words "important notice" in bold type immediately above the notice and surrounded the notice with a box of dots to draw customer attention to the notice.³³

[*86] Southern Bell also submitted the affidavit of Ms. Elaine Silverstein, an expert in advertising techniques, who testified that the placement of the notification on a separate page further highlighted it.³⁴ Ms. Silverstein also stated that consumers are especially sensitive to price increases and that placement of the notice in the middle of the bill would therefore not have had a significant impact on consumers awareness of the notice.³⁵ While the Court has some concern about the probative value of Southern Bell's evidence, the evidence is sufficient to raise a question of fact concerning whether Southern Bell made material misrepresentations or omissions in its 1988 and 1989 price increase offers.

There are also questions of material fact concerning whether Plaintiffs accepted those offers. Southern Bell has emphasized that Plaintiffs continued to pay their bills after receipt of the offers. Plaintiffs do not [*87] dispute this. This fact is sufficient to raise a question whether Plaintiffs intended to accept the 1988 and 1989 offers.

In accordance with the foregoing, Plaintiffs' motion for summary judgment as to Count XI is denied.

2) Solicitation

Plaintiffs also move for summary judgment on their claim in Count IX under [section 817.061](#). As noted above, that section requires a corporation, among others, to include along with each written solicitation sent to each consumer for services not yet ordered and not yet performed a warning indicating that the consumer is under no obligation to purchase the services. Plaintiffs contend that, as of 1988 and 1989, they had not ordered IWMS and that Southern Bell was therefore obligated to include the warning in the price notifications of those years. It is undisputed that Southern Bell did not include the warning in those notifications.

Southern Bell responds that Plaintiffs had been ordered IWMS as of 1988 and 1989. More specifically, according to Southern Bell, valid contracts had been formed with Plaintiffs and that the 1988 and 1989 notifications only sought to *modify* those contracts. Southern Bell concludes that it was not obligated to include [*88] the warning in the 1988 and 1989 solicitations.

The issue turns on the status of the contracts alleged to have been formed between Plaintiffs and Southern Bell prior to 1988. If those contracts were valid as of 1988 and 1989 and Southern Bell's 1988 price notification did not terminate them, then Plaintiffs had ordered the services covered by the 1988 and 1989 notifications and Southern Bell was not obligated to include the statutory warning. If, on the other hand, the contracts were not valid as of 1988, or if Southern Bell terminated those contracts via its 1988 price notification, then the services covered by the 1988 and 1989 notifications had not been ordered and Southern Bell was obligated to include the statutory warning.

The preceding section demonstrates that there are questions of material fact concerning whether the contracts purportedly formed by the 1987 solicitation were valid and, if so, whether Southern Bell's 1988 price increase either terminated or modified those contracts. Accordingly, the Court declines to grant Plaintiffs' motion for summary judgment as to their solicitation claim.

³² See Exhibit 10 to Southern Bell's Response.

³³ [Id. at pp. 112](#).

³⁴ Exhibit B to Southern Bell's Response, Affidavit of Elaine Silverstein at P 7.

³⁵ [Id.](#)

Based on the foregoing, it is hereby ORDERED and ADJUDGED that Plaintiffs' motion [*89] for summary judgment on contract and state law statutory claims is DENIED.

SOUTHERN BELL'S MOTION FOR PARTIAL RECONSIDERATION OF ORDER CERTIFYING CLASS AS TO CERTAIN SUBSTANTIVE ISSUES

Southern Bell requests the Court to reconsider its Order of December 23, 1993. That Order certified two Plaintiff classes with respect to Plaintiffs claims in Counts I-IX and single class with respect to Plaintiffs claims in Counts X-XII.³⁶ Southern Bell concedes that class action treatment of the claims in Counts I-IV--the antitrust claims--is appropriate, but requests decertification of the classes certified with respect to the other counts.

1) Florida RICO claims

In Counts V-VIII, Plaintiffs assert claims under [sections 772.103\(1\)-\(3\)](#) of Florida's RICO statute and seek damages pursuant to [section 772.104](#). Southern Bell objects to the classes certified with respect to these claims for three reasons. [*90] First, Southern Bell objects to the [Rule 23\(b\)\(3\)](#) class on the ground that individual issues predominate over issues common to the class. Second, Southern Bell objects to the [Rule 23\(b\)\(2\)](#) class on the ground that Plaintiffs seek primarily damages and that certification of an injunctive class is therefore appropriate. Finally, Southern Bell contends that certification of the [Rule 23\(b\)\(3\)](#) violates its right to a jury trial on each of the elements of liability.

The first of these objections is the most important. Southern Bell contends that individual issues regarding proof of the predicate acts necessary to show a RICO violation, of reliance, and of damages predominate over issues common to the class. The Court notes that [HN33](#)[↑] the presence of individual questions concerning reliance and damages does not preclude the treatment of issues related to liability on a class basis. The Court can simply sever trial of the issues of liability from trial of the issues of reliance and damages. [Entin v. Barg, 60 F.R.D. 108, 112-113 \(E.D. Pa. 1973\)](#) ("Indeed, the weight of authority is that variations in the manner of reliance do not defeat the class action, and if reliance [*91] is prerequisite to recovery, it may properly be the subject of a separate trial, as is common in bifurcated trials on liability and damages."); [Green v. Wolf Corp., 406 F.2d 291, 301 \(2d Cir. 1968\)](#) ("We see no reason why the trial court, if it determines individual reliance is an essential element of the proof, cannot order separate trials on that particular issue, as on the question of damages, if necessary. The effective administration of [Rule 23\(b\)\(3\)](#) will often require the use of the 'sensible device' of split trials."). Trial of liability can proceed along with trial of the other claims in the action. In the event that Plaintiffs prevail on the liability issues, the Court can then conduct separate proceedings to resolve the issues related to reliance and damages. The Court can utilize a special master or magistrate to expedite these proceedings if necessary. Newberg at § 4.26 ("Courts have substantially reduced judicial burdens of resolving individual damage issues through various devices such as bifurcated trials of liability and damage issues with the same or different juries; use of masters or magistrates to preside over individual damages proceedings; [*92] class decertification after liability trial accompanied by notice to the class concerning how they may proceed to prove individual damages. . . .").

The issue whether Plaintiffs' RICO claims are appropriate for class treatment thus turns on the question whether the issues related to liability are suitable for class treatment. In connection with each of these claims, Plaintiffs assert that Southern Bell engaged in a pattern of criminal activity. [HN34](#)[↑] In order to prove this, Plaintiffs must prove that Southern Bell engaged in at least two incidents of criminal activity that had the same or similar intents, results, accomplices, victims or methods of commission. [Fla.Stat.Ann. 772.102\(4\)](#). The latest incident must fall within no more than five years of at least one other incident. *Id.* These incidents form the so-called "predicate acts".

Plaintiffs allege as predicate acts that Southern Bell's 1987 written solicitations in 1987, 1988, and 1989, in addition to its various oral misrepresentations, violated [sections 817.06, 817.40](#), and [817.41](#) of the Florida Statutes. [HN35](#)[↑] Those sections prohibit misleading advertising and require a plaintiffs to satisfy the elements of common law *criminal* fraud. [*93]³⁷ These elements include: 1) a false statement of material fact; 2) known by the defendant to

³⁶ As noted, Counts I-IX contain Plaintiffs' antitrust claims, while Counts V-XII contain Plaintiffs' other state law claims.

be false at the time it was made; and 3) made for the purpose of inducing the plaintiff to act in reliance thereon. *Vance v. Indian Hammock Hunt & Riding, Ltd.*, 403 So. 2d 1367 (Fla. 4th Dist. Ct. App. 1981). The elements of fraud thus all focus on the conduct and state of mind of the defendant.

The question whether a claim based in fraudulent misrepresentations is appropriate for class action treatment turns on the degree of similarity between the representations made [*94] to the individual class members, however. The Advisory Committee Official Note to the 1966 Amendment to [Rule 23](#) explains that:

HN36[] [A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for a separate determination of damages suffered by individuals within the class. On the other hand, although having a common core, a fraud case may be unsuited for treatment for a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.

[Fed.R.Civ.Pro. 23, Advisory Committee's Official Note, 39 F.R.D. 98, 107 \(1966\)](#). **HN37**[] Written misrepresentations disseminated to all of the members of the class have often been held to be sufficiently similar. See, e.g., *Heastie v. Community Bank*, 125 F.R.D. 669 (N.D.Ill. 1989).

In contrast, oral misrepresentations have generally been held to be insufficiently similar to warrant class treatment. *Kaser v. Swann*, 141 F.R.D. 337, 339 (Fla. 1991). [*95] The same has generally been true of cases involving a mix of oral and written misrepresentations. *Id.* In mixed cases, however, class treatment is appropriate where the plaintiff can demonstrate that no material variation existed among the oral statements made to class members and between the oral and written statements. See *Kirkpatrick v. Bradford*, 827 F.2d 718, 724 (11th Cir. 1987) (class treatment of securities fraud claims appropriate where court found that no material variation between oral representations to named plaintiffs and written information alleged to have been disseminated to entire class); *Grainger v. State Sec. Life Ins. Co.*, 547 F.2d 303, 307 (5th Cir. 1977) ("the key concept in determining the propriety of class action treatment is the existence or nonexistence of material variations in the alleged misrepresentations. It is possible . . . that oral misrepresentations can be uniform, e.g., through the use of a standardized sales pitch by all the company's salesmen. Plaintiffs in the present case should be given the opportunity to demonstrate the existence and use of such device.").

In the present [*96] case, Plaintiffs allege that no material variation existed between the written and oral representations made to the class members because the oral representations were made using standardized written scripts. In order to prove that the representations were sufficiently similar to warrant class treatment, Plaintiffs need only demonstrate that: 1) there was no material variation among any oral representations made to the class representatives and 2) Southern Bell's sales representatives utilized a standardized script to sell IWMS orally. See *Kirkpatrick*, 827 F.2d at 724; *Grainger*, 547 F.2d at 307. The Court is not aware of any evidence detailing the contents of the scripts. Accordingly, the Court will conduct a hearing on Friday, February 4, 1994, at which Plaintiffs shall present evidence concerning any similarity among the oral representations and between the oral and written representations. The Court will defer ruling on Southern Bell's motion for reconsideration with respect to Plaintiffs' RICO claims pending the completion of this hearing.

Southern Bell's second two arguments in support of its motion for reconsideration [*97] are meritless. In its Order of December 23, 1993, the Court noted that certification of both an injunctive class and a damages class is appropriate where both damages and injunctive relief are important components of the relief requested. See, e.g., *Waldrup v. Motorola, Inc.*, 85 F.R.D. 349 (N.D.Ga. 1980). Both damages and injunctive relief are important aspects

³⁷ Florida RICO provides civil remedies for *criminal* violations. Thus, proof of the predicate acts requires proof that the defendant engaged in a *criminal* violation. As a result, Plaintiffs need not prove reliance and damages in order to complete proof of the alleged predicate acts. Once Plaintiffs have completed proof of these acts, Plaintiffs must prove reliance and damages in order to recover under [section 772.104](#).

of the relief requested in the present case. The Court therefore declines to decertify the [Rule 23\(b\)\(2\)](#) classes certified in the December 23, 1993 Order.

Southern Bell's argument that certification violates the company's [Seventh Amendment](#) right to a jury trial is both untimely and meritless. Southern Bell had the opportunity to raise the argument in its response to Plaintiffs motion for class certification and failed to do so. As another district court explained:

This argument appears for the first time in [the] motion to reconsider. Why they did not include [this argument in the original brief] is not the Court's concern, but the Court will not "re-open" the matter now, much as an appellate court will not consider an argument not made at the trial level. . . . The Court will not [*98] entertain continual new arguments and briefing.

Kelley v. Mid-America Racing Stables, Inc., 139 F.R.D. 405, 411-412 (W.D.Okl. 1990). The argument is also inconsistent with the many cases holding that damages, for example, may be determined by a special master or magistrate. See, e.g., [In re LILCO Sec. Lit.](#), 111 F.R.D. 663 (E.D.N.Y. 1986); [In re Corrugated Container Antitrust Lit.](#), 80 F.R.D. 244 (N.D.Tex. 1978). The Court therefore declines to decertify the existing classes on this ground.

2) Restitution

As noted above, Plaintiffs contend that the contracts between them and Southern Bell covering IWMS are void or voidable. They advance two distinct theories in support of this contention.

Southern Bell again requests decertification on the ground that individual issues predominate, that the primary relief requested is monetary, not injunctive, and that certification violates Southern Bell's [Seventh Amendment](#) right to a jury trial. The Court disposed of the latter two contentions on page 74-75. There is no need to repeat that analysis here.³⁸

[*99] Southern Bell contends that individual issues predominate because the representations varied from class member to class member and because the issues of reliance and damages require individual proof. As noted above, the Court can defer resolution of the issues of reliance and damages pending the completion of trial on the issues of liability.

The Court must assess the question whether individual issues predominate with respect to the liability issues presented by each of Plaintiffs' theories. Plaintiffs' theory of material misrepresentations and omissions is based on *section 164 of the Restatement (Second) of Contracts*. Under the Restatement, the inquiry whether a particular misrepresentation or omission was fraudulent or material focuses on the conduct and state of mind of the defendant.³⁹ Thus, to the extent that Plaintiffs can demonstrate that there was no material variation among the oral representations made to the class members and between the oral representations and the written representations to them, the liability questions connected with this theory are suitable for class treatment. The Court defers on this issue until after the February 4, 1994 hearing.

[*100] Plaintiffs also contend that the IWMS contracts are void because they never accepted Southern Bell's contractual offers. The viability of Plaintiffs' non-acceptance theory depends on whether Plaintiffs intended silence,

³⁸ Southern Bell also raises its [Seventh Amendment](#) argument in connection with Counts X-XII. The Court rejects the argument in connection with each of those counts for the reasons specified in the preceding section.

³⁹ The Court notes that, consistent with the language of the Restatement, Florida does *not* require a showing of fraud in order to recover under a restitution theory. *Circle Finance Co. v. Peacock*, 399 So. 2d 81, 84 (Fla. 1st Dist. Ct. App. 1981). Instead, the plaintiffs need only show that the misrepresentation or omission at issue was material. Moreover, once the plaintiff has proved this, the plaintiff is entitled to a presumption of reliance. *Sollenbarger*, 121 F.R.D. at 434. This presumption arises in the case of both omissions and misrepresentations. See Williston # 2 ("Where representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be presumed that the representations were relied on.") (emphasis added).

coupled with the regular payment of their phone bills, to constitute acceptance. These issues thus focus on the individual class members' states of mind and are therefore not susceptible to class-wide proof. Plaintiffs' restitution claim is therefore decertified *with respect to this theory only*.

3) Solicitation

As discussed above, the viability of Plaintiffs' solicitation claim in Count IX turns on whether Plaintiffs ordered IWMS prior to each of Southern Bell's solicitations. This question, in turn, depends on whether valid contracts were formed prior to each of these solicitations. Thus, the suitability of the solicitation claim for class treatment depends on the suitability of the restitution claim for such treatment. Resolution of the question whether the restitution claim is suitable for class treatment must await completion of February 4, 1994 hearing.

4) Money Had And Received

The viability of Plaintiffs' claim in Count X for money had and received [***101**] turns on whether Southern Bell received monies for IWMS from Plaintiffs inequitably. The suitability of the claim for class treatment therefore depends on whether Southern Bell behaved in the same manner with respect to all of the class members; more specifically, whether or not the representations Southern Bell made to Plaintiffs concerning IWMS varied materially from class member to class member. The Court defers ruling on this issue until after the February 4, 1994 hearing.

5) Breach Of The Duty Of Good Faith And Fair Dealing

In Count XII, Plaintiffs allege that Southern Bell breached its implied duty of good faith and fair dealing by, for example, impeding customer efforts to cancel their subscriptions to IWMS. The ways in which Southern Bell went about this appear to have varied considerably from class member to class member. The Court will afford Plaintiffs the opportunity at the February 4, 1994 hearing to demonstrate that no such material variance existed. The Court therefore defers ruling on the propriety of class certification with respect to Count XII until after the February 4, 1991 hearing.

Based on the foregoing, it is hereby ORDERED and ADJUDGED that Southern Bell's [***102**] motion for partial reconsideration of order certifying class as to certain substantive issues is GRANTED in part. Plaintiffs' non-acceptance theory in Count XI is hereby decertified. The Court DEFERS ruling on the remaining aspects of the motion pending a hearing to be held on February 4, 1994 on the suitability of the liability issues in Counts V-XII for class treatment and will thereafter enter appropriate orders concerning the structure of further proceedings.

PLAINTIFFS' MOTION TO STRIKE AND ALTERNATIVE MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM

On January 14, 1994, Southern Bell filed a Counterclaim against unnamed members of the class who received services under their IWMS plans. Southern Bell subsequently filed a set of forty-two volumes containing the names of the Counterclaim Defendants.

In Count I of the Counterclaim, Southern Bell alleges that it is entitled to receive the value of services rendered to customers who contacted the phone company, requested IWMS plan services, and accepted the benefit of those services. In Count II, Southern Bell seeks the return of all monies previously paid to specific class members at their request as a refund of fees paid under the IWMS [***103**] plans.

Plaintiffs move to strike or, in the alternative, to dismiss Southern Bell's Counterclaim on the following five grounds: 1) the Counterclaim violates the Court's pretrial Orders; 2) the Counterclaim is untimely because Southern Bell was required to serve the Counterclaim with its Answer; 3) the Counterclaim Defendants--absent class members--are not parties within the meaning of Rule 13 of the Federal Rules of Civil Procedure; 4) the Counterclaim is premature; and 5) the Counterclaim does not state a claim upon which relief can be granted.

Plaintiffs contend that the Counterclaim violates the Court's pretrial orders and is untimely because the Court's pretrial Orders in 1992 and 1993 put Southern Bell on notice that it should promptly file any additional claims. Plaintiffs rely, in particular, on the Court's Orders of July 27, 1992, June 10, 1993, and November 1, 1993. The July

27, 1993 Order directed the parties' to submit reports concerning additional discovery required and set a cut-off date for the filing of dispositive motions. The June 10, 1993 Order set the dates for the Pretrial Conference and the trial. The November 1, 1993 Order set the date for the discovery cutoff. [*104] None of these Orders obligated the parties to file additional claims by a date certain. Thus, these Orders do not render Southern Bell's Counterclaim untimely.⁴⁰

Plaintiffs also contends that the Counterclaim is untimely because Southern Bell was required to file the Counterclaim with its Answer. Southern Bell's Answer was directed at Plaintiffs' antitrust claims only. Southern Bell has not answered Plaintiffs state law claims in Counts V-XII. Moreover, prior to the issuance of this Order, Southern Bell was under no obligation to answer those claims, or to assert its counterclaims, due to the pendency of its motion to dismiss those claims.⁴¹ [United States v. Snider, 779 F.2d 1151, 1157 \(6th Cir. 1985\)](#) ([HN38](#)↑) "Until the motion to dismiss is ruled upon it is not known whether the plaintiff has a claim. Without a valid claim, there can be no counterclaim, compulsory or permissive. A motion to dismiss pursuant to [Rule 12\(b\)](#) [*105] . . . is not a pleading as defined in [Rule 7](#). There is no reason for a party to file a pleading while a motion to dismiss is pending."). Southern Bell's Counterclaim is timely.

Plaintiffs also contend that the Counterclaim Defendants, as absent class members, are not "parties" within the meaning of [Rule 13\(a\)](#)--the federal rule governing compulsory counterclaims. Plaintiffs conclude that [Rule 13\(a\)](#) does not apply to Southern Bell's Counterclaim and that the Counterclaim therefore cannot be compulsory. As its Counterclaim is permissive, Southern Bell is obligated to demonstrate that there is some independent basis for federal jurisdiction over the Counterclaim. [East-Bibb Twiggs Neighborhood Association v. Macon Bibb Planning & Zoning Comm., 888 F.2d 1576 \(11th Cir. 1989\)](#). Since there is no independent basis for jurisdiction, Plaintiffs [*106] conclude that the Court must dismiss the Counterclaim.

The authorities are divided on the question whether absent class members are parties within the meaning of [Rule 13\(a\)](#). Compare [Nat'l Super Spuds, Inc. v. New York Mercantile Exchange, 75 F.R.D. 40 \(S.D.N.Y. 1977\)](#) ([HN39](#)↑) absent class members are parties within the meaning of [Rule 13](#), with [Dennis v. Saks & Co., 1975 Trade Cases 60396](#) (absent class members are not parties for purposes of [Rule 13](#)). The Court acknowledges the authority supporting the proposition that absent class members are not parties, but finds that the contrary rule is the better reasoned. While permitting Southern Bell to bring a counterclaim against absent class members may increase the opt-out rate, and thus undercut the purposes underlying [Rule 23](#), it is only fair to require those who may benefit from a lawsuit to undertake some of its risks. As one court explained:

those who choose to join in a lawsuit assert claims against a defendant must be prepared to accept the legal risks and consequences of their voluntary choice. In stark and simple terms, one who throws a punch ought to be ready to receive [*107] one in return.

[Hermann v. Atlantic Richfield Co., 72 F.R.D. 182, 186 \(W.D.Pa. 1976\)](#). Accordingly, the Court concludes that [Rule 13](#) applies to Southern Bell's Counterclaim.

The next question is whether the Counterclaim is compulsory. In this circuit, a counterclaim is compulsory when there is a logical relationship between the counterclaim and the plaintiff's claims. [Republic Health Corp. v. Lifemark Hospitals of Fla., Inc., 755 F.2d 1453, 1455 \(11th Cir. 1985\)](#). Such a relationship exists when the same operative core of facts serve as the basis for both the plaintiff's claims and for the defendant's counterclaim. *Id.*

In the present case, both Plaintiffs' claims and Southern Bell's Counterclaim arise out of the circumstances under which Southern Bell provided, and Plaintiffs received, the IWMS service plan and the actual rendition of services

⁴⁰ The Court will not entertain any further claims by any party.

⁴¹ That motion has now been resolved and Southern Bell is obligated to file its answer to those claims in accordance with the time frame set out in [Rule 12](#).

thereunder. The claims thus all arise out of the same operative core of facts. Southern Bell's Counterclaim is therefore compulsory.

Plaintiffs object to the Counterclaim as premature, however. In particular, Plaintiffs contend that the viability of the Counterclaim turns of [*108] whether Plaintiffs prevail on their contract claims at trial. If Plaintiffs do not succeed in demonstrating that their contracts with Southern Bell are void or voidable, then Southern Bell will have no basis upon which to demand repayment for services rendered under those contracts.

The Court does not agree that the uncertainty of the outcome of this litigation renders the Counterclaim premature. The Counterclaim, like Plaintiffs claims, is based on events that occurred prior to trial. The uncertainty associated with the outcome of the litigation in which a claim is brought generally does not render the claim contingent and therefore does not prevent assertion of the claim.

The relationship between the Counterclaim and Plaintiffs' claims affects the timing and manner in which the Court will address the claim, however. As noted, Southern Bell asserts in the Counterclaim that certain individual class members received inside wire repairs pursuant to their IWMS plans and demands repayment for these plans. Whether, and under what circumstances, these class members received these repairs bears on whether the class members accepted Southern Bell's contract offers, whether the class members [*109] relied on Southern Bell's representations concerning IWMS, and whether the class members are entitled to damages in the full amount that they paid for IWMS. The Court has already determined that these issues are not appropriate for class treatment. In the event that it retains class certification on issues related to the nature and materiality of Southern Bell's misrepresentations and omissions, it will defer resolution of the issues of acceptance, reliance, and damages until after the trial of the issues subject to class-wide proof. The Court will also defer resolution of the Counterclaim pending the completion of the trial on the class-wide issues. See [*Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485, 489-490 \(S.D.N.Y. 1973\)*](#) ("If liability is established, other issues, including damages and counterclaims, can be handled on a class member-by-class member basis.").

Plaintiffs contend that the Court need not consider the Counterclaim in such proceedings, however, because the Counterclaim does not state a claim upon which relief can be granted. Plaintiffs advance the following four arguments in support of their motion: 1) Southern Bell has failed [*110] to identify the Counterclaim Defendants; 2) Southern Bell's claim for recovery under its quantum meruit is premature because it turns on whether the contracts between the parties for the provision of IWMS are valid; 3) Southern Bell's allegations that it "voluntarily repaid" amounts charged for IWMS upon customer demand are insufficient, without further allegations, to support a claim for unjust enrichment; and 4) Southern Bell's demand in Count II for the repayment of monies refunded to customers is not an independent claim, but rather an argument for the mitigation of damages.

Plaintiffs' first argument is moot as Southern Bell recently filed a set of 42 volumes containing the names of the Counterclaim Defendants. The Court rejected Plaintiffs' argument concerning the alleged prematurity of Southern Bell's Counterclaim above. Moreover, the fact that Southern Bell has failed to mention quantum meruit specifically in Count I does not warrant dismissal of the count. Southern Bell has alleged that it has performed services which the Counterclaim Defendants received and accepted. That is all that is required to state a claim for quantum meruit or unjust enrichment. See *Challenge Air Transport, Inc. v. Transportes Aereos Nacionales, S.A.*, 520 So. 2d 323 (Fla. 3d Dist. Ct. App. 1988). [*111] The allegations include sufficient factual detail to put on notice of the basis of the claim and thus satisfy the requirements of [*Rule 8*](#). See [*Fed.R.Civ.Pro. 8*](#).

The Court need not address Plaintiffs' argument that the allegations in Count II are insufficient to state a claim, as the Court finds that Count II does not represent an independent claim. In the event that Plaintiffs' prevail on their contract claims at trial, they will be entitled to damages in the amount of the monies that they paid for IWMS. Southern Bell's claim for repayment of the amounts that it refunded prior to any judgment cannot exceed the amount that Plaintiffs paid. Thus, Plaintiffs will not be obligated to pay Southern Bell money even if Southern Bell prevails on Count II. Rather, the amounts due Southern Bell under Count II will simply be deducted from the amounts Southern Bell owes to Plaintiffs. As a result, Count II merely represents an argument for the mitigation of damages, not an independent claim.

Based on the foregoing, it is hereby ORDERED and ADJUDGED that Plaintiffs' motion to strike is DENIED. Plaintiffs motion to dismiss is DENIED with respect to Count I of the Counterclaim and GRANTED with [*112] respect to Count II of the Counterclaim.

It is further ORDERED and ADJUDGED that:

- 1) Southern Bell's Motion To Dismiss Or Alternatively, For Partial Summary Judgment As To The State's Complaint In Intervention is GRANTED in part and DENIED in part. The Court applies all of its rulings in this Order and its Order of February 4, 1991 to the State's Complaint in Intervention. Therefore, summary judgment is entered in favor of Southern Bell with respect to Counts II and IV of the State's Complaint in Intervention and Counts VII and VIII are dismissed. Further, Southern Bell shall not be liable to the State on the basis of Counts I and III of the Complaint in Intervention for conduct prior to January 1, 1987.
- 2) *Davis* Plaintiffs' Motion For Reconsideration of This Court's Order Of February 4, 1991 is DENIED.
- 3) Southern Bell's Motion For Summary Judgment On Count IX ([Section 817.061](#)); Count X (Money Had And Received); and Count XII (Breach Of The Duty Of Good Faith) is STRICKEN as untimely.
- 4) Southern Bell's Motion For Summary Judgment On Counts V, VI, VII, And VIII As To The Individual Plaintiffs is STRICKEN as untimely.
- 5) Southern Bell's Motion For Partial Summary Judgment [*113] On Plaintiffs' Florida RICO Claims is STRICKEN as untimely.
- 6) *Davis* Plaintiffs' And The State Of Florida's [Rule 56\(f\)](#) Motion In Opposition To Southern Bell's Motion For Summary Judgment is DENIED.
- 7) Plaintiffs' Motion To Compel is DENIED, except as to those matters identified in the hearing held on January 14, 1994.
- 8) Plaintiffs' Emergency Motion For Order Permitting And Requiring The Completion Of Merits Discovery is DENIED.
- 9) The Attorney General Of Florida's Motion For Clarification Or Modification Of Order Regarding Confidential Documents is DENIED.
- 10) The Attorney General Of Florida's Motion For Modification Of Order Regarding Confidential Documents To Allow Access By The Florida Public Service Commission is DENIED.
- 11) The State Of Florida And *Davis* Plaintiffs' Motion For Continuance Of Trial is GRANTED. The Court will reset the trial date in a future order.
- 12) Plaintiffs' Motion In Limine is DENIED.
- 13) Plaintiffs' Emergency Motion To Strike Southern Bell's Motions For Summary Judgment is GRANTED. Southern Bell's motions were stricken as untimely above.
- 14) Southern Bell's Appeal Of Magistrate Palermo's November 4, 1993 Order Granting Plaintiffs' [*114] Motion To Compel is DENIED as moot. No further discovery beyond that authorized in the January 14, 1994 hearing is permitted.
- 15) Southern Bell's Motion For Protective Order Regarding Plaintiffs' November 29, 1993 Notice Of Depositions is DENIED as moot.
- 16) Southern Bell's Appeal Of Magistrate Palermo's November 24, 1993 Order Granting Plaintiffs' Motion For Expedited Treatment Of Its Emergency Motion And Emergency Motion For Order Requiring Southern Bell To

Respond To Interrogatories And Request For Production, And To Produce Outstanding Documents On Or Before November 30, 1993 is DENIED as moot.

17) GTE's Motion To Quash is DENIED as moot.

18) Plaintiffs' Petition For Appeal From Order Of Magistrate Judge Palermo Dated October 27, 1993 On Southern Bell's Motion To Compel Expert Depositions And Production Of Documents is DENIED as moot.

19) Plaintiffs' Petition For Appeal From Order Of Magistrate Judge Palermo Dated October 27, 1993 On Southern Bell's Motion To Compel Expert Depositions And Production Of Documents is DENIED as moot.

20) Plaintiffs' Motion For Protective Order Prohibiting Southern Bell From Taking Depositions Of Named Plaintiffs Efron And Davis Listed **[*115]** On Southern Bell's November 23, 1993 Notice Of Deposition is DENIED as moot.

21) Plaintiffs' Motion For Protective Order is DENIED as moot.

22) Competitor's Motion To Compel Continued Depositions To Be Held Before Magistrate, And Limited, Pursuant To The Magistrate's Order, To Certain Competitors Responding To Matters Raised By Southern Bell's Motion To Compel is DENIED as moot.

23) Southern Bell's Motion To Compel Answers To Interrogatories is DENIED as moot.

24) Southern Bell's Motion To Compel Production Of Documents is DENIED as moot.

25) Southern Bell's Motion To Compel Weitzman & Phillip, Inc. To Produce Documents Pursuant To Subpoena Duces Tecum is DENIED as moot.

26) Southern Bell's Motion To Strike Affidavits And Portions Of Deposition Testimony Of Alleged Competitors is DENIED.

27) Southern Bell's Motion In Limine To Exclude Testimony Of Expert Witnesses is DENIED.

28) Southern Bell's Motion In Limine To Exclude Testimony Of Linda Davis And David Efron is DENIED.

29) Plaintiffs' Motion To Strike The Affidavit Of Elaine Silverstein is DENIED.

30) The State Of Florida And *Davis* Plaintiffs' Motion To Strike And Notice Of Objections is DENIED.

31) Southern **[*116]** Bell's Motion To Strike Prayer For Punitive Damages In Plaintiff/Intervenor's Complaint is GRANTED.

DONE and ORDERED, in chambers, Miami, Florida, this 1st day of February 1994.

LENORE C. NESBITT

UNITED STATES DISTRICT JUDGE



Appraisers Coalition v. Appraisal Inst.

United States District Court for the Northern District of Illinois, Eastern Division

February 4, 1994, Decided ; February 7, 1994, Docketed

No. 93 C 913

Reporter

845 F. Supp. 592 *; 1994 U.S. Dist. LEXIS 1533 **; 1994-2 Trade Cas. (CCH) P70,732

The APPRAISERS COALITION, ALAN B. BLAU, individually and d/b/a ALAN BLAU & ASSOCIATES, W.S. BUCKLEY, BUCKLEY APPRAISAL SERVICES, INC., VINCENT A. SOLANO, individually and d/b/a V.A. SOLANO & ASSOCIATES, Plaintiffs, v. APPRAISAL INSTITUTE, an Illinois corporation, THE AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, an Illinois corporation, and PATRICIA MARSHALL, BERNARD FOUNTAIN, DOUGLAS BROWN, C. DAVID MATTHEWS, CLIFFORD E. FISHER, JR., JOHN R. UNDERWOOD, JR., BRUCE R. WILLMETTE, BONNIE D. ROERIG, DAVID F. PEATFIELD, DONALD L. BURKE, NANCY M. MUELLER, GERALD A. TEEL, NORMAN E. HALL, JOE R. PRICE, LOUIE REESE III, and RITCH LE GRAND, Defendants.

Core Terms

designation, Appraisal, monopolization, Defendants', antitrust, amended complaint, allegations, motion to dismiss, advertisement, conspiracy, lawsuit, real estate, damages, associations, Counts, individual defendant, plaintiff's claim, anti trust law, defamation, membership, individual plaintiff, opinion of the court, non-residential, defamatory, conferred, promoting, cases, real estate appraiser, injunctive relief, Lanham Act

LexisNexis® Headnotes

Business & Corporate Law > Unincorporated Associations

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

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Standing

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

HN1[] Business & Corporate Law, Unincorporated Associations

A claim of injury to an association itself is necessary to confer standing for a direct federal antitrust claim or for a direct Lanham Act claim.

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

Trademark Law > ... > Remedies > Equitable Relief > General Overview

845 F. Supp. 592, *592L^A1994 U.S. Dist. LEXIS 1533, **1533

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

Business & Corporate Law > Unincorporated Associations

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Standing

HN2 Justiciability, Standing

While associations are generally denied standing to sue for damages under the antitrust laws, the federal courts have permitted associations to maintain actions seeking injunctive relief on behalf of, and as the representative of, its members. Whether, and in what circumstances, it is permissible for an association to sue under the federal antitrust laws or under the Lanham Act is governed by a three part test established by the Supreme Court. An association has standing to bring suit on behalf of its members when (1) the members would otherwise have standing to sue for themselves; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Business & Corporate Law > Unincorporated Associations

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

HN3 Business & Corporate Law, Unincorporated Associations

In considering the issue of associational standing on remand, the court's analysis must begin with a review of the benefits of associational standing. These benefits must be weighed against any deficiencies an association might have, including actual and potential conflicts. In addressing apparent conflicts, district courts should determine if other approaches less drastic than denying group standing will protect the interests of those whose position is not represented by the association, while affording the group and the judicial system as a whole the efficiencies identified in associational standing.

Business & Corporate Law > Unincorporated Associations

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

HN4 Business & Corporate Law, Unincorporated Associations

The association asserting standing to bring suit on behalf of its members must seek to protect interests that are germane to the organization's purpose. This "germaneness" requirement has teeth only when a conflict of interests exists. Otherwise, the germaneness test requires only that an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together.

Business & Corporate Law > Unincorporated Associations

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN5 Business & Corporate Law, Unincorporated Associations

Dismissal for lack of associational standing is only required when the lawsuit would require the participation of each member of the association.

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

Business & Corporate Law > Unincorporated Associations

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

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

HN6[**Private Actions, Remedies**

The proof of antitrust injury necessary to federal antitrust claims may require individualized proof. That kind of proof is necessary in circumstances where complex factual issues exist that require evidence of actions taken against individual defendants. However, as analysis of the antitrust injury requirement indicates, not all antitrust cases necessarily require inquiry into complex factual issues to resolve the question of antitrust injury. In particular, where an antitrust claim attacks a policy or practice that is equally applicable and detrimental to all members of an association, such individualized proof is not necessary.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Business & Corporate Law > Unincorporated Associations

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

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

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

HN7[**Remedies, Injunctions**

Antitrust plaintiffs seeking injunctive relief pursuant to § 16 of the Clayton Act, [15 U.S.C.S. § 18 et seq.](#), must demonstrate the threat of an antitrust injury. An antitrust injury is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. This requirement forces the parties and the court to reason closely about the nature of the antitrust violation alleged in order to test whether the injury and damages claimed by the plaintiff match the rationale for finding any violation in the first place and makes clear that injuries resulting from competition will not support either damage or equity actions by private parties under the antitrust laws.

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

Evidence > Burdens of Proof > General Overview

HN8[**Monopolies & Monopolization, Actual Monopolization**

845 F. Supp. 592, *592L^A 1994 U.S. Dist. LEXIS 1533, **1533

In order to prove monopolization, a plaintiff must prove that a given defendant has (1) possession of monopoly power in the relevant market, and (2) acquired and maintained that power apart from permissible competitive means such as growth, development of a superior product, business acumen or historic accident.

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

Evidence > Burdens of Proof > General Overview

HN9 [blue download icon] **Monopolies & Monopolization, Attempts to Monopolize**

To prove attempted monopolization, a plaintiff must show (1) that the defendant has engaged in predatory or anticompetitive conduct, with (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Unincorporated Associations

HN10 [blue download icon] **Antitrust & Trade Law, Sherman Act**

Section 2 liability under the Sherman Act, 15 U.S.C.S. § 1 et seq., may be imposed on an association that does not compete directly in its membership's market.

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

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

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

Antitrust & Trade Law > Clayton Act > General Overview

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

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

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

HN11 [blue download icon] **Conspiracy to Monopolize, Sherman Act**

To prove a conspiracy to monopolize, a plaintiff must prove (1) the existence of a combination or conspiracy, (2) overt acts in furtherance of the conspiracy, (3) an effect upon a substantial amount of interstate commerce, and (4) the existence of specific intent to monopolize. Unlike the proof required for monopolization or attempted monopolization, the proof required to demonstrate a conspiracy to monopolize does not require a proof of market power in a relevant market. Under the more permissive theory of § 2 of the Clayton Act, 15 U.S.C.S. § 1 et seq., individuals who are incapable themselves of monopolizing a market, may be found liable under § 2 for intentionally joining others to do so.

Antitrust & Trade Law > Sherman Act > General Overview

845 F. Supp. 592, *592L^A 1994 U.S. Dist. LEXIS 1533, **1533

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

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

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

HN12 [] Antitrust & Trade Law, Sherman Act

Generally, an agreement between a parent corporation and its wholly owned subsidiary cannot be concerted action for purposes of § 1 of the Sherman Act, 15 U.S.C.S. § 1 et seq. Similarly, an agreement between officers or employees of the same firms does not constitute a § 1 conspiracy. The reasoning also applies to § 2 claims. However, there is an exception to that doctrine. A subsidiary, officer or employee of a corporation may be said to have conspired with a corporation when the subsidiary or individual has an independent interest in participating in the conspiracy. Although the independent interest exception has been limited, it must be considered to apply when an entity's agents or employees are direct competitors.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

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

HN13 [] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, prohibits every contract, combination or conspiracy in restraint of trade. Despite this broad language, however, only unreasonable restraints violate this section. A plaintiff may demonstrate that a particular restraint is unreasonable either by demonstrating that the restraint falls within a narrow set of per se unreasonable restraints, or by conducting a rule of reason analysis to show that the restraint's anticompetitive effects outweigh any redeeming virtues.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN14 [] Practices Governed by Per Se Rule, Boycotts

Boycotts are among those limited restraints that are considered per se illegal. However, the Supreme Court's application of the per se rule to purported boycotts and concerted refusals to deal has been mixed. The Court has warned against over-zealous application of the doctrine and has stated that the rule should be applied only when

the challenged practice threatens the proper operation of our predominantly free-market economy or when the challenged practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN15[] Antitrust & Trade Law, Sherman Act

In light of its increased concern over the applicability of the per se rule, the Supreme Court has been slow to condemn rules adopted by professional associations. This reluctance has been expressed by the Seventh Circuit with respect to both professional and trade associations. Typically, professional and trade associations' rules of exclusion or restriction are evaluated under the rule of reason.

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

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

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 > 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

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN16[] Practices Governed by Per Se Rule, Boycotts

Although the per se rule for boycotts may apply to a trade association's membership requirements when membership in that trade association is necessary to compete effectively in the relevant market, application of the proposed rule often requires a court to beg the question of the reasonableness of the proposed restraint. Even then, in applying a per se analysis, courts are often forced to take a quick look at the reasonableness of the challenged restraint.

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

845 F. Supp. 592, *592L^A 1994 U.S. Dist. LEXIS 1533, **1533

HN17 [blue document icon] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The "quick look" is a means by which the per se rule and rule of reason have been collapsed. The "quick look" means that the court will first consider the justifications for the challenged restraint. A persuasive justification for an apparent illegal restraint may require further analysis which effectively converts a per se approach into a rule of reason analysis.

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

Real Property Law > Property Valuations

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > General Overview

Transportation Law > Private Vehicles > Odometers

HN18 [blue document icon] Antitrust Statutes, Clayton Act

Section 7 of the Clayton Act, [15 U.S.C.S. § 18 et seq.](#), prohibits one corporation from acquiring another corporation where the effect of the merger may be substantially to lessen competition, or to tend to create a monopoly. Plaintiffs cannot state a claim under § 7 without notifying the defendants of the market said to be monopolized.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Antitrust & Trade Law > Consumer Protection > 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 > Trade Dress Protection > General Overview

HN19 [blue document icon] Trade Dress Protection, Causes of Action

See [15 U.S.C.S. § 1125\(a\)](#).

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

845 F. Supp. 592, *592L^A 1994 U.S. Dist. LEXIS 1533, **1533

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

[**HN20**](#) [blue icon] **False Designation of Origin, Elements of False Designation of Origin**

To state a claim for false advertising under § 43(a) of the Lanham Act, [15 U.S.C.S. § 1125\(a\)](#), a plaintiff must allege that the defendants' advertisements were (1) false and misleading; (2) actually or likely to deceive a substantial segment of their audience; (3) material in their effects on purchasing decisions; (4) touting goods or services in interstate commerce; and, (5) likely to injure the plaintiff.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

[**HN21**](#) [blue icon] **Consumer Protection, False Advertising**

To state a claim for a Lanham Act violation, a plaintiff need not allege that the defendant's representations make direct comparisons to the plaintiff's product or even specifically mention the plaintiff's product.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

[**HN22**](#) [blue icon] **Antitrust & Trade Law, Sherman Act**

Since Illinois state courts are guided by the federal **antitrust law** where the wording of the state act is identical to a federal provision, the court treats the state **antitrust law** as it would federal law, and dismisses any state claims corresponding to federal antitrust claims which have been dismissed, and retains any state claims corresponding to retained federal claims. [740 Ill. Comp. Stat. 10/11](#).

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

[**HN23**](#) [blue icon] **Consumer Protection, False Advertising**

The Illinois Consumer Fraud and Deceptive Business Practices Act (Act), [815 Ill. Comp. Stat. 505/1 et seq.](#) (1993), purports to prohibit all unfair methods of competition, but has been restricted to deceptive practices. A violation of the Act based on misrepresentation or fraud must be pled with the particularity of [Fed. R. Civ. P. 9\(b\)](#).

Civil Procedure > Remedies > Damages > Special Damages

Torts > Intentional Torts > Defamation > Defamation Per Se

845 F. Supp. 592, *592I^A994 U.S. Dist. LEXIS 1533, **1533

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Special Damages

Torts > Intentional Torts > Defamation > General Overview

Torts > ... > Defamation > Elements > General Overview

Torts > ... > Defamation > Remedies > General Overview

HN24 [↓] **Damages, Special Damages**

Where plaintiffs make no specific allegations with respect to their damages, only alleging only that defendants' statements injured their business reputations, these allegations are insufficient to state special damages. Plaintiffs must show per se defamation to proceed with a defamation claim.

Torts > Intentional Torts > Defamation > Defamation Per Se

Torts > Intentional Torts > Defamation > General Overview

HN25 [↓] **Defamation, Defamation Per Se**

A statement that imputes an inability to perform or want of integrity in the discharge of duties of office or employment is one of four categories of statements that are considered defamatory per se in Illinois.

Torts > Intentional Torts > Defamation > Defamation Per Se

Torts > Intentional Torts > Defamation > General Overview

HN26 [↓] **Defamation, Defamation Per Se**

The "innocent construction" rule is stated as follows: A written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable per se.

Torts > Business Torts > Trade Libel > Elements

Torts > Business Torts > Trade Libel > General Overview

HN27 [↓] **Trade Libel, Elements**

To state an action for commercial disparagement, plaintiff must show that defendant made false and demeaning statements regarding the quality of another's goods and services.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN28[] Commercial Interference, Prospective Advantage

The elements of the common law tort of tortious interference are as follows: (1) the existence of a valid business expectancy; (2) knowledge of that expectancy by the interferer; (3) interference causing a termination of that expectancy; and (4) damages.

Counsel: **[**1]** For Plaintiffs: Myron M. Cherry, Jeffrey Mark Wagner, CHERRY & FLYNN, Chicago, IL. Kenneth Frederick Levin, LAW OFFICES OF KENNETH F. LEVIN, CHTD., Lincolnwood, IL.

For Defendants: David B. Bayless, Gary L. Prior, David Michael Keller, David Marx, Mark W. Schroeder, Christopher MacNeil Murphy, McDERMOTT, WILL & EMERY, Chicago, IL.

Judges: NORDBERG

Opinion by: JOHN A. NORDBERG

Opinion

[*595] MEMORANDUM OPINION AND ORDER

This is an action arising out of alleged illegal competition in the non-residential real estate appraisal market. Plaintiffs filed suit on February 11, 1993, and filed a First Amended Complaint on March 3, 1993, before any response to the original complaint had been filed. The Defendants moved to dismiss that First Amended Complaint. On August 18, 1993, the Court issued a Memorandum Opinion and Order granting that motion. Appraisers Coalition v. Appraisal Inst., 1993 U.S. LEXIS 11770, No. 93- C-913, 1993 WL 326671 (N.D. Ill. Aug. 18, 1993). With the permission of the Court, Plaintiffs filed their Second Amended Complaint, seeking relief in eleven counts. Before the Court is Defendants' Motion to Dismiss the Second Amended Complaint. For the following reasons, the Motion is denied in part and granted in part, without prejudice to the Plaintiffs filing a final amended complaint, if appropriate, consistent with this Memorandum Opinion and Order.

I. ALLEGATIONS OF FACT

Assuming as true the allegations in the Second Amended Complaint, and reasonable inferences therefrom, the Court summarizes the facts of the case as follows. The Plaintiffs are three **[**2]** individual non-residential real estate appraisers, Alan B. Blau, W.S. Buckley, and Vincent A. Solano, their respective businesses, Alan Blau & Associates, Buckley Appraisal Services, Inc., and V.A. Solano & Associates, and the Appraisers Coalition (the "Coalition"), a voluntary unincorporated association.¹ The individual Plaintiffs, through their businesses, and each member of the Coalition, is engaged in the profession of providing appraisals of non-residential real estate in the United States. Each of these appraisers is a member of an organization called the Society of Real Estate Appraisers, Inc. (the "Society").

The Society was founded in 1935 to establish, confer, and promote professional training, qualifications, and designations for **[**3]** real estate appraisers. Before January 1, 1991, the Society conferred one or more of three designations upon its individual members: (1) the SRPA, or Senior Real Property Appraiser, the Society's highest form of professional certification for appraisers of non-residential real estate; (2) the SRA, or Senior Residential Appraiser, which designated appraisers of residential real estate; and (3) the SREA, or Senior Real Estate Analyst, which pertains to financial analysis of income-producing real estate, but not necessarily appraisals. (Second Am.

¹ Although unincorporated, the Appraiser Coalition is entitled to sue in its own name under [735 ILCS 5/2-209.1](#) (Smith-Hurd 1993) which permits "any organization of 2 or more individuals formed for a common purpose, excluding a partnership or corporation" to sue and be sued.

Compl. PP 16(a)-(c.) Each of the individual Plaintiffs and each member of the Coalition earned the Society's SRPA designation. (*Id.* P 3.)

Until 1991, the Society, and its members, competed with Defendant American Institute of Real Estate Appraisers ("AIREA"), and its members. Like the Society, AIREA was organized in the 1930s to establish, confer, and promote professional training, qualifications, and designations for real estate appraisers. AIREA conferred two designations on its members: (1) the MAI, or "Member Appraisal Institute", which was conferred on AIREA members having top qualifications for appraising non-residential real estate; **[**4]** and (2) the RM, which was comparable to the Society's SRA. Thus, before 1991, the Society's SRPAs directly competed with **[*596]** AIREA's MAIs, and the SRAs directly competed with the RMs. Each of the individual Defendants is a holder of the MAI designation.

During the events leading to this lawsuit, a small percentage of Society members, having either an SRPA or SREA designation, also held an MAI designation, as was permitted by Society rules. Plaintiffs allege that "at some point prior to 1989" the "dual designation" MAI members of the Society managed to take control of that organization, despite the fact that such members made up less than four percent of the Society's voting members.

In 1989, AIREA representatives and Society representatives began discussing a "unification" of the two organizations. Under the initial "unification" proposal, AIREA's RM members would be given the option of automatically receiving the Society's better-known and more widely-held SRA designation; the Society's small number of SREAs, some of whom were not appraisers, would be given the option of automatically becoming MAIs. The SRPA designation was to be phased out; but, SRPAs, unlike SREAs, were not automatically **[**5]** permitted to become MAIs. Upon learning of the terms of the initial proposal, many SRPAs protested the elimination of their designation. These protests resulted in the inclusion, in the organizations' "Final Plan of Unification" (the "Plan"), of a provision stating that "all existing designations" would be "retained indefinitely" and would be "promoted until such time as the Board of Directors deems it appropriate to cease." By October 15, 1989, the Plan was set for submission to the respective voting members of the Society and AIREA. The Plan was to be either approved or disapproved at special membership meetings held on January 19, 1990.

Plaintiffs allege that the Plan was not approved at the special membership meetings. However, in June 1990, the Defendants caused AIREA, but not the Society, to vote on the Plan again. On January 1, 1991, the Defendants caused the Plan to take effect, without the approval of the Society's membership. (Second Am. Compl. P 26.)

Upon implementation of the Plan, the Defendants took several actions that devalued the SRPA. With this implementation came the creation of the Defendant "Appraisal Institute", a parent corporation that now controls AIREA and **[**6]** the Society. Plaintiffs assert that the Appraisal Institute's name promotes public awareness of MAIs at the cost of public awareness of the SRPA designation, creating the appearance that MAIs are superior to SRPAs. Plaintiffs claim that they were further discriminated against by the Defendants' creation of the General Appraisal Board (the "GAB"). The GAB became the Appraisal Institute's arm for conferring the MAI designation, for controlling the ability of SRPAs to attain that designation, and for promoting the SRPA designation. Plaintiffs claim that SRPAs were locked out of any voice in these matters when the Defendants filled 11 of the 12 GAB positions with MAI holders, and prohibited the single SRPA member from voting on any matter affecting the qualifications for MAI status or the ability of SRPAs to become MAIs, and by restricting the Appraisal Institute's directors' ability to alter GAB policies.

Plaintiffs assert that Defendants "established a set of arbitrary, onerous, and subjective criteria" for those SRPAs seeking to become MAIs, even though some of the previous requirements for becoming an MAI were less stringent than those necessary to become a SRPA. (Compl. P 29.) ² **[**7]**

² The Second Amended Complaint states the following with respect to the alleged arbitrary, onerous, and subjective criteria:

(a) Defendants instituted a requirement that any SRPA wishing to become a MAI must take and pass a day-long Comprehensive Examination, even though as many as 700 current MAIs have never taken that examination;

[**8] [*597] Defendants failed to promote, and denigrated, the SRPA designation, despite their pre-unification promises to the contrary, by producing and disseminating materials, including advertisements, that tacitly disparaged SRPAs and that falsely implied that the SRPA designation was irrelevant, non-existent, inferior, or non-professional. (Compl. PP 30, 31.)

Plaintiffs claim that as a result of this discrimination: "the individual and business entity plaintiffs have been severely, if not irreparably, damaged in their business and property." (Compl. P 33.) Plaintiffs complain that their SRPA designations have "become valueless at best" and, at worst, carry "a negative connotation in comparison with MAIs." (Id.)

Plaintiffs seek both legal and equitable remedies in their eleven count Second Amended Complaint. In Counts I-VI, Plaintiffs allege violations of federal law. Counts I, II, and III respectively assert claims for monopolization, attempted monopolization, and conspiracy to monopolize in violation of section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2 (1988). In Count IV, Plaintiffs allege that the Defendants agreed to a per se illegal restraint [**9] of trade in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1988). Count V charges a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18 (1988). In Count VI, Plaintiffs claim that the Defendants violated section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1988).

Counts VII-XI are pendent state law claims. In Count VII, Plaintiff Solano claims that the Defendants violated the Illinois Antitrust Act, 740 ILCS 10/1 to 10/11 (Smith-Hurd 1993). In Count VIII, Plaintiff Solano seeks relief for violations of the Illinois Consumer fraud and Deceptive Business Practices Act, 815 ILCS 505/1 to 505/12 (Smith-Hurd 1993). In Count IX, Plaintiffs Blau, Solano, Buckley, and Buckley Appraisal Services, Inc. claim that they were defamed and commercial disparaged. In Count X, Plaintiffs Blau, Solano, and Buckley plead tortious interference with their property rights. In Count XI, Plaintiffs Blau, Solano, and Buckley claim a common law breach of fiduciary duty.

II. ANALYSIS

A. Associational Standing

Defendants challenge the Coalition's standing to sue. The Second [**10] Amended Complaint names the Coalition as a Plaintiff in the five federal antitrust counts (I-V) and the Lanham Act false advertising count (VI). Since the Plaintiffs have not specifically alleged the capacity in which they contend the Coalition may sue, and since Plaintiffs have failed to allege any injury to the association itself,³ the Court concludes that the Coalition must be seeking associational standings as a representative of its members. (See Defs.' Mem. in Supp. of Mot. to Dismiss Second

(b) Defendants provided in the Plan, and have rigidly enforced, a requirement that SRPAs wishing to become MAIs must demonstrate an additional year of "experience" beyond that which was required to earn the SRPA designation, even though the SRPA designation itself required more non-residential appraisal experience than was required to become a MAI;

(c) Defendants instituted a requirement that SRPAs wishing to become MAIs must pass a "character and fitness review" at the hands of their MAI competitors, even though prior to the "unification" SRPAs demonstrably were required to adhere to a stricter standard of ethics than MAIs (for example, the Society stripped a number of former SRPA/MAIs of their SRPA status on ethical grounds, though those same persons continue to retain their MAI status); and

(d) Defendants so arranged matters that SRPAs who nevertheless attempted to become MAIs were subject to subjective and arbitrary "reviews" and judgments by MAI panels whose members included direct competitors of the SRPA applicants.

(Second Am. Compl. PP 29 (a)-(d).)

³ Such is a necessary allegation to substantiate an association's direct claim. See Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1379-80 (7th Cir. 1987) (indicating that HN1 claim of injury to association itself is necessary to confer standing for a direct federal antitrust claim); Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods, 799 F.2d 6, 10 (1st Cir. 1986) (indicating that claim of injury to association itself is necessary to confer standing for a direct Lanham Act claim).

Am. Compl. at 4.) The Plaintiffs do not dispute this conclusion. (See generally Pls.' Mem. in Resp. to Mot. to Dismiss Second Am. Compl.)

[**11] **HN2** While associations are generally denied standing to sue for damages under the antitrust laws, the federal courts have permitted associations to maintain actions seeking injunctive relief on behalf of, and as the representative of, its members. See Warth v. Seldin, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975) (holding that an association may have standing to sue as a representative [^{*}598] of its members); Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1380 & n.3 (7th Cir. 1987) (listing cases). Whether, and in what circumstances, it is permissible for an association to sue under the federal antitrust laws or under the Lanham Act is governed by the three part test established by the Supreme Court in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). See Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584 (7th Cir. 1993) (applying Hunt to an association's antitrust claims); Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1380-81 (7th Cir. 1987) (same); Camel Hair & Cashmere Inst. of Am. v. Associated Dry Goods, 799 F.2d 6, 10 (1st Cir. 1986) [**12] (applying Hunt to an association's Lanham Act claims). Under Hunt, an association has standing to bring suit on behalf of its members when: (1) the members would otherwise have standing to sue for themselves; (2) the interests the association seeks to protect are "germane to the organization's purpose"; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt, 432 U.S. at 343.

The Supreme Court reaffirmed the doctrine of associational standing in UAW v. Brock, 106 S. Ct. 2523, 91 L. Ed. 2d 228, 477 U.S. 274 (1986). In so doing, the Supreme Court also explained the basis for the doctrine. In Brock, the UAW and several of its members brought suit against the Secretary of Labor to challenge his interpretation of the eligibility provisions of the Trade Act of 1974, which provided benefits to workers laid off because of competition from imports. Among the Secretary's challenges to the suit was his contention that the UAW lacked standing to sue in federal court on behalf of its affected members. The district court found for the plaintiffs on the merits and the Court of Appeals [**13] for the District of Columbia reversed, without reaching the merits, holding that the UAW lacked standing to represent its members.

The Supreme Court reversed the Court of Appeals, applying the Hunt test. It then addressed the Secretary's contention that "absent a showing of particularized need", members of associations should be required to litigate common questions of fact or law against a common defendant only through the class action provisions of Fed. R. Civ. P. 23. In rejecting the Secretary's argument, the Supreme Court explained that the doctrine of associational standing had special features that made it "advantageous both to the individuals represented and to the judicial system as a whole." Brock, 477 U.S. at 289. In contrast with the class action vehicle, in which plaintiffs might have little in common other than their claims, an association suing on behalf of its members could draw upon a "pre-existing reservoir of expertise and capital." Id. This pooling of resources provides economies to both plaintiffs and courts. The Court concluded by noting:

The doctrine of associational standing recognizes that the primary reason people [**14] join an organization is often to create an effective vehicle for vindicating interests that they share with others. "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all." . . . The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests.

Brock, 477 U.S. at 290 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 187, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Jackson, J., concurring)).

Here, Defendants argue that the Coalition should not be permitted to avail itself of the Hunt and Brock cases for three reasons. First, Defendants contend that the individual Plaintiffs have a conflict with the Coalition. Defendants also argue that the Plaintiffs have failed to satisfy both the second and third parts of the Hunt test. The Court rejects each of these arguments.

As Defendants point out in their Memorandum in Support [**15] of Motion to Dismiss Second [*599] Amended Complaint, the conflict of interest argument they make "does not fit neatly within the three part test." (Mem. in Supp. at 6.) Federal courts have addressed similar arguments under both the second and three elements of the Hunt test; and at least one Court of Appeals has noted that such an argument might be construed as a proposed fourth element to that test. See, e.g., Associated Gen. Contractors of California, Inc. v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991) (analyzing a conflict of interest argument under the third element of the Hunt test), cert. denied, 118 L. Ed. 2d 390, 112 S. Ct. 1670 (1992); Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1380-81 (7th Cir. 1987) (analyzing a conflict of interest argument under the second element of the Hunt test); National Maritime Union of Am. v. Commander, Military Sealift Command, 263 U.S. App. D.C. 248, 824 F.2d 1228, 1232 (D.C. Cir. 1987) (stating that a conflict of interest argument might be seen either as an attempt to add a fourth factor to the Hunt [**16] test or as a part of the third factor). Given that Defendants here have challenged the Coalition's ability to satisfy both the second and third elements of Hunt, the Court addresses the conflict issue first and then, when discussing the other arguments, will address any implications that issue might have on those arguments.

Defendants' contend that the interests of the individual Plaintiffs conflict with those of the appraisers represented by the Coalition. The individuals seek millions of dollars in damages. The Coalition seeks only injunctive relief. Because the individuals are officers and members of the Coalition, but seek damages in addition to equitable relief, they have created, so the argument goes, a litigation strategy conflict between themselves and the Coalition and, by implication, within the Coalition. In the opinion of the Court, this argument is insufficient to defeat associational standing.

The Seventh Circuit Court of Appeals clarified its position with respect to standing for associations having purported internal conflicts of interest in Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584 (7th Cir. 1993). In instructing [**17] a district court HN3 considering the issue of associational standing on remand, the Seventh Circuit stated that the court's analysis must begin with a review of the benefits of associational standing expressed in Brock. Id. at 607. These benefits must be weighed against any deficiencies an association might have, including actual and potential conflicts. In addressing apparent conflicts, district courts should determine if "other approaches less drastic than denying group standing" will protect the interests of those "whose position is not represented" by the association, "while affording the group and the judicial system as a whole the efficiencies that Brock has identified in associational standing." Id. at 607.

Given this charge from the Court of Appeals, it is the opinion of the Court that the efficiencies created by the Coalition in this case outweigh any conflicts created by its participation in this lawsuit. The Defendants protest that the Coalition does not really afford any of the efficiencies contemplated by Brock because it was organized solely as a means of financing this lawsuit. The Court disagrees, even [**18] accepting the Defendants' categorization of the Coalition.

The injunctive relief sought by the Coalition, if justified, would likely benefit any appraiser having an SRPA designation. While Plaintiffs have not stated how many members of the association there are, according to the Second Amended Complaint, there were 2,243 holders of the SRPA designation prior to implementation of the Plan. (Compl. P 33.) After the implementation of the Plan, that number fell to approximately 900. (Id.) If the Coalition and the individual Plaintiffs succeed in their attempt to enjoin alleged anticompetitive conduct, at least these 900 individuals would benefit. The fact that the Coalition may have been formed as a vehicle to assemble financial resources does not run contrary to the Brock decision. In fact, as quoted above, the opinion specifically refers to the benefits afforded the public and the individuals making up the association by permitting the pooling of such resources. In addition, even if formed for purposes related to this litigation, the Coalition is still a pool of similarly situated individuals with similar interests. If Plaintiffs have valid claims, the [*600] Court perceives no wrong [**19] in permitting them to rely on whatever resources, capital or intellectual, the Coalition may provide.

Contrasted with the benefits of the associational vehicle is Defendants' assertion that the Coalition's participation in this lawsuit is contrary to the interests of other appraisers potentially having claims in this lawsuit. The crux of this argument is that the individual defendants will have incentives to settle for cash in lieu of the injunctive relief sought by the Coalition. In the opinion of the Court, the purported "conflict" between the individual Plaintiffs and other

members of the Coalition is only speculative at this point. Furthermore, the Court is not convinced that any such speculative conflict would be diminished by the absence of the Coalition. First, there is no indication of any immediate conflict or dissent within the Coalition. Second, the individual Plaintiffs, as officers and organizers of the Coalition, owe fiduciary duties to the other members of the organization. There is no indication that the Coalition's participation in this lawsuit will compromise those duties. Third, even if the Coalition were not a party to this lawsuit, the individual Plaintiffs, who [\[**20\]](#) also seek injunctive relief, might favor a cash settlement over injunctive relief. And, depending on the circumstances, such an agreement might be binding on other individuals, whether or not such individuals were parties to this lawsuit. Furthermore, should this case proceed to trial and the Plaintiffs lose, the doctrine of defensive collateral estoppel might bind future litigants regardless of whether the Coalition participates or not. Fourth, should any future litigant demonstrate that he or she was not adequately represented in this lawsuit, that individual would not be precluded from bringing suit. Given these factors, the Court is unwilling to deny the Coalition standing to file suit.

The Court's conclusion is supported by [Retired Chicago Police Ass'n](#). In that case, the Seventh Circuit summarized the "major contributions" on this issue by other circuits. The Court of Appeals discussed two cases, [Maryland Highways Contractors Ass'n v. Maryland](#), [933 F.2d 1246](#) (4th Cir.), [cert. denied](#), [116 L. Ed. 2d 325](#), [112 S. Ct. 373](#) (1991), and [Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n](#), [830 F.2d 1374](#) (7th Cir. 1987), [\[**21\]](#) in which associational standing had been denied. The basis for that conclusion, in both cases, was the existence of a "profound" conflict of interest. In the [Maryland Highways Contractors Ass'n](#) case the association's lawsuit worked to the "direct detriment" of the minority members of that association. The association in that case brought suit without observing its own by-laws. In [Southwest Suburban Bd. of Realtors](#), members of the association were actual defendants in the case, a clearly unworkable conflict. As indicated in [Retired Chicago Police Ass'n](#), the "profound" conflicts in those cases were inconsistent with [Brock](#). No such profound conflict or inconsistency with [Brock](#) exists here.

Defendants protest that Plaintiffs failed to satisfy the second element of the [Hunt](#) test by failing to plead the Coalition's purpose. The second element of [Hunt](#) requires that [HN4](#)⁴ the association in question seek to protect interests that are "germane to the organization's purpose." [Hunt](#), [432 U.S. at 343](#). This "germaneness" requirement formed one basis for the Seventh Circuit's decision in [Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n](#), [830 F.2d 1374](#) (7th Cir. 1987). [\[**22\]](#)⁴ However, as indicated in [Retired Chicago Police Ass'n](#), this "germaneness" requirement has teeth only when a conflict of interests exists. [7 F.3d at 607](#). Otherwise, the germaneness test requires only that "an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together." *Id.* (quoting [Humane Soc'y of the United States v. Hodel](#), [268 U.S. App. D.C. 165](#), [840 F.2d 45, 56](#) (D.C. Cir. 1988)). Given that no "profound" conflict here exists, and given that the Coalition's membership came together to help prosecute this case, the germaneness test is satisfied. The Court will not deny the Coalition [\[*601\]](#) standing for a failure to plead its purpose.

Finally, Defendants contend that the Coalition should [\[**23\]](#) be denied standing for failure to satisfy the third element of [Hunt](#), which states that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Defendants assert that, given the Second Amended Complaint's allegations, it will be necessary for several members of the Coalition to testify and further participate in the lawsuit. This position is not disputed. However, the third element in [Hunt](#) does not require a dismissal on that basis. The decision in [Retired Chicago Police Ass'n](#) makes clear that the [Hunt](#) test does not mean that dismissal is required when the participation of any association member is necessary. Rather, [HN5](#)⁴ dismissal is only required when the lawsuit would require the participation of each member of the association. [7 F.3d at 601-02](#). The third element of [Hunt](#) is satisfied, despite the participation of one or many members of an association, when the cause of action and relief sought does not require "individualized proof" for the litigation of the case.

The difficult issue here presented is whether Plaintiffs claims require the "individualized proof" that would [\[**24\]](#) defeat Associational standing. As noted in dicta in both [Retired Chicago Police Ass'n](#), [7 F.3d at 602 n.25](#), and

⁴ The Court also questioned whether the plaintiff association could satisfy the third element of the [Hunt](#) test. See [Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n](#), [830 F.2d at 1381](#).

Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n, 830 F.2d at 1380-81, HN6[↑] the proof of antitrust injury necessary to federal antitrust claims may require such "individualized proof." That kind of proof is necessary in circumstances where complex factual issues exist that require evidence of actions taken against individual defendants. See Retired Chicago Police Ass'n, 7 F.3d at 602 n.25; Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n, 830 F.2d at 1380-81. However, as analysis of the "antitrust injury" requirement indicates, not all antitrust cases necessarily require inquiry into "complex factual issues" to resolve the question of antitrust injury. In particular, where an antitrust claim attacks a policy or practice that is equally applicable and detrimental to all members of an association, such individualized proof is not necessary. See National Office Mach. Dealers Ass'n v. Monroe, the Calculator Co., 484 F. Supp. 1306, 1307 (N.D. Ill. 1980). [**25]

In Cargill v. Monfort of Colorado, 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986), the Supreme Court held that HN7[↑] antitrust plaintiffs seeking injunctive relief pursuant to section 16 of the Clayton Act must demonstrate the threat of an "antitrust injury." An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). This requirement is intended to serve two functions. First, as explained by professors Areeda and Hovenkamp:

It forces the parties and the court to reason closely about the nature of the antitrust violation alleged in order to test whether the injury and damages claimed by the plaintiff match the rationale for finding any violation in the first place.

Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law P 334.2a (Supp. 1992). Second, the requirement makes clear that "injuries resulting from competition will not support either damage or equity actions by private parties under the antitrust laws." Areeda & Hovenkamp, supra.

In some circumstances, determining whether the plaintiffs' **26 alleged injury was an "antitrust injury" requires factual analysis of the injuries suffered by individual, or particular, members of the plaintiff association. Here, in contrast, the antitrust injuries complained of are based on the Defendants' alleged discriminatory policies and practices that purportedly devalued the SRPA designation. In the opinion of the Court, the factual proof of these policies and their anticompetitive effects does not require the complex individualized proof contemplated in Southwest Suburban Bd. of Realtors. While this case potentially requires complex legal analysis and a complex factual inquiry into the nature of the markets involved, these analyses do not depend on the evidence of any particular member of the Coalition. As individualized proof is not necessary to demonstrate *602 an antitrust injury here, the Court rejects Defendants' argument on this issue.

Accordingly, with respect to the issue of associational standing, Defendants' Motion to Dismiss is denied.

B. Federal Antitrust Claims

1. Sherman Act Section 2

In Counts I, II, and III respectively, Plaintiffs claim that the Defendants' conduct constituted illegal monopolization, illegal attempted **27 monopolization, and a conspiracy to illegally monopolize.

a. Actual and Attempted Monopolization

HN8[↑] In order to prove monopolization, a plaintiff must prove that a given defendant has (1) possession of monopoly power in the relevant market, and (2) acquired and maintained that power apart from permissible competitive means such as growth, development of a superior product, business acumen or historic accident. United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). HN9[↑] To prove attempted monopolization, a plaintiff must show: (1) that the defendant has engaged in predatory or anticompetitive conduct, with (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power. Spectrum Sports v. McQuillan, 122 L. Ed. 2d 247, U.S. , 113 S. Ct. 884, 890-91 (1993).

Both monopolization and attempted monopolization thus require the acquisition or probable acquisition of monopoly power. In an attempt to satisfy this requirement, Plaintiffs allege that the MAIs, collectively and as a result of the institutional Defendants' conduct, maintain "substantial market power." (Compl. Count I P 6 at 19.) In the opinion [**28] of the Court, this, and the other allegations in the Second Amended Complaint are sufficient to state claims for monopolization and attempted monopolization against the Appraisal Institute and AIREA (collectively, the "Institutional Defendants"), but not against any of the individual Defendants.

Defendants argue that neither of the Institutional Defendants can be said to monopolize or attempt to monopolize the market for non-residential real estate appraisal services because neither directly competes in that market. See White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 104-05 (4th Cir. 1987); see also Ball Memorial Hosp. v. Mutual Hosp. Ins., 603 F. Supp. 1077 (S.D. Ind. 1985), aff'd, 784 F.2d 1325 (7th Cir.), reh'g denied, 788 F.2d 1223 (7th Cir. 1986). Defendants' position rests on the assumption that the only market applicable to the Defendant institutions is the market for establishing, conferring, and promoting professional training, qualifications, and designations for real estate appraisers. This argument has only infrequently been addressed in the [**29] case law, see Carleton v. Vermont Dairy Herd Improvement Ass'n, 782 F. Supp. 926, 934-35 (D. Vt. 1991), and was then questionably analyzed under a "monopoly leveraging" theory more appropriate for tying cases. In the opinion of the Court, however, several Supreme Court cases, although they do not discuss the issue, are sufficient precedent on which to permit the Plaintiffs to proceed. See American Soc'y of Mechanical Eng'r's v. Hydrolevel Corp., 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982) (affirming HN10[†] the imposition of section 2 liability on an association that did not compete directly in its membership's market); Silver v. New York Stock Exch., 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963) (same); United States v. Associated Press, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945) (same); see also McDonnell v. Michigan Chapter No. 10, Am. Inst. of Real Estate Appraisers, 587 F.2d 7 (6th Cir. 1978) (indicating that group boycott by real estate association, also a Defendant in this case, may support monopolization claim). Accordingly, with respect to the institutional Defendants on Counts I, and II, Defendants' Motion [**30] to Dismiss is denied.⁵

In contrast, Plaintiffs have failed to state a monopolization or attempted monopolization [*603] claim against the individual Defendants. Plaintiffs make no allegation with respect to the market power of any individual or the individual Defendants collectively. Accordingly, with respect to the individual Defendants, on Counts I, and II, Defendants' Motion to Dismiss is granted.⁶

[**31] b. Conspiracy to Monopolize

⁵ With respect to Counts I and II, the parties make no distinction between the two institutional Defendants. Neither, then, does the Court. Plaintiffs should be cautioned, however, that future analysis will require such a distinction. The corporate form should be considered in all future proof.

⁶ The Plaintiffs do not specifically allege any vicarious liability upon which the Court might include the individual Defendants in Counts I and II. It may be that the individual Defendants could be included in Counts I and II due to the Court's finding that each might be held liable under the conspiracy to monopolize alleged in Count III and discussed infra. If the individuals are found to have conspired to monopolize, under Count III, they may be liable for the acts of their coconspirators. See SEC v. Kimmes, 799 F. Supp. 852 (N.D. Ill. 1992), aff'd, 997 F.2d 287 (7th Cir. 1993). This coconspirator theory of liability was not addressed by the parties in their memoranda. While there has been some question regarding this theory's applicability in antitrust cases, see Zenith Radio Corp. v. Matsushita Elec. Indus., 513 F. Supp. 1100, 1176-78 (E.D. Pa. 1981) (discussing potential applicability of Pinkerton v. United States, 328 U.S. 640, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946), to civil case based on Robison-Patman Act and Clayton Act claims), aff'd in part, rev'd in part, 723 F.2d 238 (3d Cir. 1983), rev'd, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), the Court sees no reason why it should not apply. See Sidney Morris & Co. v. National Ass'n of Stationers, 40 F.2d 620 (7th Cir. 1930) (applying vicarious coconspirator liability to old precursor to Robinson-Patman Act). This issue might be raised by Defendants should Plaintiffs include a civil Pinkerton theory of liability in their final amended complaint.

A second theory of liability, less commonly used in antitrust cases, that might be raised is an aiding and abetting theory. This theory is sometimes used in attempts to include labor unions as antitrust defendants. See Hunt v. Crumboch, 325 U.S. 821, 65 S. Ct. 1545, 89 L. Ed. 1954 (1945). Like the coconspirator theory, this theory was not alleged by Plaintiffs or raised in argument. Its applicability to this case, like that of the coconspirator theory, remains to be resolved.

In Count III, Plaintiffs allege that the Defendants conspired to monopolize the market for non-residential real estate appraisal services. [HN11](#)⁷ To prove a conspiracy to monopolize, a plaintiff must prove: (1) the existence of a combination or conspiracy, (2) overt acts in furtherance of the conspiracy, (3) an effect upon a substantial amount of interstate commerce, and (4) the existence of specific intent to monopolize. Unlike the proof required for monopolization or attempted monopolization, the proof required to demonstrate a conspiracy to monopolize does not require a proof of market power in a relevant market. [Perington Wholesale v. Burger King Corp.](#), [631 F.2d 1369, 1376-77 \(10th Cir. 1979\)](#); see also [United States v. National City Lines](#), [186 F.2d 562](#) (7th Cir.), cert. denied, [341 U.S. 916, 95 L. Ed. 1351, 71 S. Ct. 735 \(1951\)](#).⁷ [\[**32\]](#) Under this more permissive [section 2](#) theory, individuals who are incapable themselves of monopolizing a market, may be found liable under [section 2](#) for intentionally joining others to do so.⁸

Defendants argue that [Copperweld Corp. v. Independence Tube Corp.](#), [467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#), bars Plaintiffs' claim. In [Copperweld](#), the Supreme Court held that [HN12](#)⁹ an agreement between a parent corporation and its wholly owned subsidiary cannot be concerted action for purposes of [section 1](#) of the Sherman Act. The Court also held that an agreement between officers or employees of the same firms does not constitute a [section 1](#) conspiracy. The [Copperweld](#) reasoning also applies to [section 2](#) claims. [Pudlo v. Adamski](#), [789 F. Supp. 247, 252 \(N.D. Ill. 1992\)](#), aff'd, [2 F.3d 1153 \(7th Cir. 1993\)](#), cert. denied, [471 U.S. 1066, 105 S. Ct. 2140, 85 L. Ed. 2d 497, 1993 U.S. LEXIS 1013, 1993 WL 466848 \(U.S. 1994\)](#).

Despite the clear statement of the law in [Copperweld](#), [\[**33\]](#) there is an exception to that doctrine. A subsidiary, officer or employee of a corporation may be said to have conspired with a corporation when the subsidiary or individual has an "independent interest" in participating in the conspiracy. See [7 Phillip E. Areeda, *Antitrust Law* PP 1470-1474 \(1986\)](#). Although the "independent interest" [\[*604\]](#) exception has been limited, see, e.g., [Nurse Midwifery Assocs. v. Hibbett](#), [918 F.2d 605, 612-15 \(6th Cir. 1990\)](#) (holding that medical staffs could not conspire with hospitals even if members of the staffs have "independent personal stake" in the alleged conspiracy), modified, [927 F.2d 904 \(6th Cir., cert. denied, 112 S. Ct. 406 \(1991\)\)](#), it must be considered to apply when an entity's agents or employees are direct competitors. See [Poller v. Columbia Broadcasting Sys.](#), [368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 \(1962\)](#) (holding that CBS could conspire with one of its affiliates to eliminate another affiliate from competition); [Spence v. Southeastern Alaska Pilots' Ass'n](#), [789 F. Supp. 1014 \(D. Alaska 1992\)](#) (holding that an [\[**34\]](#) association and its members could conspire when the members competed against each other); [United States v. Metro MLS, Inc.](#), [1974-2 Trade Cas. \(CCH\) P75,311, No. 210-73- N, 1973 WL 918 \(E.D. Va. 1973\)](#) (holding that a real estate listing corporation could conspire with its members when each member of the corporation maintained a related business entity separate from the corporation). Unlike in [Copperweld](#), each member of the Defendant trade associations is a competitor capable of conspiring with the other members.

Turning to the substance of the allegations against the Defendants, the Court concludes that Plaintiffs have stated a claim against every Defendant save AIREA. AIREA has no independent interest apart from the Appraisal Institute and must therefore be dismissed under [Copperweld](#). With respect to the individual Defendants, Plaintiffs' allegations are scant.⁹ The Court concludes, however, given reasonable bounds of inference from the facts alleged, that these

⁷ The Court notes that [United States v. National City Lines](#) has been criticized, see [Besser Publishing Co. v. Pioneer Press, Inc.](#), [571 F. Supp. 640, 641 \(N.D. Ill. 1983\)](#); [Tire Sales Corp. v. Cities Serv. Oil Co.](#), [410 F. Supp. 1222, 1232 \(N.D. Ill. 1976\)](#), rev'd, [637 F.2d 467 \(7th Cir. 1980\)](#), cert. denied, [451 U.S. 920, 68 L. Ed. 2d 312, 101 S. Ct. 1999 \(1981\)](#), but it remains the law in this Circuit.

⁸ Since it was not addressed by the parties, the Court leaves open the issue of whether, in proving a claim for conspiracy under [section 2](#), a plaintiff must prove that the conspirators collectively must be capable of achieving a monopoly or monopoly power.

⁹ The Plaintiffs' allegations against the individual Defendants, with the exception of Joe R. Price who is specifically mentioned in one other paragraph, are completely quoted as follows:

13. All of the individual defendants are holders of the MAI designation. They are, and have been at all material times, engaged in direct competition with plaintiffs, in interstate commerce in the United States, for non-residential real estate appraisal business. All of the individual defendants are or were officers or officials of the Society, AIREA, and/or the Appraisal Institute. Acting for

allegations are sufficient to notify each of the individual Defendants of his or her purported role in the alleged conspiracy. The Second Amended [~~*605~~] Complaint also adequately notifies the Appraisal Institute of the allegations against it.

[**35] Defendants argue that under *Boerstler v. American Medical Ass'n*, 16 F.R.D. 437, 447 (N.D. Ill. 1954), Plaintiffs have failed to properly plead the names of all persons involved in the alleged conspiracy and the years of their participation. As Defendants, point out, however, *Boerstler* did not require that the case be dismissed, only that the Defendants make a more definite statement.

Accordingly, with respect to Defendant AIREA, Defendants Motion to Dismiss is granted. With respect to the remaining Defendants, the Motion to Dismiss is denied.

2. Sherman Act *Section 1*

Section 1 of the Sherman Act [HN13](#) prohibits "every contract, combination . . . or conspiracy in restraint of trade." [15 U.S.C. § 1 \(1988\)](#). Despite this broad language, however, only unreasonable restraints violate this section. *Board of Trade v. United States*, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918). A plaintiff may demonstrate that a particular restraint is unreasonable either by demonstrating that the restraint falls within a narrow set of *per se* unreasonable restraints, or by conducting a "rule of reason" analysis to show that [**36] the restraint's anticompetitive effects outweigh any "redeeming virtues." Here, in Count IV, Plaintiffs allege that the Defendants' conduct constitutes a *per se* illegal boycott, or "concerted refusal to deal." Although the Court previously indicated that *per se* analysis would apply to this case, the Court now believes that a rule of reason analysis is called for.

their own individual benefits and purposes, with intent to benefit themselves individually and/or through their various businesses, each of them participated with defendants AIREA and Appraisal Institute in implementing and furthering the MAIs' takeover of the Society, the elimination of competition from SRPAs, and the other wrongful conduct described in this Complaint. More particularly:

(a) At all material times, each of defendants **LOUIE REESE III**, a resident of Alabama, and **RITCH LeGRAND**, a resident of Iowa, held the MAI designation. However, each also held a Society-conferred designation, and in that capacity Reese and LeGrand became presidents of the Society in 1989 and 1990 respectively and used their offices to urge the members of the Society to accept and vote for the AIREA "unification" scheme by which the MAIs effected the takeover of the Society and the crippling of competition from the SRPAs.

(b) At all material times, each of defendants **PATRICIA MARSHALL** and **BERNARD FOUNTAIN**, residents of New York, and **DOUGLAS BROWN**, a resident of South Carolina, held the MAI designation. All of them were and are members of the Appraisal Institute's Executive Committee (Marshall was also President of the Institute and AIREA's First Vice President), and exercise substantial influence and control over the Appraisal Institute's operations.

(c) In addition, defendant Fountain was a Society Vice-President in 1990 and is now a Director of the Society; and, though neither has ever earned nor held any designation conferred by the Society, defendant Marshall is currently the President of the Society and defendant Brown is currently the Treasurer of the Society.

(d) At all material times, each of the defendants **C. DAVID MATTHEWS**, **CLIFFORD E. FISHER, JR.**, **JOHN R. UNDERWOOD, JR.**, **BRUCE R. WILLMETTE**, **BONNIE D. ROERIG**, **DAVID F. PEATFIELD**, **DONALD L. BURKE**, **NANCY M. MUELLER**, **GERALD A. TEEL**, and **NORMAN E. HALL** has held the MAI designation. Each of those defendants is a member of, and together those defendants control and operate, the General Appraisal Board ("GAB") of the defendant Appraisal Institute. The GAB, which operates from the Institute's headquarters in Chicago, Illinois, controls the requirements for, and the conferring and promotion of, the MAI designation, and as a result of the MAIs' takeover of the Society also controls the promotion of the SRPA designation and the ability of SRPAs to become MAIs.

(d)[sic] At all material times, defendant **JOE R. PRICE** has held the MAI designation and has been the Regional Chairman of the Appraisal Institute's "Region X," which includes the entire State of Florida.

HN14 [↑] Boycotts are among those limited restraints that are considered per se illegal. See, e.g., *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959) (holding that a concerted refusal to deal was per se illegal despite significant competition in the relevant market); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941). Despite these conclusions, the Supreme Court's application of the per se rule to purported boycotts and concerted refusals to deal has been mixed. The Court has warned against "over-zealous" application of the doctrine and has stated that the rule should be applied only when the challenged practice threatens the "proper operation of our predominantly free-market economy" or when the challenged practice "facially appears" [**37] to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979).

HN15 [↑] In light of its increased concern over the applicability of the per se rule, the Supreme Court has "been slow to condemn rules adopted by professional associations." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986). This reluctance has been expressed by the Seventh Circuit with respect to both professional and trade associations. See *Wilk v. American Medical Ass'n*, 895 F.2d 352, 359 (7th Cir. 1990) (discussing professional associations), cert. denied, 496 U.S. 927, 110 L. Ed. 2d 642, 110 S. Ct. 2621 and cert. denied, 498 U.S. 982, 112 L. Ed. 2d 524, 111 S. Ct. 513 (1990); *Phil Tolkan Datsun v. Greater Milwaukee Datsun Dealers' Advertising Ass'n*, 672 F.2d 1280, 1285 (7th Cir. 1982) (discussing trade associations). Typically, professional and trade associations' rules of exclusion or restriction are evaluated under the rule of reason. See, e.g., *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598, 603-04 (7th Cir. 1984); [**38] *Koefoot v. American College of Surgeons*, 652 F. Supp. 882 (N.D. Ill. 1986).

Plaintiffs argue that *Phil Tolkan Datsun* created an exception regarding this Circuit's treatment of association rules. They contend that in that decision, the Seventh Circuit implied that **HN16** [↑] the per se rule for boycotts would apply to a trade association's membership requirements when membership in that trade association is necessary to compete effectively in the relevant market. See *Phil Tolkan Datsun*, 672 F.2d at 1285-86. While support for that assumption may be found in *Associated Press v. United States*, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945), and in *Silver v. New York Stock Exchange*, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963), application of the proposed rule often requires [**606] a court to beg the question of the reasonableness of the proposed restraint. Even then, in applying a per se analysis, Courts are often forced to take a "quick look" at the reasonableness of the challenged restraint.¹⁰ Here, there likely will be factual disputes over the relative competitive statuses of MAIs and SRPAs and over the restrictiveness [**39] of the rules governing an SRPA's conversion to an MAI. Given this required analysis, the court concludes that at least a "quick look" is required. Therefore, rather than engage in any abbreviated analysis of the challenged restraint, the Court will proceed under the "rule of reason".

Accordingly, with respect to Count IV, Defendants' Motion to Dismiss is granted, without prejudice to Plaintiffs' amending this Count to plead a claim based on the "rule of reason."¹¹

[**40] 3. Clayton Act Section 7

In Count V of their Second Amended Complaint, Plaintiffs allege that Defendants violated Section 7 of the Clayton Act, 15 U.S.C. § 18 (1988), by merging AIREA with the Society through the vehicle of the Appraisal Institute.

¹⁰ This approach includes a "quick look" at the reasonableness of the restraint. See 7 Phillip E. Areeda, *Antitrust Law* PP 1510c, 1511 (1986). **HN17** [↑] The "quick look" is a means by which the per se rule and "rule of reason" have been collapsed. The "quick look" means that the Court will first consider the justifications for the challenged restraint. A persuasive justification for an apparent illegal restraint may require further analysis which effectively converts a per se approach into a rule of reason analysis.

¹¹ In amending this Count, Plaintiffs are directed to be cautious about the inclusion of both institutional Defendants. As was indicated in the Court's discussion of Plaintiffs' section 2 claims, the Appraisal Institute and AIREA cannot conspire with one another under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984).

Section 7 [HN18](#)[↑] prohibits one corporation from acquiring another corporation where the effect of the merger "may be substantially to lessen competition, or to tend to create a monopoly." [15 U.S.C. § 18 \(1988\)](#).

Despite these allegations, Plaintiffs make no allegation regarding the market in which competition was lessened or monopolized. While either the market for non-residential real estate appraisal services or the market for establishing, conferring, and promoting professional training, qualifications, and designations for real estate appraisers, or both, might have been alleged, Plaintiffs do not state a claim without notifying the Defendants of the market said to be monopolized. See [United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593, 1 L. Ed. 2d 1057, 77 S. Ct. 872 \(1957\)](#) (indicating that identification of the relevant product and geographic markets is [\[**41\]](#) a "necessary predicate" to a section 7 claim). Accordingly, with respect to Count V, Defendants' Motion to Dismiss is granted.

C. The Lanham Act

In Count VI, Plaintiffs claim that all of the Defendants violated section 43(a) of the Lanham Act. That section, in relevant part, states:

[HN19](#)[↑] (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
 . . .
 (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
 shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

[15 U.S.C. § 1125\(a\) \(1988\)](#).

[HN20](#)[↑] To state a claim for false advertising under section 43(a), a plaintiff must allege that the defendants' advertisements were: (1) false and misleading; (2) actually or likely to deceive a substantial [\[**42\]](#) segment of their audience; (3) material in their effects on purchasing decisions; (4) touting goods or services in interstate commerce; and, (5) likely to injure the plaintiff. See [Cook, Perkiss & Liehe, Inc. v. Northern California Collection Serv., 911 F.2d 242, 244 \(9th Cir. 1990\)](#).

In paragraphs 30 and 31 of the Second Amended Complaint, Plaintiffs describe the allegedly disparaging advertising.¹² Plaintiffs [\[*608\]](#) contend that only two weeks after the implementation of the "unification" Plan, the

¹² These allegations are quoted as follows:

30. Having effectively disenfranchised SRPAs and drastically impaired their ability to preserve competitive equality by obtaining the MAI designation, as described in PP 28 and 29 above, following the "unification" defendants have not only also failed to promote the SRPA designation (contrary to their pre-unification promises, see P 25 above), but in fact have actively denigrated the SRPA designation relative to the MAI designation and thereby unfairly, deceptively, and anti-competitively advantaged MAIs (including themselves) at the expense of SRPAs (including plaintiffs). Among numerous examples are the following, all of which, whether produced and disseminated by the Appraisal Institute or by one of its Chapters, were and are under defendants' supervision and control:

(a) Within weeks of the "unification" effective date, an Appraisal Institute advertisement in Florida's most prominent real estate publication falsely stated that "**NOW THERE ARE ONLY TWO PROFESSIONAL DESIGNATIONS FOR APPRAISERS**" -- which the advertisement identified as:

"MAI Member Appraisal Institute SRA Senior Residential Appraiser" --

and reinforced the falsehood by "warning" the consuming public that

Appraisal Institute placed an advertisement in Florida's "most prominent real estate publication" which falsely stated that: "Now there are only two professional designations for appraisers." Those two designations were identified as the MAI and the SRA. No mention was made of the SRPA. Plaintiffs also complain that the Appraisal Institute has made several other advertisements promoting the SRA and the MAI designations without promoting the SRPA designation.

[**43] In the only example in the Second Amended Complaint of allegedly false advertising by an individual Defendant, Plaintiffs complain that Defendant Price, a regional chairman for the Appraisal Institute, caused an

"Many call themselves appraisers but not all appraisers are professionals."

This tacit disparagement of SRPAs carried the imprimatur of the official Appraisal Institute logo.

(b) Numerous Appraisal Institute advertisements in educational materials have made and continue to make no mention whatever of the SRPA designation. Instead, these advertisements feature two large logos (each over three times taller than the advertisement's largest type face) superimposed over the outline of the United States -- the SRA logo and (as the "lead" logo) the logo of "MAI - American Institute of Real Estate Appraisers."

(c) Defendants have fostered a campaign of promotions and advertising designed to convey the false and misleading impression that the SRPA designation is at best irrelevant or non-existent, if not actually inferior and non-professional. In addition to the examples noted above, these have included advertisements, such as one in the January 30, 1991 BANKER AND TRADESMAN magazine, asking the buying public the question:

"Who in the world could give you the fair and square value of an oval office?"

The answer (under a picture of the White House) once again disparaged SRPAs:

"A Real Estate Appraiser certified as MAI. A designation of such demanding requirements that only 3% of the appraisers in America have qualified. Experience. Knowledge. Ethics. Professionalism. Performance. These are the reasons courts, banks, developers, brokers, and government agencies for over fifty years have sought out and relied upon MAI appraisals. The next time you require a real estate appraiser, demand an MAI."

(d) Numerous advertisements placed by individual Chapters of the Appraisal Institute treat SRPAs and the SRPA designation as nonexistent. The Chapters identify themselves, for example, as

"APPRaisal INSTITUTE - CLEVELAND CHAPTER Awarding the MAI and SRA Professional Designations."

(e) Continuing the theme of SRPA non-existence and/or professional inferiority, an Appraisal Institute promotional piece put forth under defendants' supervision and control asserts -- *falsely*, since SRPAs are also members of the Institute -- that:

"The Appraisal Institute members hold two of the oldest and most respected professional designations in the real estate appraisal industry, the MAI (general appraisers specializing in all types of properties) and SRA (specialists in appraisals of individual properties of 1-4 units)."

(f) Even when defendants do not disparage SRPAs (and advantage MAIs) by omitting SRPAs outright, defendants' official publication descriptions denigrate SRPAs. Those publications state, for example, that MAIs "*are experienced*," while SRPAs (if mentioned at all) merely "*have experience*;" that MAIs do "*valuation and evaluation*," while SRPAs (if mentioned at all) merely do "*valuation*;" and that MAI is a "*professional membership designation*," while SRPA is merely a "*membership designation*."

31. Defendants' wrongful conduct described in P 30 above has not abated with time, despite numerous complaints and entreaties from plaintiffs. At the instance of defendant JOE R. PRICE, plaintiffs believe, still another disparaging advertisement was placed in the January, 1993 edition of *Florida Trend*, the best known real estate business publication in Florida, falsely stating that as a result of a recent merger "MAI and SRA **are the surviving designations . . .**" [Emphasis added]. Defendant Price, regional chairman for defendant Appraisal Institute's Region X, which includes Florida, is a competitor of, *inter alia*, plaintiffs Buckley and Buckley Appraisal Services, Inc. The address given in the advertisement is 1639 Forum Place, West Palm Beach, Florida, 33401, which on information and belief is the address of defendant Price's real estate appraisal business. On information and belief, defendant Price has also been instrumental in earlier disparaging advertising promulgated in Florida.

(Second Am. Compl. PP 30-31.)

advertisement to be placed in the January, 1993 edition of Florida Trend. The advertisement stated that as a result of a recent merger "MAI and SRA are the surviving designations . . ."

Although the Defendants contend that the advertisements alleged are neutral with respect to the SRPA, and merely puff up the MAI, see Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 945-46 (3d Cir. 1993); Cook, Perkiss & Liehe, Inc. v. Northern California Collection Serv., 911 F.2d 242, 245 (9th Cir. 1990), the substantive allegations against Defendants Price and the Appraisal Institute are sufficient to withstand a motion to dismiss. HN21[¹³] To state a claim for a Lanham Act violation, a plaintiff need not allege that the defendant's representations make direct comparisons to the plaintiff's product or even specifically mention the plaintiff's product. See Castrol Inc., 987 F.2d at 946. The representations [**44] alleged by Plaintiff might reasonably be understood to be misrepresentations. Plaintiffs have thus stated the substance of a claim.¹³

Defendants correctly point out, however, that Plaintiffs have stated claims only against the Appraisal Institute and Joe R. Price. No other Defendant is specifically connected to any alleged misrepresentation. Given that Plaintiffs have not alleged or demonstrated the applicability of any theory of vicarious liability, they do not state a claim against the other Defendants.

Accordingly, with respect to Defendants Appraisal Institute and Joe R. Price, on Count VI, Defendants' Motion to Dismiss is denied. With respect to the other Defendants, the Motion is granted.

D. [**45] Pendent State Law Claims

1. Illinois Antitrust Laws

In Count VII, Plaintiff Solano alleges a violation of the Illinois Antitrust Act, 740 ILCS 10/1 to 10/11 (Smith-Hurd 1993), incorporating by reference parts of each of the first five counts. As the Court treats the state antitrust law as it would federal law, see 740 ILCS 10/11 (Smith-Hurd 1993) (indicating that HN22[¹⁴] Illinois state courts should be guided by the federal antitrust law where the wording of the state act is identical to a federal provision), the Court concludes as follows. To the extent federal antitrust counts, or parts thereof, have been dismissed, the corresponding parts of this count are also dismissed. To the extent the previous counts remain, this count remains.

Accordingly, with respect to Count VII, Defendants Motion to Dismiss is denied in part and granted in part, as indicated above.

2. Illinois Consumer Fraud and Deceptive Business Practices Act

In Count VIII, Plaintiff Solano claims that the Defendants violated HN23[¹⁵] the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 to 505/12 (Smith-Hurd 1993). That act purports to prohibit all unfair methods of competition, but has been [**46] restricted to deceptive practices. Laughlin v. Evanston Hosp., 133 Ill. 2d 374, 550 N.E.2d 986, 993 (Ill. 1990).

A violation of the Illinois Consumer Fraud and Deceptive Business Practices Act based on misrepresentation or fraud must be [*609] plead with the particularity of Rule 9(b) of the Federal Rules of Civil Procedure. See Ramson v. Layne, 668 F. Supp. 1162, 1170 (N.D. Ill. 1987). To the extent that plaintiffs claim any of the Defendants violated section 505/2, Rule 9(b) is satisfied only with respect to Defendants Appraisal Institute and Price, based on the misrepresentations said to satisfy the Lanham Act.

Plaintiffs seek to include the remaining Defendants within the scope of this count by alleging, without specificity, that the Defendants' "foregoing schemes" and "foregoing conduct", presumably meaning the previously alleged violations of the Sherman and Clayton Acts, constituted violations of section 505/2. Without addressing the question

¹³ Defendants also contend that Plaintiffs have made no allegations with respect to their goods or services which have been misrepresented. This concern is adequately addressed by the Second Amended Complaint. In this Count, Plaintiffs seek damages for the misrepresentation of the quality of their appraisal services.

of whether these allegations afford sufficient notice, the Court concludes that Plaintiffs have failed to state a claim with respect to any of the remaining Defendants. According to the Supreme Court [**47] of Illinois, the act is "limited to conduct that defrauds or deceives consumers or others." *Laughlin v. Evanston Hosp.*, 550 N.E.2d at 993; see also *Sullivan's Wholesale Drug Co. v. Faryl's Pharmacy, Inc.*, 214 Ill. App. 3d 1073, 573 N.E.2d 1370, 1376, 158 Ill. Dec. 185 (Ill. App. Ct.) (citing *Laughlin*), appeal denied, 580 N.E.2d 136, 141 Ill. 2d 561, 162 Ill. Dec. 510 (Ill. 1991). Since Plaintiffs have failed to state a theory of vicarious liability, they state a claim only against the Appraisal Institute and Price.

Accordingly, with respect to Defendants Appraisal Institute and Price, on Count VIII, Defendants' Motion to Dismiss is denied. With respect to the remaining Defendants, the Motion is granted.

3. Defamation and Commercial Disparagement

In Count IX, Plaintiffs Blau, Solano, Buckley, and Buckley Appraisal Services, claim that the Defendants defamed them. To state a claim for defamation, a plaintiff must show that a defendant or defendants made a false statement concerning him, that there was an improper publication to a third party with the defendant or defendants at fault, and that the statement's publication caused damage to the plaintiff. *Krasinski v. United Parcel Serv.*, 124 Ill. 2d 483, 530 N.E.2d 468, 471, 125 Ill. Dec. 310 (Ill. 1988). [**48] Here at issue is whether the Plaintiffs have properly stated that they were damaged by the Defendants' alleged statements.

Defamatory statements may be considered defamatory per se or per quod. Statements are defamatory per se when "the words used are so obviously and materially harmful to the plaintiff that injury to his reputation may be presumed." *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 607 N.E.2d 201, 206, 180 Ill. Dec. 307 (Ill. 1992). Statements are defamatory per quod if when their defamatory character is not apparent on their face, and extrinsic facts are required to explain their defamatory meaning. *Id.* If a plaintiff properly pleads per se defamation, he need not make any specific allegations with respect to his damages; damages are presumed. However, if a plaintiff must demonstrate per quod defamation to prevail, he must specifically plead his special damages in his complaint. *Fed. R. Civ. P. 9(g)*.

Here, **HN24**[¹] Plaintiffs make no specific allegations with respect to their damages; they only allege that Defendants' statements injured their business reputations. These allegations are insufficient to state special damages. See *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 270 (7th Cir. 1983). [**49] Plaintiffs must therefore must show per se defamation to proceed with their defamation claim.

Initially, the Court notes that Plaintiffs make the general allegation that the Appraisal Institute publishes and disseminates materials which assert that MAIs hold a "professional membership designation", while SRPAs do not. These allegations lack the specificity required to state a claim. See *Derson Group, Ltd. v. Right Management Consultants*, 683 F. Supp. 1224, 1229 (N.D. Ill. 1988).

Plaintiffs do point to one specific advertisement said to falsely impute their lack of professionalism. Plaintiffs claim that the Defendants falsely claimed in the challenged advertisement that MAIs and SRAs are the "only two professional designations for appraisers." That statement, coupled with the statement "Many call themselves appraisers" [*610] but not all appraisers are professional," contained in the same advertisement, is argued to be defamatory. Plaintiffs contend that the statements that "Now there are only two professional designations for appraisers" and that "many call themselves appraisers but not all appraisers are professional," are per se defamatory because [**50] they impute lack of professionalism to SRPAs. **HN25**[¹] A statement that imputes an "inability to perform or want of integrity in the discharge of duties of office or employment" is one of four categories of statements that are considered defamatory per se in Illinois. *Id.*

In the opinion of the Court, Defendants statements may be understood to impute a lack of professionalism to SRPAs, assuming, as Plaintiffs claim, SRPAs are professional appraisers. The alleged statement clearly limits professional appraisers to MAIs and SRAs. To a knowledgeable reader, this statement has the same effect as the statement: "SRPAs are not professional appraisers."

Defendants contend that the statements are subject to [HN26](#)[↑] the "innocent construction" rule. The rule is stated as follows:

[A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable per se.

[Chapski v. Copley Press, 92 Ill. 2d 344, 442 N.E.2d 195, 199, 65 Ill. Dec. 884 \(Ill. 1982\)](#). [\[**51\]](#) Taken in the context of the facts as set out in the Second Amended Complaint, the alleged statements cannot be given a reasonably innocent meaning. Assuming SRPAs were professional appraisers at the time the statement was published, the statements stating that only other kinds of appraisers were "professional" cannot be innocently construed. That argument is thus rejected.

Defendants also argue that the statements were not defamatory because they did not specifically refer to any of the Plaintiffs or to SRPAs in general and therefore were not "obviously and naturally hurtful" so as to be considered defamatory per se. Defendants do not provide the Court with authority that supports this position, however. The Court will therefore let this claim proceed against the Appraisal Institute.¹⁴ No other Defendant is specifically alleged to have made the advertisement here found to be defamatory per se.

In addition [\[**52\]](#) to making its defamation allegations, Count IX is also predicated on the common law action of commercial disparagement. Although there is some dispute as to whether this type of action remains viable in Illinois, the Court, for the moment, accepts the reasoning of Judge Duff in [Richard Wolf Medical Instruments Corp. v. Dory, 723 F. Supp. 37, 42 \(N.D. Ill. 1989\)](#). In Dory, Judge Duff held that commercial disparagement was still actionable in Illinois.¹⁵

[HN27](#)[↑] To state an action for commercial disparagement, the plaintiff must show that the Defendant made false and demeaning statements regarding the quality of another's goods and services. [Zahran v. National Guardian Life Ins., 1993 U.S. Dist. LEXIS 4730](#), No. 90- C-907, [1993 WL 116738](#) at *3 (N.D. Ill. April 14, 1993) (Grady, J.). In the opinion of the Court, Plaintiffs [\[**53\]](#) have stated a claim under this standard. The statement regarded as defamatory might also be reasonably construed to demean the quality of Plaintiffs appraisal services.

Accordingly, Defendants Motion to Dismiss Count IX is denied with respect to the Appraisal Institute. The Motion is granted with respect to the remaining Defendants.

4. Usurpation of a Commercial Property Right

In Count X, Plaintiffs Blau, Solano, and Buckley claim that the Defendants unlawfully interfered with their right to pursue their business. This is an attempt to [\[*611\]](#) plead the common law tort of tortious interference. See [City of Rock Falls v. Chicago Title & Trust Co., 13 Ill. App. 3d 359, 300 N.E.2d 331, 333 \(Ill. App. Ct. 1973\)](#). [HN28](#)[↑] The elements of this tort are as follows: (1) the existence of a valid business expectancy; (2) knowledge of that expectancy by the interferer; (3) interference causing a termination of that expectancy; and (4) damages. [Id.](#)

Plaintiffs have alleged an expectancy in their SRPA designations. The Plaintiffs allegations with respect to purported anticompetitive activity are sufficient to permit this claim to proceed with respect to each of the Defendants, at least to a motion [\[**54\]](#) for summary judgment, if appropriate.

Accordingly, Defendants' Motion to Dismiss Count X is denied.

5. Breach of Fiduciary Duty

¹⁴ Contrary authority may be presented to the Court on a Motion for Summary Judgment, if appropriate.

¹⁵ The validity of the Wolf decision and the relationship between the commerical disparagement theory and the defamation theory may be raised on a motion for summary judgment, if appropriate.

In Count XI, Plaintiffs Blau, Solano, and Buckley claim that Defendants Marshall, Fountain, Brown, Reese and LeGrand breach fiduciary duties owed by virtue of their positions as officers of the Society.

The Second Amended Complaint alleges that Defendants Marshall and Brown are current officers of the Society. It does not allege that Marshall and Brown were officers of the Society at the time of "unification." Any breach of fiduciary duty by either Marshall or Brown, based on either's status as an officer of the Society, must be predicated on post-unification conduct. The Second Amended Complaint fails to allege any such conduct by the Society. While these Defendants might have been involved in a conspiracy post unification, there is no indication, or permissible inference, that Marshall or Brown breached a fiduciary duty. Neither had any power relevant to the Second Amended Complaint. According to Plaintiffs' allegations, the Society lacked the power to affect the SRPA designation post-unification. Accordingly, with respect to Defendants Marshall and [**55] Brown, the motion to dismiss, on Count XI, is granted.

With respect to Defendants Fountain, Reese, and Le Grand, Plaintiffs' claims may proceed.

Accordingly, Defendants' Motion to dismiss is granted in part and denied in part, as indicated.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is denied in part and granted in part. Plaintiffs are granted leave to file a final amended complaint within thirty days of the date of this Memorandum Opinion and Order.

ENTER:

JOHN A. NORDBERG

United States District Judge

DATED: February 4, 1994

End of Document



MCM Partners v. Boscarino

United States District Court for the Northern District of Illinois, Eastern Division

February 16, 1994, Decided ; February 17, 1994, Docketed

No. 92 C 5641

Reporter

1994 U.S. Dist. LEXIS 1824 *; 1994-1 Trade Cas. (CCH) P70,547

MCM PARTNERS, INC., Plaintiff, v. NICK BOSCARINO, O.G. SERVICE CORPORATION, ANDREWS-BARTLETT & ASSOCIATES, INC. d/b/a ANDREWS-BARTLETT EXPOSITION SERVICES, CHARLES (BUTCH) BARTLETT, BONNIE AARON, FREEMAN DECORATING COMPANY, DALE LEITHLEITER, and DOUG VAN ORG, Defendants.

Core Terms

alleges, conspiracy, Sherman Act, exhibition, contractors, seller, rent, antitrust, motion to dismiss, supplier, prices, monopolize, conspired, buyer, competitors, lifts, moving equipment, price fixing, violations, consumers, personnel, privity, rental, res judicata, forklifts, parties, fork, dismissal with prejudice, material handling, rental equipment

LexisNexis® Headnotes

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

Criminal Law & Procedure > Sentencing > Fines

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview

HN1 Regulated Practices, Trade Practices & Unfair Competition

Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who authorize, order, or do any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$ 5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court. [15 U.S.C.S. § 24](#).

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN2 Preclusion of Judgments, Res Judicata

For res judicata to bar a subsequent suit, the parties in both suits must be identical or in privity, the cause of action must be the same, and there must be a final judgment on the merits. There is no doubt that a dismissal with prejudice is a decision on the merits. The "cause of action" is the same since a "cause of action" for res judicata purposes is broadly defined as a single core of operative facts that give rise to a remedy.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN3 [down arrow] **Preclusion of Judgments, Res Judicata**

If defendants in a suit are not the same as the defendants in the first suit, they must show that they are in privity with them in order to benefit from the prior dismissal. Privity between parties is established where parties' interests are so closely aligned that they represent the same legal interests. Privity designates a person so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved or the term is sufficiently inclusive under the federal law of res judicata that a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

Section 1 of the Sherman Act proscribes any contract, combination or conspiracy in restraint of trade and condemns every person who makes such a contract or enters into such a conspiracy. Section 15 of the Sherman Act permits any person injured by the violation to sue for treble damages. Although all-encompassing on its face, § 1 of the Sherman Act prohibits only unreasonable restraints of trade. A restraint may be found unreasonable either because it fits within a class of restraints held to be per se unreasonable, or because it violates what has come to be known as the "rule of reason." 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. Certain types of conduct are so destructive of competition that they are considered per se violations of the Sherman Act. When a per se offense is alleged, a showing of anticompetitive effect is not required to establish a Sherman Antitrust Act violation, the conduct is considered anticompetitive without an inquiry into the precise harm caused. A § 1 plaintiff must show more than injury to a competitor; he must show an injury to market competitiveness.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN5**](#) [↓] Antitrust & Trade Law, Sherman Act

A conspiracy in violation of [§ 1](#) of the Sherman Act may be found where an agreement is found between two or more persons having a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

[**HN6**](#) [↓] Dismissal, Involuntary Dismissals

Defining the appropriate market is a question of fact, and it is fundamental that in deciding a motion to dismiss the well-pled allegations of the complaint must be taken as true.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN7**](#) [↓] Regulated Industries, Higher Education & Professional Associations

A Sherman Act claim requires that the plaintiff allege an anticompetitive effect in a relevant market.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN8**](#) [↓] Attempts to Monopolize, Elements

An attempt to monopolize has three elements: specific intent to monopolize, predatory or anticompetitive conduct, and a dangerous probability of success.

Antitrust & Trade Law > Clayton Act > General Overview

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

Contracts Law > Personal Property > Personality Leases > General Overview

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

[**HN9**](#) [↓] Antitrust & Trade Law, Clayton Act

Section 3 of the Clayton Act, [15 U.S.C.S. § 14](#), provides in pertinent part that it shall be unlawful for any person to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, for use, consumption, or resale within the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Judges: [*1] Plunkett

Opinion by: PAUL E. PLUNKETT

Opinion

MEMORANDUM OPINION AND ORDER

This is a suit alleging unfair competition in the rental of equipment to exhibition contractors at McCormick Place in Chicago. MCM Partners, Inc. ("MCM"), a would-be lessor of fork lifts, material handling and personnel moving equipment to exhibition contractors at the McCormick Place exposition center in Chicago, sued its competitor, O.G. Service Corporation ("OG") and OG's principal, Nick Boscarino. What makes this suit unusual is that MCM also sued two exhibition contractors it wants to do business with, Andrews-Bartlett Exhibition Services ("AB") and Freeman Decorating Company ("FDC"); AB's president, Charles Bartlett; its controller, Bonnie Aaron; as well as Dale Leithleiter and Doug Van Ort,¹ identified as an employee and an officer of FDC respectively. On November 18, 1992, MCM voluntarily dismissed Boscarino and OG, leaving these potential customers and their employees as the only Defendants. The Court has jurisdiction under the antitrust laws, [15 U.S.C. § 15](#), and RICO, 18 U.S.C. § 1964(c). FDC, Leithleiter, and Van Ort have moved to dismiss [*2] the Complaint.²

Count I purports to state a claim under RICO. According to the Complaint, prior to April 1991 the only suppliers of fork lift trucks and other equipment to be used at McCormick Place were OG and another company, AIM Industrial Lift Truck. In April 1991, MCM started supplying forklifts to AB at McCormick Place. In the fall of 1991, OG bought out AIM. Boscarino, identified as a "principal" of OG, is a steward for the International Brotherhood of Teamsters Local 714 ("Teamsters"). According to the Complaint, Boscarino used his power as Teamsters' steward to compel exhibition contractors to rent from OG. According to the Complaint, contractors other than AB have refused to do business with MCM, stating that they have been told that they will have trouble with the Teamsters if they rent from anyone other than OG.

In a letter dated January 17, 1992, [*3] (Compl. Exh. A), AB agreed to utilize MCM as its primary supplier of gas scooters and to rent from MCM fifty percent of its requirements for fork lift trucks for two shows and one hundred percent of its requirements for others. On April 14, 1992, AB sent two purchase orders to MCM for forklifts and scooters. (*Id.* Exhs. B, C.) In a letter dated April 17, 1992, (*id.*, Exh. D), AB cancelled these purchase orders.

MCM then brought suit No. 92 C 2621 in this court on April 20, 1992, against OG, Boscarino and others, alleging RICO violations and tortious interference with its contract with AB. This suit was settled and dismissed with prejudice on April 24, 1992. MCM alleges in the instant suit that as part of the settlement of the prior suit, AB, which was not a party to that suit, was to rescind its cancellation of the purchase orders. MCM alleges that it fulfilled the purchase orders but has not been fully paid.

¹ Named as Doug van Org in the Complaint, his attorneys spell his name Van Ort.

² The motion was initially referred to Magistrate Judge Weisberg.

MCM alleges that OG, Boscarino, Cliff Martin Larsen (a non-defendant), AB, Bartlett, and other unknown persons formed a racketeering enterprise that embarked upon a Scheme to use Boscarino's positions as a steward of Teamsters Local 714 and as president of OG to make OG [*4] the sole provider of fork lifts, material handling, and personnel moving equipment to exhibition contractors at McCormick Place. The Complaint alleges that Bartlett and Van Ort, as officers of AB and FDC respectively, caused AB and FDC, employers of employees represented by the Teamsters, to transfer things of value to Boscarino in violation of [29 U.S.C. § 186](#). These things of value were orders to rent fork lifts, material handling and personnel moving equipment from OG at inflated, above-market prices. As a result, MCM alleges it has been shut out of the market for equipment rentals at McCormick Place.

Count II alleges that AM, Bartlett, FDC, Leithleiter, and Van Ort conspired with Boscarino and OG to monopolize the rental of forklifts, material handling, and personnel moving equipment to exhibition contractors at McCormick Place in violation of [sections 1 and 2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2](#). MCM alleges that Leithleiter and Van Ort agreed with Boscarino that they would cause FDC to rent exclusively from OG and that Bartlett similarly agreed on behalf of AB. This, MCM alleges, substantially increases the [*5] price of trade shows held at McCormick Place and thereby affects interstate commerce. Count III alleges that the exclusive dealing arrangements between OG and AB and FDC violate section 3 of the Clayton Act, [15 U.S.C. § 14](#), because they tend to lessen competition or create a monopoly.

Count IV alleges that by acquiring the assets of AIM Industrial Lift Truck in the fall of 1991, OG was attempting to monopolize the market for forklifts, materials handling, and personnel moving equipment to the trade show industry in Chicago. Because OG has been dismissed as a Defendant, MCM is not pursuing this claim. (Pl.'s Br. at 12.)

Count V alleges that the individual Defendants are liable for violations of [15 U.S.C. § 24](#), which makes corporate officers, directors, and agents liable for acts of their corporations in which they participate.³

[*6] Count VI alleges the state-law tort of trespass to chattels, alleging that FDC's employees without MCM's consent used nine of MCM's fork lifts that had been parked and secured at McCormick Place. Count VII alleges that FDC breached a promise to pay \$ 30.00 for twenty gallons of gasoline, surely one of the smallest claims to be asserted in federal court in recent times.

Discussion

I. Res Judicata

The Defendants' motion first asserts that both the RICO and antitrust claims are barred by *res judicata* because of the dismissal with prejudice of MCM's first suit against OG and Boscarino. The parties agree that [HN2](#) for *res judicata* to bar a subsequent suit, the parties in both suits must be identical or in privity, the cause of action must be the same, and there must be a final judgment on the merits. [Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 69 L. Ed. 2d 103, 101 S. Ct. 2424 \(1981\)](#).

There is no doubt that a dismissal with prejudice is a decision on the merits. The "cause of action" is the same since a "cause of action" for *res judicata* purposes is broadly defined as "a single core of operative facts that give rise to a remedy." [Lim v. Central DuPage Hosp., 972 F.2d 758, 763 \(7th Cir. 1992\)](#), [*7] cert. denied, 113 S. Ct. 1586, 123

³

[HN1](#) Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$ 5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

L. Ed. 2d 153 (1993). Both suits allege the exclusion of MCM from the rental market at McCormick Place as a result of OG's alleged connection to the Teamsters' Union. It does not matter that the first suit did not assert an antitrust theory of liability; prior litigation acts as a bar not only to those issues raised and decided in the earlier litigation but also to those issues which could have been raised in that litigation. *Id.*

However, since the [HN3](#)⁴ Defendants in this suit are not the same as the defendants in the first suit, they must show that they are in privity with them in order to benefit from the prior dismissal. Privity between parties is established where parties' interests are so closely aligned that they represent the same legal interests. [*Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 688 \(7th Cir. 1986\)](#). The court in *Fitzsimmons* stated:

[Privity] designates . . . a person so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved . . . Or . . . the term is [*8] sufficiently inclusive 'under the federal law of res judicata [that] a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.'

[*Fitzsimmons*, 805 F.2d at 688 n.9](#) (quoting [*Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 493, 493-94 \(4th Cir. 1981\)](#) (citations omitted)). See also [*Kerr-McGee Chem. Corp. v. Hartigan*, 816 F.2d 1177, 1180 \(7th Cir. 1987\)](#) ("[A] person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.")

Defendants have not shown how this requirement has been met. Privity is a question of fact. [*Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 301 \(7th Cir. 1985\)](#). The only facts before us are those of the complaints in the two suits.⁴ Although the alleged roles of the parties are different in the two complaints, neither portray the interests of OG and the exhibition contractors AB and FDC as congruent or that OG served [*9] as their virtual representative.

In the earlier suit, AB was portrayed as a victim of OG's racketeering activity, forced by threats of labor disruptions to pay a higher than market price for inferior equipment. FDC was not mentioned. In this suit FDC and AB are portrayed as co-conspirators with OG in a conspiracy to keep OG's rivals out of the marketplace. Assuming this is true (although it is hard to see how they could benefit from such a conspiracy), MCM cites no authority for the proposition that alleged co-conspirators who conspire to commit a tort are [*10] in privity such that a judgment in favor of one bars a suit against another. (A finding in the first suit that no conspiracy existed might collaterally estop MCM, but there were no findings of fact in the first suit.) Nor does the fact that AB and FDC have exclusive contractual relationships with OG establish their privity with OG. As far as we can see, the only interest AB and FDC have in common with OG is their desire not to be sued by MCM or to pay damages, and that hardly suffices. *Res judicata*, therefore, does not bar this suit against the remaining Defendants.

II. RICO

Defendants contend that MCM's RICO claim should be dismissed because the Complaint does not state which subsection of [18 U.S.C. § 1962](#) the Defendants have violated. The Defendants also contend that the Complaint does not plead predicate acts of mail fraud with the particularity required by Rule 9(b), and that MCM has not properly alleged a pattern of racketeering activity. MCM does not respond to these contentions, but says that the defects are "mostly cosmetic" concerns that may be cured by amendment. (Pl.'s Br. at 12-13.) In light of the deficiencies pointed [*11] out by Defendants, Count I is hereby dismissed without prejudice.

III. Sherman Act Section 1

MCM's antitrust claims do not fit recognized patterns. Instead of a conspiracy of sellers to raise prices, we have a conspiracy of *buyers* to raise prices by entering into exclusive dealing arrangements, coerced by threats of labor

⁴ Since the first suit was dismissed by order of the court on Plaintiff's motion under Rule 41(a), no facts were established. It is doubtful that we would be required to accept as true the allegations of a prior complaint in deciding whether privity was established, absent facts giving rise to an estoppel against the plaintiff. Nevertheless, even accepting as true the relationships among the parties inferred from the first complaint, we cannot find privity here.

disruption by a union official in cahoots with the would-be monopolist. As a consequence the Plaintiff is unable to compete and prices for rental equipment at McCormick place have allegedly been artificially inflated. But what makes this suit truly extraordinary is that the Plaintiff is not suing the would-be monopolist but the victims forced to deal with it.

Count II purports to state a claim under both [sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2. HN4↑](#) [Section 1](#) of the Sherman Act proscribes any contract, combination or conspiracy in restraint of trade and condemns every person who makes such a contract or enters into such a conspiracy. [Section 15](#) permits any person injured by the violation to sue for treble damages. Although all-encompassing on its face, the Supreme Court has long held that [section 1](#) prohibits [*12] only *unreasonable* restraints of trade. See [Continental T.V., Inc. v. GTE Sylvania, Inc.](#), [433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). A restraint may be found unreasonable either because it fits within a class of restraints held to be *per se* unreasonable, or because it violates what has come to be known as the "Rule of Reason." 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." *Id.*

Certain types of conduct are so destructive of competition that they are considered *per se* violations of the Sherman Act. When a *per se* offense is alleged, a showing of anticompetitive effect is not required to establish a Sherman Antitrust Act violation -- the conduct is considered anticompetitive without an inquiry into the precise harm caused. [Continental T.V., 433 U.S. at 49-50](#); [Wilk v. American Medical Ass'n](#), [895 F.2d 352, 359 \(7th Cir. 1990\)](#). A [section 1](#) plaintiff must show more than injury to a competitor; he must show an injury to market competitiveness. See [*13] [Wigod v. Chicago Mercantile Exch.](#), [981 F.2d 1510, 1515 \(7th Cir. 1992\)](#).

The Complaint is unclear as to exactly what the alleged conspiracy or contract is. We see three possibilities. MCM did not distinguish these in its Complaint or in its brief. We do so here because the appropriate analysis differs as to each. In evaluating the Complaint on a motion to dismiss there is some tension between the rule that the motion should not be granted unless "no relief could be granted under any set of facts that could be proved consistent with the allegations," [Hishon v. King & Spalding](#), [467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 \(1984\)](#), and the rule that a court should not "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." [Associated Gen. Contractors, Inc. v. California State Council of Carpenters](#), [459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#).

A. Extortion as a [Section 1](#) Violation

The first possible conspiracy that may be inferred from the Complaint is Boscarino's and OG's alleged use of extortion to prevent exhibition contractors at [*14] McCormick Place from renting from other suppliers and to prevent other suppliers from renting to them. A conspiracy to injure competitors by unfair methods of competition can violate the Sherman Act if the effect is to restrain competition. [Havoco of America, Ltd. v. Shell Oil Co.](#), [626 F.2d 549, 556-58 \(7th Cir. 1980\)](#). Such claims are evaluated under the Rule of Reason. *Id.* Whether or not McCormick Place would otherwise be considered a distinct, "market," taking the allegations of the Complaint as true, it became one when OG and Boscarino claimed it as their "turf" and threatened other suppliers and those who dealt with them. This action made it possible for them to fix the rental prices for equipment to be used there. It may be inferred from the Complaint that OG threatens to damage the equipment of any supplier that rents to a McCormick Place exhibition contractor, with the result that OG is the sole supplier available.

The fundamental obstacle to this theory is that OG's alleged use of extortion to create barriers to the entry of other equipment suppliers has nothing to do with the remaining Defendants, none of which are alleged to have assisted [*15] or conspired with OG or Boscarino in threatening MCM or other potential equipment suppliers. Aside from conclusory allegations that they "conspired" with OG and Boscarino, all they are alleged to have done is rent equipment from OG and refuse to deal with MCM.

[HN5↑](#) A conspiracy in violation of [section 1](#) may be found where an agreement is found between two or more persons having "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." [American Tobacco Co. v. United States](#), [328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 \(1946\)](#).

See also [Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#). Nothing in the Complaint tends to show an agreement by AB or FDC to further OG's alleged plan to monopolize the market for rental equipment at McCormick Place or suggests a reason why they would want such a result. The only reasonable inference to be drawn from the facts alleged in the Complaint is that AB and FDC's agreement to deal exclusively with OG was motivated by their desire to avoid labor trouble and damage to the rented equipment, which hardly suggests a meeting of the minds with OG or Boscarino. [*16] The person who "agrees" to give a gunman his wallet is not a co-conspirator.

B. Horizontal Conspiracy

Although FDC and AB did not agree to OG's use of intimidation against them and MCM, they did agree to deal exclusively with OG.⁵ Can there be a violation in this agreement? According to the Complaint, the purpose of this conspiracy was to raise or stabilize the price for the rentals of forklifts, material handling and personnel moving equipment to exhibition contractors at McCormick Place in Chicago. (Compl. P 60.) We can infer that AB and FDC, as exhibition contractors at McCormick Place, are competitors. An agreement among competitors to fix the prices at which they will purchase can constitute a violation of [section 1](#) of the Sherman Act.

[*17] There are two problems with this theory. First, an allegation of "price fixing" is not a shibboleth that automatically opens the doors of the federal courthouse. According to the Complaint, AB and FDC did not agree to rent only at a particular price, only to rent from a particular source, with the alleged purpose of raising or stabilizing the prices paid. Presumably, AB and FDC would pay the same price, whatever OG chose to charge, but that is hardly what is meant by price fixing. Instead of buyers combining to dictate prices to the seller, they have combined in order to permit a single seller to dictate prices to them. Each individual seller "fixes" the price it will charge, and if more than one buyer agrees to pay that price, it is hardly a Sherman Act violation. An agreement by competitors to buy from the same source could conceivably be a Sherman Act violation, but it is not "price fixing" and not a *per se* violation.

MCM has not cited any case in which an agreement between purchasers for the purpose of "raising or stabilizing" the prices at which they purchase to be in violation of [section 1](#). We have serious doubts that this is a type of conduct the antitrust laws were intended [*18] to protect against, and this is a prerequisite for a cause of action. See [Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1283 \(7th Cir. 1983\)](#). Normally an antitrust plaintiff must show injury to consumers, not just to itself. [Wigod, 981 F.2d at 1515](#). Who are the consumers? AB and FDC are consumers of rental equipment, but to consider as an antitrust injury their self-inflicted "injury" resulting from their decision to pay higher prices would be absurd. To do so would mean any seller whose lower bid was not accepted by a purchaser could sue under the Sherman Act. As will be discussed later, MCM has not shown any effect on the market for rental equipment in Chicago, so no consumer injury may be found there.

What about AB's and FDC's consumers, those organizations that contract with them to stage exhibitions and trade shows? The ordinary consequence of an agreement to buy from the same higher-priced supplier is that the conspirators' costs are raised and their profits lowered. They will be able to pass the increased costs along to consumers only if they have market -- the ability to raise prices -- in their [*19] own market, here, the market for exhibition contractors.⁶ MCM alleges that AB and FDC together had seventy-five percent of the convention and trade show business in Chicago in 1992, (Compl. P 95), but does not allege that they have market power. Market

⁵ We note that the Complaint does not allege that they specifically agreed *not* to deal with MCM, but rather alleges that they agreed to deal exclusively with OG. We do not therefore have to consider whether the facts of this case could somehow be shoehorned into the "group boycott" category of Sherman Act violations. See [FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458, 90 L. Ed. 2d 445, 106 S. Ct. 2009 \(1986\)](#).

⁶ We ask whether AB and FDC have monopoly power only because it is a prerequisite to any harm to consumers resulting from their agreeing to pay a higher price for rental equipment. A supplier such as MCM would not have standing to complain of a monopoly among exhibition contractors. See [Associated Gen. Contractors, 459 U.S. at 537-43; In re Indus. Gas Antitrust Litig. \(Bichan\), 681 F.2d 514 \(7th Cir. 1982\)](#).

power should not be presumed from a seventy-five percent market share without additional information about the capability of non-conspiring firms to increase their market share and the costs of entry for new competitors. See [Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.](#), 784 F.2d 1325, 1335 (7th Cir. 1986). This information cannot be derived from the Complaint, and therefore MCM has not sufficiently pleaded injury to consumers in this market, either.

[*20] This count has another fundamental defect. Aside from the allegation that AB and FDC "combined and/or conspired" with OG, there are no allegations of any agreement *between* AB and FDC to deal only with OG. A boilerplate recitation of a conspiracy is insufficient to withstand a motion to dismiss. [Car Carriers, Inc. v. Ford Motor Co.](#), 745 F.2d 1101, 1107 n.4 (7th Cir. 1984). The pleaded facts must "outline or adumbrate" a Sherman Act violation. *Id. at 1106*. It is highly unlikely that such a conspiracy would exist under the set of facts pleaded. While we can infer from the allegations of the Complaint that it was in each firm's interest to deal exclusively with OG, there is nothing in the Complaint suggesting why they would "conspire" with each other to do so, and manifestly *unreasonable* inferences need not be drawn to sustain a complaint against a motion to dismiss. Cf. [Monsanto](#), 465 U.S. at 764 (plaintiff must present evidence tending to exclude the possibility that alleged conspirators acted independently). Without allegations of a true "horizontal" conspiracy between AB and FDC, no [*21] "horizontal price fixing" claim has been pleaded.

C. Exclusive Dealing

One possibility remains. Exclusive dealing contracts have occasionally been addressed under [section 1](#). An exclusive dealing contract is a "vertical" restraint, that is, it is an agreement between persons on different levels, here a lessor and lessee, rather than a "horizontal" agreement between competing buyers or sellers. Only if a vertical restraint is used to implement a price fixing scheme is it considered a *per se* violation of the Sherman Act. Otherwise it is judged under the "Rule of Reason." [Car Carriers](#), 745 F.2d at 1108. The plaintiff must show that the arrangement has an anticompetitive effect that outweighs any pro-competitive benefits.

Although MCM alleges that OG, AB, and FDC conspired to fix prices, an agreement between one lessor and two lessees cannot constitute price fixing as that term is understood in [antitrust law](#). Every seller "fixes" the price at which he will trade with a customer; that two purchasers agreed to pay one seller's price is hardly a Sherman Act violation. For "price fixing" to mean anything, it must refer to a plurality of sellers. Although [*22] the economic effect may be the same for the buyer, there is a qualitative difference between a scheme to coerce a buyer to buy from one seller at that seller's price and a conspiracy among sellers to ensure that whichever seller the buyer chooses the price remains the same.

The Seventh Circuit discussed the analysis applicable to an exclusive dealing arrangement in [Collins v. Associated Pathologists, Ltd.](#), 844 F.2d 473, 478 (7th Cir. 1988). The plaintiff, a pathologist, complained of a contract between a hospital and the defendant, a group of pathologists of which he was a former member. The contract designated the defendant medical group as the sole supplier of pathology services to the hospital.

The court followed [Tampa Electric Co. v. Nashville Coal Co.](#), 365 U.S. 320, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961), which had involved a protracted requirements contract between a public electric utility and a coal company. In determining whether the contract was an unreasonable restraint of trade, the Court focused on potential competitors of the coal company that had contracted with Tampa Electric. The Court concluded that the relevant market area was the area [*23] where the other coal companies that could have supplied Tampa Electric competed. *Id. at 330-33*.⁷

⁷ Although *Tampa Electric* was brought under section 3 of the Clayton Act, courts rely on its analysis for cases arising under [sections 1](#) and [2](#) of the Sherman Act. Since the proscription of section 3 of the Clayton Act is broader than that of [sections 1](#) and [2](#) of the Sherman Act, if a contract does not fall within the relevant market coverage of the former it is not forbidden by the latter. [Collins](#), 844 F.2d at 478 n.4.

Following this reasoning, the Seventh Circuit first noted that there is no separate market for pathology services among patients. [Collins, 844 F.2d at 477-78](#). The only market that could be affected, therefore, was the market for pathologists. The court found that this market was nationwide, with pathologists often traveling across the country to take positions in hospitals. Excluding the plaintiff from employment [*24] at one hospital had a negligible effect on that market, and the court affirmed summary judgment in favor of the defendants. [Id. at 478-79](#).

Applying that reasoning here, the relevant market is not rentals to exhibition contractors at McCormick Place. Just as the plaintiff pathologist in *Collins* could sell his services to other hospitals or to employers other than hospitals, the market here is all of the potential renters of the equipment that MCM offers.⁸ MCM does not allege and has given us no reason to suppose that the equipment it rents is suitable *only* for use at exhibition sites. Without some such allegation, it makes no sense to limit the market to McCormick Place in Chicago.

[*25] [HN6](#)[

Defining the appropriate market is a question of fact, and it is fundamental that in deciding a motion to dismiss the well-pled allegations of the complaint must be taken as true. Nevertheless, dismissal is appropriate here. As the Seventh Circuit noted in *Car Carriers*, antitrust litigation is too expensive to permit a plaintiff to subject a defendant to the expense of discovery when there is no reasonable likelihood that it can construct a claim from the events related in the complaint. [Car Carriers, 745 F.2d at 1106](#).

[HN7](#)[ A Sherman Act claim requires that the plaintiff allege an anticompetitive effect in a relevant market. [Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081, 1087-88 \(7th Cir. 1992\)](#). A market that is arbitrarily defined, a group of buyers or sellers alleged to be a market without supporting facts making it reasonable to treat them as such, has not been well pled. To permit a plaintiff to avoid a motion to dismiss by defining as a market any area of economic activity in which he has been injured would lead to absurdity. If the Marshall Field's store in the Chicago Loop refused to deal with a supplier [*26] of dress shirts, that supplier would have been excluded from a substantial part of the department store trade in the Chicago Loop, but the impact on the market for dress shirts in Chicago would be negligible. If a plaintiff could avoid a motion to dismiss by defining the relevant market as department stores in the Chicago Loop, it would be "tantamount to providing antitrust litigation with an exemption from Rule 12(b)(6)." [Car Carriers, 745 F.2d at 1106-07](#).

A plaintiff must plead sufficient facts to show that the plaintiff's proposed market is a reasonable hypothesis; otherwise the plaintiff is pleading a legal conclusion. Here, MCM pleaded no facts tending to show that the market for its rental equipment is limited to exhibition contractors. In the absence of such allegations, we take judicial notice that the words "forklifts, materials handling and personnel moving equipment" designate items of widespread industrial use. That the market for them would be limited to exhibition contractors is so improbable that MCM should not be permitted to proceed with the suit. MCM's claim under § 1 of the Sherman Act is dismissed.⁹

⁸ Defendants contended that furnishing forklifts, materials handling, and personnel moving equipment at McCormick Place cannot constitute a market for antitrust purposes because there are other exhibition facilities within the Chicago metropolitan area. (Defs.' Br. at 11.) This was the wrong argument since it conceded that rentals to exhibition contractors was the relevant market. On a motion to dismiss, we must accept as true that the vast majority of the convention and trade show business in Chicago is conducted at McCormick Place, (Compl. P 72), and that AB and FDC together have 75% of the convention and trade show business there, (*id.* P 95). If the market is rentals to exhibition contractors, MCM has probably alleged sufficient anticompetitive effect.

⁹ It may appear contradictory that we have treated the rental of equipment at McCormick Place as a market in discussing MCM's claim of attempted monopolization by extortion, but have denied it is a relevant market here. In the first case, however, we look at competition from the standpoint of lessees and potential lessees of fork lift trucks to be used at McCormick place. They presumably need the equipment at McCormick place, not somewhere else, and the alleged actions undeniably impact the price they must pay. On the other hand, in reviewing an exclusive dealing arrangement for a good or service, we are instructed to look to the entire relevant market for that good or service, not just the part from which the plaintiff claims to have been excluded. We are to look at the economic effects from the standpoint of the competing supplier, not the potential purchaser with particular needs. Thus, although those needing fork lifts to be used at McCormick place and those supplying them to the Chicago area

[*27] IV. Sherman Act Section 2

MCM's claim under section 2 of the Sherman Act cannot survive the dismissal of OG and Boscarino, since that section forbids monopoly or an attempt to monopolize. HN8¹⁰ An attempt to monopolize has three elements: specific intent to monopolize, predatory or anticompetitive conduct, and a dangerous probability of success. Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1413 (7th Cir. 1989). While the Complaint might have stated a claim against OG and Boscarino, it does not allege facts from which it can be inferred that AB or FDC were attempting to monopolize anything.

The individual Defendant officers of AB and FDC could conceivably be liable under section 2 if they had acted with the purpose of furthering OG's attempt at monopoly, but we do not read the boilerplate allegation that they "combined and/or conspired" with Boscarino and OG, (Compl. P 59), so broadly. We read it as alleging no more than that the individual officers agreed, on behalf of their respective companies, to rent equipment to be used at McCormick place solely from OG. The only reasonable inference from the Complaint is that they were [*28] acting in the interests of their corporations in doing so; there is no allegation that they received any personal benefit from the agreements to rent equipment from OG at inflated prices. Specific intent to monopolize has therefore not been pleaded with respect to them, either.

V. Remaining Claims

Count III, based on § 3 of the Clayton Act, 15 U.S.C. § 14, also cannot survive the dismissal of Boscarino and OG. This section prohibits exclusive dealing if the effect is substantially to lessen competition and defines liability in terms of a person who sells or contracts for sale; it does not provide for liability of the buyer.¹⁰ McGuire v. Columbia Broadcasting Sys., Inc., 399 F.2d 902, 906 (9th Cir. 1968); Genetic Sys. Corp. v. Abbott Lab., 691 F. Supp. 407, 414-15 (D.D.C. 1988).

[*29] As noted above, MCM is not pursuing Count IV. Count V, based on 15 U.S.C. § 24, creates liability for corporate officers, directors and agents for corporate antitrust violations. The Defendants contend that this is a penal provision and not applicable. However, the substantive provisions of the antitrust laws are penal, and 15 U.S.C. § 15 permits civil suits for treble damages by persons injured by violations. It is accepted that corporate officers, directors, and agents may be held liable in a civil action for antitrust violations they authorize. Brown v. Donco Enter., Inc., 783 F.2d 644, 646-47 (6th Cir. 1986). Whether this liability is derived from section 24 or ordinary tort law principles makes no difference. Nevertheless, this count depends upon a predicate antitrust violation and cannot survive dismissal of the other antitrust counts.

As no viable federal claim remains, there is no basis for federal jurisdiction and this Court must decline jurisdiction over the pendent state law claims. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966); Manor Health Care v. Guzzo, 894 F.2d 919, 922 (7th Cir. 1990). [*30]

Conclusion

meet in the same market whether there is an effect on competition depends upon which end of the telescope one is looking through.

¹⁰ HN9¹⁰ Section 3 of the Clayton Act, 15 U.S.C. § 14, provides in pertinent part as follows:

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

Defendants' motion to dismiss Count I (RICO) is granted, as MCM has not opposed the Defendants' contention that it has not been adequately pled. Dismissal as to this count is without prejudice.

Defendants' motion to dismiss Count II is granted as to [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), for failing properly plead either a horizontal conspiracy among the remaining Defendants, a vertical conspiracy with OG for the purpose of unfair competition, or that the exclusive dealing arrangements affected the relevant market. That count is dismissed with prejudice.

Defendants' motion to dismiss Count II is granted as to [section 2](#) of the Sherman Act, [15 U.S.C. § 2](#), because of MCM's failure to plead that the Defendants other than OG and Boscarino monopolized or intended to monopolize any market.

Defendants' motion to dismiss Count III is granted as to section 3 of the Clayton Act, [15 U.S.C. § 14](#), because that section applies only to sellers. This count is dismissed with prejudice.

Defendants' motion to dismiss Count IV is granted since MCM has withdrawn it.

Defendants' [\[*31\]](#) motion to dismiss Count V is granted since it applies only to corporate officers, directors or agents who participate in an underlying antitrust offense.

Defendants' motion to dismiss Counts VI and VII alleging trespass and breach of contract under Illinois law is granted. Those counts are dismissed without prejudice since there is no remaining basis for federal jurisdiction.

Counsel for MCM has periodically come close to Rule 11 sanctions. The claims dismissed herein ate a mish-mash. MCM's prosecution of this suit after dismissing OG and Boscarino left a racketeering count with no racketeer and an antitrust suit with no monopoly. If MCM refiles a RICO claim, it will be carefully scrutinized. If the problems addressed in this Opinion are ignored, sanctions will be imposed.

ENTER:

Paul E. Plunkett

UNITED STATES DISTRICT JUDGE

DATED: February 16, 1994

End of Document



Kabealo v. Huntington Nat'l Bank

United States Court of Appeals for the Sixth Circuit

December 6, 1993, Argued ; February 18, 1994, Decided ; February 18, 1994, Filed

Nos. 92-4359, 92-4368

Reporter

17 F.3d 822 *; 1994 U.S. App. LEXIS 2683 **; 1994 FED App. 0055P (6th Cir.) ***; 1994-1 Trade Cas. (CCH) P70,524

PHILLIP M. KABEALO and CHARLES L. KABEALO, Plaintiffs-Appellants, Cross-Appellees, v. THE HUNTINGTON NATIONAL BANK, Defendant-Appellee, Cross-Appellant.

Subsequent History: [\[**1\]](#) Certiorari Denied October 3, 1994, Reported at: [1994 U.S. LEXIS 5477](#).

Prior History: ON APPEAL from the United States District Court for the Southern District of Ohio. District No. 88-01178. John D. Holschuh, Chief District Judge.

Disposition: AFFIRMED

Core Terms

damages, statute of limitations, landfill, accrued, cause of action, district court, speculative, antitrust, speculative damages, summary judgment, four year, anti-tying, documents, tolled, projections, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

[HN1](#) [down arrow] Financial Institutions, Bank Holding Company Act

[12 U.S.C.S. § 1975](#) provides that a person injured by violation of the anti-tying provisions of [12 U.S.C.S. § 1972](#) shall be entitled to recover three times the amount of damages sustained by him.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Antitrust & Trade Law > Regulated Industries > Financial Institutions > 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
Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

HN2 [down] Financial Institutions, Bank Holding Company Act

The purpose and effect of [12 U.S.C.S. § 1972](#) is to apply the general principles of the Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking, without requiring plaintiffs to establish the economic power of a bank and specific anticompetitive effects of tying arrangements.

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > General Overview

HN3 [down] Statute of Limitations, Pleadings & Proof

When rules are in avoidance of the statute of limitations, the party seeking the benefit of them has the burden of proof to establish them. All presumptions are against him, since his claim to exemption is against the current of the law and is founded on exceptions.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN4 [down] Statute of Limitations, Time Limitations

Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. All courts that have written on the subject agree that it is the last overt act of the defendant, not any act of the plaintiff, that triggers the statute of limitations.

Counsel: For PHILLIP M. KABEALO, Plaintiff - Appellant Cross-Appellee: David A. Ison, ARGUED, BRIEFED, Scott A. Smith, Fusco, Smith & Mathews, Westerville, OH.

For HUNTINGTON NATIONAL BANK, Defendant - Appellee Cross-Appellant: Samuel Ronald Cook, Jr., ARGUED, BRIEFED, Porter, Wright, Morris & Arthur, Columbus, OH.

For MICHAEL DAVIS, Defendant - Appellee: Samuel Ronald Cook, Jr., ARGUED, BRIEFED, Porter, Wright, Morris & Arthur, Columbus, OH. For CHRISTOPHER L. WHITE, DONALD F. MOOREHEAD, Defendants - Appellees: Richard Douglas Wrightsel, Emens, Hurd, Kegler & Ritter, Columbus, OH.

Judges: Before: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

Opinion by: LIVELY

Opinion

[***1] [*823] LIVELY, Senior Circuit Judge. The plaintiffs appeal from summary judgment in favor of the defendants in this case that arose under the "anti-tying" provisions of the Bank Holding Company Act, [12 U.S.C. § 1971 et seq. \(1988\)](#) (the Act). The district court held that this action [***2] was barred by the Act's four-year statute of limitations, [12 U.S.C. § 1977\(1\)](#), rejecting the plaintiffs' contention that the statute of limitations was tolled under the facts of the case. We agree with the district court and, accordingly, affirm the judgment dismissing the action.

I.

The plaintiffs Phillip and Charles Kabealo owned all the stock in Buckeye Waste Control, Inc. (Buckeye), an industrial waste hauling company. Buckeye was a customer of and frequent borrower from the defendant Huntington National Bank (the bank). The plaintiffs alleged in their complaint that the bank violated the anti-tying provisions of the Act¹ in connection with two credit transactions, [**2] one in 1982 and one in 1984.

A.

In 1982, Phillip Kabealo discovered a landfill for sale (the Logan Landfill). When Kabealo's accountant, Robert Foster, approached the bank in October 1982 about a loan to purchase the landfill, the plaintiffs claim that the bank's loan officer refused to lend the Kabealos enough money to purchase the landfill unless [**3] Steve Hale, a business associate [***3] of the Kabealos and a customer of the bank, was joined in the deal. The bank denies that it conditioned making the 1982 loan on the Kabealos bringing in Hale. Nonetheless, on November 29, 1982, Kabealo and Hale submitted a proposal that the loan be made to Phillip Kabealo and Steve Hale, on behalf of Logan Waste Control (LWC), an Ohio corporation consisting of Kabealo, Hale and Max Gehle, the original owner of the Logan Landfill. The bank committed to the loan on or about December 1, 1982.

Shortly after purchasing the landfill, Phillip Kabealo began the application process for a "Permit to Install" (PTI) from the Ohio Environmental Protection Agency (the OEPA). Such a permit would allow the landfill, which had little available space, to be expanded and thus greatly increase its value. The administrative steps to complete the process were completed in September 1986 and the OEPA granted the permit in July 1987. According to Phillip Kabealo, he located a buyer in the summer of 1987 who wanted to purchase the Logan Landfill and was willing to pay \$ 45.9 million. This sale could not be accomplished, Kabealo claims, because Gehle and Hale sold their interests [**4] in the landfill to another company in September of 1987 for around \$ 3 million each. Kabealo claims that [*824] had he controlled 100% of LWC (and he would have if the bank had not required a co-owner), he would have made the sale at a great profit.

B.

After LWC acquired the landfill, Buckeye continued to expand, making several acquisitions that were financed through the bank. During this time, Kabealo hired Donald Moorehead as General Manager and Christopher White as Operations Manager for Buckeye. He gave each man a 25 percent equity interest in Buckeye.

Michael Davis, a loan officer at the bank, took charge of the Buckeye account in October 1984. On October 17, 1984, Davis met with Phillip Kabealo, White and Moorehead. According to the plaintiffs, the purpose of this meeting

¹ As pertinent here, [12 U.S.C. § 1972](#) provides:

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement--

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

....

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

....

was to discuss amortization of several Buckeye [***4] loans. According to the bank, the men discussed an additional \$ 250,000 loan. Notes made by Anthony Salvatore, a bank employee who was present on October 17, indicate that the meeting could have included both. On that day, Kabealo, White and Moorehead executed several documents, including a security interest in their Buckeye stock in favor of the bank.

Phillip Kabealo [**5] met with Davis again on October 18, 1984. According to Kabealo, Davis stated that the bank refused to amortize the notes unless Kabealo gave to White and Moorehead a total of fifty-two percent of the shares of Buckeye. (Since each man already owned 25 percent, this would require Kabealo to give each another 1 percent). Furthermore, according to Kabealo, Davis stated that if Kabealo did not give controlling interest in Buckeye to Moorehead and White, Davis would "flush [Kabealo] and this whole deal down the toilet."

On November 7, 1984, the Kabealos, Moorehead and White executed a close corporation agreement which accomplished the share distribution allegedly demanded by the bank. Shortly after these documents were executed, the Kabealos were fired as part of a "payroll reduction." In January of the following year (1985), the controlling shareholders removed Phillip Kabealo from the Board of Directors.

II.

The plaintiffs filed this action on November 7, 1988, four years to the day after they executed documents giving control of Buckeye to White and Moorehead, but more than six years after the alleged improper conduct of bank employees related to the Logan Landfill. Their complaint [**6] charged that in connection with both the 1982 and 1984 transactions and others the bank conditioned the extension of credit to LWC and Buckeye on the plaintiffs' providing "additional credit, property, or services" to the bank that were not usually required for such loans.

[**5] In addition to the bank, the complaint named as individual defendants bank loan officer Davis and Buckeye stockholders White and Moorehead. The complaint included several state law claims as well as numerous claims alleging violations of the Act. After the district court dismissed the individual defendants, the bank filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim. The district court denied this motion, but following discovery the bank filed a motion for partial summary judgment.

In the face of this motion the plaintiffs eliminated all claims under the Act but those related to the 1982 and 1984 transactions described above. The district court granted summary judgment on both claims, finding both barred under the Act's four-year statute of limitations. The court's judgment dismissed the federal claims with prejudice and the state law claims without prejudice. The plaintiffs [**7] appeal from summary judgment and the bank cross-appeals from the court's denial of its motion to dismiss.

III.

We treat the parties' arguments concerning the two claims separately.

A. The 1982 Claim

1.

The plaintiffs agree that their 1982 claim accrued in October of that year when the [*825] bank allegedly made an unlawful demand that Steve Hale be associated with Kabealo in LWC as a condition for granting a loan to purchase the Logan Landfill. Thus, unless tolled, the four-year statute of limitations would bar a cause of action based on this claim. The plaintiffs argue, as they did in the district court, that the statute was tolled because their damages were "speculative" until LWC received the PTI in 1987. They rely on the rule announced by the Supreme Court in Zenith Radio Corp. v. Hazeltine Research, Inc., [**6] 401 U.S. 321, 339, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971), that "even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." Applying this general rule specifically to *Zenith*, which involved a claim of a continuing [**8] conspiracy by the defendant to violate federal antitrust law, the Court stated:

In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the

cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted.

Id.

The plaintiffs maintain that their damages were entirely speculative so long as their request for a PTI was pending. They state that the value of a landfill depends on its size, and until it was known whether they could expand Logan Landfill its value "was somewhere between \$ 0 and \$ 10 million." Because their future damages were incapable of proof in October 1982, the plaintiffs argue, they could not have brought "a good faith action" then or at any time within four years. Relying on *Zenith*, they state that the cause of action as to those damages did not accrue until they became provable in 1987.

2.

The bank responds with several arguments. First, [**9] the bank contends that the speculative damages rule applies only to antitrust actions, not those brought under the Bank Holding Company Act. The bank points out that *Zenith* involved a continuing conspiracy in which "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by [***7] that act and that, as to those damages, the statute of limitations runs from the commission of the act." [401 U.S. at 338](#). In a case such as this one, where the plaintiffs contend that a single, discrete act of the defendant violated federal law, the defendant asserts that the reasoning of *Zenith* should not apply.

The bank argues further that even if the speculative damages rule does apply in Bank Holding Company Act cases, the plaintiffs have utterly failed to carry their burden of proving that their damages were speculative at the time of the bank's allegedly unlawful act and for four years thereafter. They rely specifically on the fact that the plaintiffs submitted five-year projections of income and cash flow to the bank in connection with loan applications for loans to LWC. Furthermore, by the time the statute [**10] of limitations ran in 1986, the plaintiffs had operated the landfill for four years and had a history of its financial return. A fact-finder could have calculated damages reasonably from this information, taking into account the fact that a favorable ruling on the PTI request could result in greater profits.

B. The 1984 Claim

Unlike the 1982 claim, the 1984 claim turns on the question of when the acts of the bank alleged by the plaintiff to have violated the Act occurred and thus started the period of limitations running.

1.

The plaintiffs argue that their cause of action for the 1984 claim accrued on November 7, 1984, when they executed the documents required to comply with the bank's demand that White and Moorehead be given a majority interest in Buckeye. Conceding, as they must, that the bank made the demand [*826] on October 18, 1984, the plaintiffs argue that their injury occurred when ownership of Buckeye changed on November 7, 1984.

[***8] 2.

The bank responds that the plaintiffs' own submissions to the district court, as well as other proof in the case, show clearly that any cause of action based on the bank's conduct with respect to the 1984 transaction occurred on October 18, 1984, [**11] at the latest. That was the date on which the bank committed the allegedly unlawful act—the demand that White and Moorehead be given 52% of the stock in Buckeye accompanied by a threat if the plaintiffs did not comply. The fact that the plaintiffs did not execute the documents required to comply with this demand until November 7, 1984 has no significance whatever. The bank cites numerous cases for the proposition that a cause of action for violation of an anti-tying provision of federal law accrues "when a defendant commits an act."

IV.

Again, we treat the claims separately, beginning with the 1982 claim.

A.

We disagree with the bank's argument that the speculative damages rule does not apply to cases under the Act. In explaining the rationale for the rule in *Zenith*, Justice White referred to "antitrust and treble-damage actions." [401 U.S. at 339](#) (emphasis added). The Act [HN1](#) provides that a person injured by violation of the anti-tying provisions of [§ 1972](#) "shall be entitled to recover three times the amount of damages sustained by him . . ." [12 U.S.C. § 1975](#). Thus, cases arising under the Act come within the [\[**12\]](#) explicit language of *Zenith*.

Furthermore, many courts have recognized that the purpose of the Act is to impose upon the banking industry the general restrictions of the antitrust laws. In discussing the text and legislative history of the anti-tying provisions of the Act, Judge Merritt, sitting by designation with the United States Court of Appeals for the Eleventh Circuit, wrote:

[\[***9\]](#) It appears, therefore, that [HN2](#) the purpose and effect of [§ 1972](#) is to apply the general principles of the Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking, without requiring plaintiffs to establish the economic power of a bank and specific anticompetitive effects of tying arrangements

[Parsons Steel, Inc. v. First Alabama Bank of Montgomery, N.A.](#), [679 F.2d 242, 245 \(11th Cir. 1982\)](#), rev'd on other grounds, [474 U.S. 518, 88 L. Ed. 2d 877, 106 S. Ct. 768 \(1986\)](#). See also [Campbell v. Wells Fargo Bank, N.A.](#), [781 F.2d 440, 443](#) (5th Cir.), cert. denied, [476 U.S. 1159, 90 L. Ed. 2d 721, 106 S. Ct. 2279 \(1986\)](#) (paraphrasing *Parsons Steel*).

The parties have not cited, nor [\[**13\]](#) have we found, a case under the Act in which the statute of limitations was tolled by applying the *Zenith* speculative damages rule. In [Lancianese v. Bank of Mount Hope](#), [783 F.2d 467 \(4th Cir. 1986\)](#), the court affirmed summary judgment for the defendant bank in a [§ 1972](#) action on the ground that the statute of limitations expired prior to the filing of the suit. The court held that the plaintiff's reliance on the speculative damages doctrine was "misplaced" because they "could have reasonably ascertained their damages and presented competent proof of them." [Id. at 470](#). The clear inference from the discussion of the *Zenith* rule is that in a situation where a plaintiff could not reasonably ascertain and present competent proof of damages in a case under the Act, the doctrine would apply.

B.

Although we conclude that the *Zenith* rule applies to claims of tying violations under the Act, that is just the initial step in disposing of the plaintiffs' 1982 claim. As in *Lancianese*, we must determine whether the plaintiffs in the present case have shown that their damages were actually speculative. In making this [\[**14\]](#) determination we examine decisions involving the anti-tying provisions of federal antitrust statutes.

[\[*827\] \[***10\]](#) In [Akron Presform Mold Co. v. McNeil Corp.](#), [496 F.2d 230, 233](#) (6th Cir.), cert. denied, [419 U.S. 997, 42 L. Ed. 2d 270, 95 S. Ct. 310 \(1974\)](#), we discussed rules that exempt parties from the effect of a statute of limitations as follows:

[HN3](#) Since the above rules are in avoidance of the statute of limitations, the party seeking the benefit of them has the burden of proof to establish them. All presumptions are against him, since his claim to exemption is against the current of the law and is founded on exceptions.

One of the "above rules" referred to was the speculative damages doctrine of *Zenith*.

In [Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.](#), [546 F.2d 570 \(4th Cir. 1976\)](#), an applicant that was eventually denied a cable franchise filed suit more than four years after the last overt act of the city council refusing to reconsider its application. The plaintiff claimed that loss of future profits could not be ascertained at the time of the city council's last act and that the statute of limitations was tolled [\[**15\]](#) under *Zenith*. In affirming summary judgment for the defendant, the court of appeals pointed out that the plaintiff had included with its original

application a projection of the number of subscribers it would attract and the gross receipts for the first five years of operation if it were awarded a franchise. *Id. at 573*. The court stated:

Since the projections were designed to induce the council to award a franchise, the district court could conclude, in the absence of evidence to the contrary, that they were rationally based on valid assumptions. Under these circumstances, we conclude that the damages which Telecasters sought were not too speculative to prevent the cause of action from accruing at the time of the last overt act, August 7, 1967.

Id.

[***11] The Charlotte Telecasters court stated that it applied traditional rules, as prescribed by the Supreme Court, in determining whether damages are speculative. "These cases teach that when the defendant's wrong has been proven, 'the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, juries are allowed [**16] to act upon probable and inferential, as well as direct and positive proof.'" *Id.* (quoting *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574 (1946)) (some interior quotation marks omitted).

In *Mir v. Little Company of Mary Hospital*, 844 F.2d 646 (9th Cir. 1988), the court rejected an antitrust suit plaintiff's claim that the statute of limitations was tolled because its damages were speculative. In *Mir* the plaintiff argued that his damages for the defendant's denial of certain surgical privileges at its hospital could not be determined until related state court proceedings were concluded. The court held that mere uncertainty as to the extent of damages will not prevent recovery under the federal **antitrust law**. The plaintiff could have presented evidence of projected lost income. This "probable and inferential" proof would have provided a reasonable basis for calculating damages. *Id. at 650*.

The court in *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261 (7th Cir.), cert. denied, 472 U.S. 1018, 87 L. Ed. 2d 615, 105 S. Ct. 3480 (1985), adopted the reasoning [**17] of *Charlotte Telecasters* in rejecting the plaintiff's reliance on the speculative damages rule to exempt it from the bar of the four-year statute of limitations. The court stated that absent special circumstances a plaintiff who could rely on predicted losses should not be permitted to "wait and see" if actual losses are realized before commencing an action for an antitrust violation. *Id. at 271*.

C.

Applying the foregoing principles, we conclude that the plaintiffs did not carry their burden of proving that their losses were so speculative as to excuse their failure to file [***12] this suit within the period of limitations. Their own projections and their actual experience during four years of operation would have been sufficient to provide the fact-finder with a reasonable basis for calculating their damages. If they felt that they could not present sufficiently exact evidence of damages within that time, they could have filed [*828] suit and requested a stay until the administrative proceedings before the OEPA were concluded. They acted at their risk in waiting until the statute of limitations had run and the district court correctly determined that their action [**18] was barred.

V.

Turning to the 1984 claim, we agree with the district court that any cause of action based on that claim accrued on October 18, 1984. Thus, the present action, which was commenced on November 7, 1988, is barred.

The Supreme Court stated in *Zenith*, "[HN4](#) Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." [401 U.S. at 338](#) (emphasis added). All courts that have written on the subject agree that it is the last overt act of the defendant, not any act of the plaintiff, that triggers the statute of limitations. We said so in *Akron Presform*, 496 F.2d at 233, and *Fontana Aviation, Inc. v. Baldinelli*, 575 F.2d 1194, 1195 (6th Cir.), cert. denied, 439 U.S. 911, 58 L. Ed. 2d 257, 99 S. Ct. 281 (1978), and we have found no published opinion from any court that holds to the contrary.

It is immaterial that the plaintiffs did not execute the documents which formally transferred control of Buckeye to White and Moorehead until November 7, 1984. The Act is concerned with injurious actions of banks that violate

its [**19] anti-tying provisions. The proscribed injury occurred when the bank made the allegedly unlawful demand on the plaintiffs, not when the plaintiffs complied.

We have examined the opinion in *Jackson v. Union National Bank of Macomb*, 715 F. Supp. 892 (C.D. Ill. 1989), which both parties have cited. That opinion merely [**13] holds that any violation of § 1972 occurred "at the time of the transaction in July 1981." *Id. at 896*. From this statement the plaintiffs in the present case argue that the 1984 "transaction" was not complete until November 7. This argument has no merit. Because the plaintiffs in *Jackson* were out of time regardless of what date in July the "transaction" occurred, it was not necessary for the court to determine the exact date. Moreover, the "transaction" referred to in *Jackson* was between the plaintiffs and the bank; the November 7, 1984, "transaction" relied upon by the plaintiffs was between them and two nondefendants. Nothing in *Jackson* detracts from the firmly settled rule that a cause of action for violation of § 1972 of the Act accrues when the defendant bank commits a prohibited act that injures [**20] the plaintiff.

CONCLUSION

The district court properly granted the bank's motion for summary judgment. Having reached this conclusion we find it unnecessary to consider the bank's cross-appeal. AFFIRMED.

End of Document



TEC Cogeneration v. Florida Power & Light Co.

United States District Court for the Southern District of Florida

February 21, 1994, Decided ; February 23, 1994, Filed

Case No. 88-2145-CIV-ATKINS

Reporter

1994 U.S. Dist. LEXIS 6313 *; 1994-1 Trade Cas. (CCH) P70,564

TEC COGENERATION, INC., and RRD CORP., as they are partners in SOUTH FLORIDA COGENERATION ASSOCIATES, THERMO ELECTRON CORPORATION, and ROLLS-ROYCE, INC., Plaintiffs, v. FLORIDA POWER & LIGHT COMPANY, FPL GROUP, INC., FPL ENERGY SERVICES, INC., WAYNE H. BRUNETTI, LARRY T. ATKINSON, JOE C. COLLIER, JR., and CLARK COOK, Defendants.

Core Terms

cogeneration, wheeling, rates, supervision, customers, plaintiffs', facilities, interconnection, anticompetitive, self-service, antitrust, immunity, regulation, energy, electricity, state policy, policies, articulated, defendants', proceedings, summary judgment, transmission, lobbying, anticompetitive conduct, public utility, state-action, generation, amended complaint, transmission line, anti trust law

LexisNexis® Headnotes

Energy & Utilities Law > Cogeneration & Independent Companies > General Overview

Governments > Federal Government > US Congress

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Cogeneration & Independent Companies > Public Utility Regulatory Policies Act > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN1 [down arrow] Energy & Utilities Law, Cogeneration & Independent Companies

Congress launched a special regulatory program for cogeneration in the Public Utility Regulatory Policies Act of 1978 (PURPA), [16 U.S.C.S. § 824a-3](#), when it directed the Federal Energy Regulatory Commission (FERC), in consultation with state public service commissions, to promulgate rules to facilitate the development of cogeneration. [16 U.S.C.S. § 824a-3\(a\)](#). Congress enacted PURPA to overcome the impediment to the development of cogeneration and the reluctance of some utilities to purchase electricity from, and sell electricity to, cogenerators. PURPA directed state utility commissions to implement and expand on the FERC rules at the state level. [16 U.S.C.S. § 824a-3\(f\)](#). PURPA exempts certain cogeneration facilities from public utility regulation if their power generation capability falls below the required threshold. [16 U.S.C.S. § 824a-3\(e\)](#).

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

HN2 [down arrow] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is mandated after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. The moving party has the initial burden of identifying the evidence which it believes shows an absence of a genuine issue of material fact. This burden may be discharged by demonstrating that there is an absence of evidence to support the non-moving party's case. If the moving party discharges this burden, the non-moving party may not rest upon mere allegation or denials, but must set forth specific facts showing that there is a genuine issue for trial. Summary judgment should be entered if, after a review of all the evidentiary material in the record, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Summary judgment is not a prohibited remedy in antitrust actions. In fact, summary judgment may be especially appropriate in an antitrust case because of the chill antitrust litigation can have on legitimate price competition.

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

Criminal Law & Procedure > Sentencing > Fines

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3 [down arrow] **Conspiracy to Monopolize, Sherman Act**

The Sherman Act, *15 U.S.C.S. § 2*, provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding \$ 10,000,000 if a corporation, or, if any other person, \$ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. A litigant may maintain a private antitrust action under *§ 2* if the action alleges both restraint of trade and monopolization actions.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Civil Procedure > Judgments > Enforcement & Execution > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN4 Sherman Act, Claims

A plaintiff has standing to sue if the court finds that the particular litigant before the court is entitled to have the court adjudicate the particular claim presented. To establish antitrust standing under [15 U.S.C.S. § 2](#), two requirements must be fulfilled after examination of the complaint. First, plaintiff must suffer an "antitrust injury," i.e., injury that arises from reduced competition. Such injury is established when plaintiffs plead and prove that the injury they have suffered derives from some anticompetitive conduct and is the type of injury the antitrust laws were intended to prevent. Second, the plaintiff must be an efficient enforcer of the antitrust laws. To satisfy the second prong, the court must balance a non-exhaustive list of factors which includes, in general, the direct, rather than the remote or speculative nature of the injury. Specifically, the factors may include: (1) whether the plaintiffs' damages claims are speculative; (2) whether the plaintiff can enforce an antitrust judgment efficiently and effectively; (3) whether there is a potential for duplicative recovery or complex apportionment of damages; and (4) whether a more direct victim of the alleged anticompetitive conduct exists.

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

HN5 Private Actions, Standing

So long as the facts alleged, viewed in the light most favorable to plaintiffs, indicate that plaintiffs have suffered an antitrust injury, then plaintiffs have met their threshold burden to show standing.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN6 Motions to Dismiss, Failure to State Claim

The Court may dismiss a complaint only if no relief could be granted under any set of facts that could be proved consistent with the allegations. Upon reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, the court must take the allegations of the complaint as true, liberally construing the complaint in favor of the plaintiff.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

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 > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Sherman Act > General Overview

HN7 Sherman Act, Defenses

The Sherman Act, [15 U.S.C.S. § 2](#), does not apply to anticompetitive restraints imposed by the states as an act of government. This is commonly known as the state-action defense. Under the defense, state regulatory agencies' and private parties' conduct is exempt from federal antitrust laws if it is undertaken pursuant to state regulation. The court uses a two-pronged test for determining whether state regulation of private parties is shielded from the federal antitrust laws. First, the challenged restraint to displace competition with regulation must be one clearly articulated and affirmatively expressed as state policy. Second, the state must supervise actively any private anticompetitive conduct.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN8 Exemptions & Immunities, Parker State Action Doctrine

A municipality's restriction of competition may sometimes be an authorized implementation of state policy. An authorized implementation of state policy occurs where a municipality's decision is substantively and procedurally correct.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Criminal Law & Procedure > ... > Driving Under the Influence > Blood Alcohol & Field Sobriety Testing > General Overview

HN9 Exemptions & Immunities, Parker State Action Doctrine

The clear articulation requirement of the state action exemption is established if the delegating statute explicitly permits the displacement of competition or if suppression of competition is merely the "foreseeable result" of what the statute authorizes. In order to determine whether there is a clear articulation of state policy, the statutes regulating the field must be examined. These statutes do not have to explicitly state what conduct is and is not permissible in order for that conduct to be undertaken pursuant to a clearly articulated state policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN10 Exemptions & Immunities, Parker State Action Doctrine

The court must give deference to the state agencies when those bodies exercise their authority in furtherance of state policy in a direct and tangible fashion.

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Cogeneration & Independent Companies > General Overview

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > Retail Wheeling

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Business & Corporate Compliance > ... > Electric Power Industry > State Regulation > Rate Setting & Tariffs

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

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

HN11 [blue icon] Pipelines & Transportation, Electricity Transmission

Florida promotes a policy favoring monopoly power in Florida electric utilities. Second, Florida encourages development of cogeneration facilities. This is evident from [Fla. Stat. ch. 366.051](#) (1991), which requires the electric utility in whose service area a cogenerator is located to purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator. [Fla. Stat. ch. 366.051](#). The cogenerator also has the option to sell such electricity to any other electric utility in the state. [Fla. Stat. ch. 366.051](#). The legislation also requires the Florida Public Service Commission, to establish guidelines for such purchases and to set rates at which a public utility must purchase power or energy from a cogenerator. [Fla. Stat. ch. 366.051](#). The rate must be equal to the purchasing utility's full avoided costs, defined to be the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators, such utility would generate itself or purchase from another source. Fla. Stat. ch. 355.051. The rates for the purchase of cogenerated electricity are limited to a utility's avoided costs in order to avoid utility customers subsidizing cogenerators. Furthermore, the statute allows a utility's customer to transfer power generated at one of the customer's facilities to another of the customer's facilities.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Civil Procedure > ... > Eminent Domain Proceedings > Pleadings > General Overview

Real Property Law > ... > Elements > Involuntary Acquisition & Diminution of Value > Takings

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > General Overview

HN12 [blue icon] Agency Rulemaking, Rule Application & Interpretation

Official agency action cannot be reinterpreted or explained by former agency officials. The motive of the governmental entity in taking the action, much less the motive of an individual officer, has no relevance to an agency's action.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Cogeneration & Independent Companies > General Overview

[**HN13**](#) [blue icon] Exemptions & Immunities, Parker State Action Doctrine

The Florida statutes governing the regulation of public utilities must be considered as extensive authority over the regulated entities. The statutes provide sufficient basis for the court to conclude that Florida has clearly articulated policies regarding utilities and cogenerators. Therefore, the court finds that the first state-action immunity requirement is met.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

[**HN14**](#) [blue icon] Exemptions & Immunities, Parker State Action Doctrine

The second prong of the state action exemption, active supervision, mandates that the state exercise ultimate control over the challenged anticompetitive conduct. The mere presence of some state involvement or monitoring does not suffice. This prong requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. The purpose of the active supervision inquiry is not to determine whether the state has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the state has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the state has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the state's own.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

[**HN15**](#) [blue icon] Exemptions & Immunities, Parker State Action Doctrine

Actual state involvement, not deference to private price fixing arrangements under the auspices of state law, is the precondition for immunity from federal antitrust law.

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Cogeneration & Independent Companies > General Overview

Energy & Utilities Law > Utility Companies > General Overview

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

[**HN16**](#) [blue icon] Antitrust Issues, Antitrust Immunity

The Florida Public Service Commission (FPSC), is the entity that establishes and enforces the guidelines for interconnection, self-service wheeling and many applicable price rates. Florida's regulatory scheme determines the initial inquiry into actual state involvement and direct FPSC supervision of the specific anticompetitive conduct concludes the examination. Since the FPSC does not directly supervise the anticompetitive conduct, a utility's actions are not entitled to state-action immunity.

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

Energy & Utilities Law > Cogeneration & Independent Companies > General Overview

Energy & Utilities Law > Cogeneration & Independent Companies > Utility Interconnection

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Energy & Utilities Law > Utility Companies > General Overview

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

Energy & Utilities Law > Utility Companies > Contracts for Service

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

Energy & Utilities Law > ... > Rates > Ratemaking Factors > General Overview

HN17 [] Oil, Gas & Mineral Interests, Purchase Contracts

Authority to apply the Florida utility and cogeneration statutes is vested in the Florida Public Service Commission (FPSC). FPSC's powers include the authority: to prescribe fair and reasonable rates and charges; to prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of Fla. Stat. ch. 366; to regulate and supervise each public utility with respect to its rates and service; through planning, development, and maintenance of a coordinated electric power grid throughout Florida, to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and to avoid further uneconomic duplication of generation, transmission, and distribution facilities; and to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. [Fla. Stat. ch. 366.05\(1\)](#), [366.04\(1\)](#) and [\(5\)](#), and [366.06\(1\)](#). The FPSC has adopted rules to calculate avoided costs rates and set forth requirements and standards for cogenerator-utility interconnection. The FPSC has also ordered and reviewed these tariffs, conducted proceedings to set rates for energy sold to cogenerators, issued declaratory statements and conducted adjudicatory proceedings in which rights and obligations of utilities and cogenerators were determined.

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Cogeneration & Independent Companies > General Overview

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > Retail Wheeling

Energy & Utilities Law > Electric Power Industry > Siting of Facilities

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN18[**Pipelines & Transportation, Electricity Transmission**

In order to encourage the development of cogeneration and small power production, the Florida Public Service Commission (FPSC), promulgated a rule which allowed a cogenerator to wheel its generated power to another utility through a host facility. Additionally, the FPSC rules provide that public utilities are not required to provide transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location unless the customer or the utility demonstrates that the provision of this service and the charges, terms, and other conditions associated with the provision of this service, are not likely to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers. The FPSC summarized this rule as signifying that public utilities were not required to provide transmission service to enable a Qualifying Facility to serve itself at more than one location unless it could be shown that it was unlikely that wheeling would cause an adverse economic impact on the utility's general body of ratepayers. Thus, in certain circumstances, self-service wheeling was permissible under the Florida scheme.

[Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview](#)

[Energy & Utilities Law > Antitrust Issues > General Overview](#)

[Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview](#)

[Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation](#)

HN19[**Exemptions & Immunities, Parker State Action Doctrine**

The Florida statutes governing the regulation of public utilities must be considered as extensive authority over the regulated entities. However, for a defendant to meet the second prong of the state-action defense, Florida must have actively supervised, substantially reviewed, or independently exercised judgment and control over the defendant's overall anti-competitive campaign. In the state supervision inquiry, the court must ascertain whether state officials had and exercised power to review particular anticompetitive acts of private parties and disapprove those that failed to accord with state policy.

[Civil Procedure > ... > Summary Judgment > Hearings > General Overview](#)

[Energy & Utilities Law > Antitrust Issues > General Overview](#)

[Energy & Utilities Law > Cogeneration & Independent Companies > General Overview](#)

HN20[**Summary Judgment, Hearings**

When there is a dispute as to whether a defendant acted in accordance with clearly articulated state policies supporting cogeneration projects, and the defendant's actions bring into question, not whether the Florida Public Services Commission (FPSC), properly ruled on a claim, but whether the FPSC ever had the opportunity to exercise power to review the specific anticompetitive acts which occurred prior to the FPSC hearing and to disapprove those that failed to accord with state policy, the defendant is not entitled to summary judgment pursuant to state action immunity.

[Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview](#)

Energy & Utilities Law > Antitrust Issues > General Overview

[**HN21**](#) [+] Exemptions & Immunities, Parker State Action Doctrine

When utility's actions regarding rates which they have the capability, authority and ability to alter, have not been reviewed by the Florida Public Safety Commission (FPSC), there is a genuine issue of material fact as to whether the FPSC supervised the utility's conduct for the purposes of state action immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

[**HN22**](#) [+] Exemptions & Immunities, Parker State Action Doctrine

The mere potential for state supervision is not an adequate substitute for a decision by the state.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Antitrust Issues > General Overview

[**HN23**](#) [+] Exemptions & Immunities, Parker State Action Doctrine

The state action immunity doctrine does not require that the state actively supervise every action taken by an entity with the monopoly power. It merely holds that state officials have and exercise power to review particular anticompetitive acts. The Florida legislature delegated rule-making authority and enforcement of those rules to the Florida Public Service Commission (FPSC). See [Fla. Stat. §§ 366.05\(1\)](#), [366.04\(1\)](#) and [\(5\)](#), and [366.06\(1\)](#). When FPSC had power to review anticompetitive acts but was not given the opportunity to exercise its authority to review actions towards plaintiffs., the utility does not establish the second requirement for state-action immunity.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

[**HN24**](#) [blue icon] Antitrust & Trade Law, Exemptions & Immunities

The federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government. This doctrine shields from the Sherman Act, [15 U.S.C.S. § 2](#), a concerted effort to influence public officials regardless of intent or purpose, and holds that efforts to influence certain legislative and executive governmental action do not violate the antitrust laws irrespective of their anticompetitive intent or effect. With respect to the stimulus producing the legislation governing the anti-competitive action, the court has held that an action of the state itself is exempt from antitrust liability regardless of the state's motives in taking the action. Thus, whether or not a group of private citizens urges a municipality to implement a regulation that ultimately provides a monopoly to that group is immaterial to the question of whether the state acted in a regulatory capacity.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

[**HN25**](#) [blue icon] Scope, Exemptions

There are certain exceptions to the Noerr-Pennington principle. The first occurs where 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. The sham exception includes circumstances where entities use the governmental process - as opposed to the outcome of that process - as an anticompetitive weapon. The purpose of delaying a competitor's entry into the market does not render lobbying activity a 'sham,' unless the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks. The commercial exception to Noerr doctrine is the final method upon which a plaintiff may establish antitrust liability. The doctrine is premised on the need to protect the [first amendment](#) right to petition the government from censure by the antitrust laws and the belief that the Sherman Act, [15 U.S.C.S. § 2](#), is concerned with economics and not with politics. When evaluating whether Noerr immunity applies, the court must not only look at the activity's impact, but also on the context and nature of the activity.

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

Torts > Public Entity Liability > Immunities > Judicial Immunity

[**HN26**](#) [blue icon] Exemptions & Immunities, Noerr-Pennington Doctrine

Another exception to the Noerr-Pennington doctrine applies when fraud is committed in an anticompetitive manner. However, fraudulent conduct overrides Noerr immunity only with respect to conduct in a judicial or quasi-judicial settings.

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

[**HN27**](#) [blue icon] Exemptions & Immunities, Noerr-Pennington Doctrine

Where an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no Noerr immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

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

Business & Corporate Compliance > ... > Real Property Law > Zoning > Building & Housing Codes

HN28 [+] Exemptions & Immunities, Noerr-Pennington Doctrine

If the alleged anticompetitive actions took place in the open political arena, then the conduct enjoys immunity from antitrust liability under Noerr. If, however, the conduct took place within the confines of a private standard-setting process, then the actions are not entitled to Noerr immunity. All Noerr exceptions emerged and have been interpreted narrowly under [First Amendment](#) principles. Because of this, the burden is on the plaintiff to show that Noerr immunity did not attach to the defendant's actions.

Judges: [*1] Atkins

Opinion by: CLYDE ATKINS

Opinion

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on defendants' Renewed Motions to Dismiss for Failure to State a Claim and for Lack of Standing and, in the alternative, Motion for Summary Judgment on the ground that defendants' conduct is immune from antitrust liability under the state-action and *Noerr/Pennington* doctrines. (d.e. 334). Upon due consideration of the parties' memoranda and relevant caselaw, the Court denies defendants' Renewed Motion for Summary Judgment (d.e. 334-1) and denies defendants' Motions to Dismiss for Failure to State a Claim and for Lack of Standing (d.e. 334-2 and -3, respectively). Specifically, the Court finds that the defendants have not satisfied both elements of the state-action immunity defense and plaintiffs have established the requirements necessary to meet the exception to the *Noerr/Pennington* defense. Therefore, defendants are not entitled to immunity from antitrust sanctions for their actions.

I. BACKGROUND

A. PARTIES

Plaintiff South Florida Cogeneration Associates ("SFCA" or "Joint Venture"), a Florida joint venture partnership, operates a power plant known as a "cogeneration [*2] facility,"¹ located in Miami, Florida. In 1983, TEC Cogeneration, Inc. ("TEC"), and Rolls-Royce, Inc. ("Rolls"), through subsidiaries TEC, and RRD Corp., respectively, formed the plaintiff SFCA to develop the cogeneration project at the Downtown Government Center ("DGC") in

¹ The term cogeneration refers to the operation of a facility that produces electrical and steam or forms of useful energy, such as heat. See [16 U.S.C. § 796\(18\)\(A\)](#). This process can be more efficient than conventional power generation, thereby conserving fuel.

Miami. SFCA operates the facility under contract with Dade, however, neither the County nor any of the plaintiffs owns the DGC's generation facilities.²

Plaintiff Thermo Electron Corporation [*3] ("Thermo") is also affiliated with SFCA, and both Thermo and Rolls are engaged in the cogeneration business in Florida and elsewhere. Some of the plaintiffs operate a cogeneration facility in downtown Miami under contract with Metropolitan Dade County, Florida ("Dade" or "County"), and others claim to have been involved in efforts to build and operate other cogeneration facilities in Florida Power & Light Company's ("FPL") service territory.

Defendant FPL is a public utility within an area including Miami, Florida. Defendant FPL Group, Inc., is a public utility holding company and is the parent corporation of FPL. Defendant FPL Energy Services, Inc. ("ESI"), is an unregulated, wholly-owned subsidiary of FPL Group Capital, Inc., which is a wholly owned subsidiary of FPL Group, Inc. ESI's primary purpose is the development of cogeneration projects.

All four individual defendants are executives of FPL. Defendant Wayne H. Brunetti is an Executive Vice President. Defendant Larry T. Atkinson is the Northeastern Division Vice President. Mr. Atkinson was the Director of Rates and Regulation of FPL from 1985 to 1988. Defendant Joe C. Collier, Jr., is a Senior Vice President of FPL. Lastly, [*4] Clark Cook is the Southern Division Vice President of FPL.

B. History of the Downtown Government Center Facility

Construction on the downtown twenty-seven (27) megawatt facility commenced in mid-1984 and the facility became operational at the end of 1986. Plaintiffs Thermo and Rolls supplied cogeneration services and equipment. The facility has proven to be several times larger than needed to supply electricity for the DGC.³ [*5] Accordingly, the County and/or plaintiff SFCA sought to find a use for the excess power capacity. SFCA chose not to sell power to FPL under the avoided cost tariffs and Florida Public Service Commission ("FPSC" or "Commission") rules. Nor did they elect to redistribute or "wheel"⁴ their power to another utility in the state. Instead, plaintiffs sought to distribute electricity to County-owned locations *outside* the DGC. Jackson Memorial was the principal target of those efforts. This suit commenced after the FPSC denied the County's petition for an order compelling FPL to wheel electricity to Jackson Memorial and after the County Board of Commissioners voted against construction of a distribution line from the facility to Jackson Memorial.

C. History of Cogeneration and its Regulation

HN1[] Congress launched a special regulatory program for cogeneration in the Public Utility Regulatory Policies Act of 1978 ("PURPA")⁵ when it directed the Federal Energy Regulatory Commission ("FERC"), in consultation with state public service commissions, to promulgate rules to facilitate the development of cogeneration. [16 U.S.C.](#)

² See *In re: Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of Self-Service Transmission*, Order No. 17510, Docket No. 860786-EI, 87 FPSC 5:32 (May 5, 1987); *infra* pp. 5-6.

³ In a lawsuit pending in state court, Thermo and Dade County are litigating who was to blame for the decision to build such a large facility. *TEC Cogeneration, Inc. v. Metro Dade County*, No. 92-08605-CA-06 (Fla. Cir. Ct. for the 11th Judicial Circuit). Two administrative proceedings, which occurred as an outgrowth of the state suit, are also pending. The first challenges the propriety of sales made by the DGC. See *petition of Metropolitan Dade County for a Declaratory Statement concerning the Sale of Cogenerated Power by South Florida Cogeneration Associates to Metropolitan Dade County*, Docket No. 930490-EQ (May 18, 1993) (petition for order that Downtown Government Center facility has been making improper retail sales of electricity). The second contests the fact that the DGC was a qualifying cogeneration facility under [16 U.S.C. § 796\(18\)\(B\)](#) since its inception. See *Metropolitan Dade County v. Energy Systems Division of Thermo Electron Corp.*, Docket EL93-45-000 (May 28, 1993) (petition to decertify the Downtown Government Center facility as a qualifying facility).

⁴ See [Almeda Mall, Inc. v. Houston Lighting & Power Co.](#), 615 F.2d 343, 352 n.16 (5th Cir.), cert. denied, **449 U.S. 870**, 66 L. Ed. 2d 90, 101 S. Ct. 208 (1980).

⁵ Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117, codified in part at [16 U.S.C. § 824a-3](#).

§ 824a-3(a). Congress enacted PURPA to overcome the impediment to the development of cogeneration and the reluctance of some utilities to purchase electricity from, and sell electricity to, cogenerators. See FERC v. Mississippi, 456 U.S. 742, 750-51, 72 L. Ed. 2d 532, 102 S. Ct. 2126, reh'g denied, 458 U.S. 1131, 73 L. Ed. 2d 1401, 103 S. Ct. 15 (1982). [*6] PURPA directed state utility commissions to implement and expand on the FERC rules at the state level. *Id.* at § 824a-3(f). PURPA exempts certain cogeneration facilities, including the one at issue, from public utility regulation, but only because the DGC power generation capability falls below the required threshold. *Id.* at § 824a-3(e).

Pursuant to the set of cogeneration-related rules adopted by the Florida legislature in 1981,⁶ plaintiffs prevailed upon Dade County to petition the FPSC for an order compelling FPL to use its transmission and distribution system to "wheel" power from the DGC facility to County's facilities at the Jackson Memorial Hospital/Civic Center complex and other County locations. *In re: Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of Self-Service Transmission*, Order No. [*7] 17510, Docket No. 860786-EI, 87 FPSC 5:32 (May 5, 1987). See Fla. Admin. Code. Rule 25-17.0882. Defining the term "self-service" as "the serving of oneself," the FPSC found that the arrangement at issue was not "self-service" because the "County had legal title to the building in which the electrical generating equipment [was] located . . . [but] the County [did] not have legal title to any of the equipment that [would] actually produce the power it [sought] to have wheeled by FPL." *In re: Petition of Metropolitan Dade County*, at 5:33 (emphasis added).⁷ After an 11-month administrative proceeding in which Thermo participated, the FPSC concluded that Dade's request did not comply with the FPSC cogeneration rule on "self-service" wheeling. *Id.* at 5:35-37. The FPSC found that the County did not generate the electrical energy because "it must first purchase the power from [SFCA] pursuant to the . . . [SFCA-County] contract." *Id.* at 5:37. The FPSC rejected the County's argument that it possessed equitable title in the equipment because the County only held an option to acquire [*8] title to the generating equipment from SFCA; but only after SFCA exercised its option to acquire title of the same from Florida Energy Partners. *Id.* This ruling was *not* appealed.

Plaintiffs also attempted to persuade the County to construct a distribution line to carry electricity from the DGC facility to Jackson Memorial. After negotiations, plaintiffs and Dade agreed on a proposed term sheet for the line, and the proposal was submitted to the County Board of Commissioners for decision. Plaintiffs lobbied for approval; defendants lobbied against. On October 4, 1988, the County Board voted 5-to-1 against construction of the line. Five weeks later, this suit was filed.

II. STANDARD OF REVIEW

HN2[] Summary judgment is mandated after "adequate [*9] time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), cert. denied, 484 U.S. 1066, 98 L. Ed. 2d 992, 108 S. Ct. 1028 (1988). The moving party has the initial burden of identifying the evidence which it believes shows an absence of a genuine issue of material fact. This burden may be discharged by demonstrating that there is an absence of evidence to support the non-moving party's case. Id. at 323-25. If the moving party discharges this burden, the non-moving party "may not rest upon mere allegation or denials . . . , but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). [*10] Summary judgment should be entered if, after a review of all the evidentiary material in the record, "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Summary judgment is not a prohibited remedy in antitrust actions. In fact, "the Supreme Court made clear that summary judgment may be especially appropriate in an antitrust case because of the chill antitrust litigation can

⁶ 1981 Fla. Laws ch. 81-131, § 1, currently codified as amended at Fla. Stat. Ann. ch. 366.051 (West Supp. 1993).

⁷ Florida Energy Partners, who leased the financed equipment to SFCA, maintained title to the equipment. *Id.* at 5:34.

have on legitimate price competition." *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988), cert. denied, 490 U.S. 1084, 104 L. Ed. 2d 670, 109 S. Ct. 2110 (1989) (citing *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)).

III. ANALYSIS

In this case, defendants do not dispute that the plaintiffs have adduced sufficient evidence from which a jury could conclude that its conduct was anti-competitive and exclusionary. Instead, FPL invokes two defenses to argue that its conduct is immune [*11] from antitrust liability, namely, the "state action" and *Noerr/Pennington* doctrines.⁸ Therefore, the Court will proceed as if defendants have engaged in such monopolistic activity. If either of the defenses properly apply, then summary judgment must be held in favor of defendants.

A. Lack of Antitrust Standing

This action arises out of alleged violations of [HN3](#) the Sherman Act, [15 U.S.C. § 2](#).⁹ [Section 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 [*12] thereof, shall be punished by fine not exceeding \$ 10,000,000 if a corporation, or, if any other person, \$ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." A litigant may maintain a private antitrust action under [Section 2](#) if the action alleges "both restraint of trade and monopolization actions." *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 351 (5th Cir.), cert. denied, 449 U.S. 870, 66 L. Ed. 2d 90, 101 S. Ct. 208 (1980). Here, unlike *Almeda Mall*, plaintiffs assert both actions to fulfill the requirements in order to maintain this suit.

[*13] In general, [HN4](#) a plaintiff has standing to sue if the court finds that "the particular litigant before the court is entitled to have the court adjudicate the particular claim presented." *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1570 (11th Cir. 1991). To establish antitrust standing under [Section 2](#) of the Sherman Act, two requirements must be fulfilled after examination of the complaint. First, plaintiff must suffer an "antitrust injury," i.e., injury that arises from reduced competition. *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1449 (11th Cir. 1991). See *Davis v. Southern Bell Tel. & Tel. Co.*, 755 F. Supp. 1532, 1534-37 (S.D. Fla. 1991) (J. Nesbitt). Such injury is established when plaintiffs "plead and prove that the injury they have suffered derives from some anticompetitive conduct and is the type [of injury] the antitrust laws were intended to prevent." *Todorov*, 921 F.2d at 1450; *Thompson*, 934 F.2d at 1571.

Second, the plaintiff must be "an efficient enforcer of the antitrust laws." *Todorov*, 921 F.2d at 1449. [*14] To satisfy the second prong, the Court must balance a non-exhaustive list of factors which includes, in general, the direct, rather than the remote or speculative nature of the injury. *Id. at 1451*. Specifically, the factors may include (1) whether the "plaintiffs' damages claims" are speculative, *id.*, (2) "whether the plaintiff can enforce an antitrust judgment efficiently and effectively," *id. at 1452*, (3) whether there is a "potential for duplicative recovery or complex apportionment of damages," *Davis*, 755 F. Supp. at 1535, and (4) whether "a more direct victim of the alleged anticompetitive conduct" exists. *Id.*

Plaintiffs assert that FPL, alone and in concert with others, used its monopoly power to prevent and defeat competition from cogenerators within FPL's service area. See Amended Complaint P 149. In paragraphs 30

⁸ Additionally, defendants argue that by bringing this case, plaintiffs are asking a federal jury to resolve issues that have been fully aired and resolved over the last twelve years by the FPSC and to reopen a legislative debate fought before the Dade County Board of Commissioners in 1987.

⁹ Originally, plaintiffs alleged violations of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), and violations of the Robinson-Patman Act, [15 U.S.C. § 13](#), in addition to the [Section 2](#) and state-law causes of action. Those claims, as well as all claims against each of the individual defendants, were voluntarily dismissed. See Order Amending This Court's Order on Pending Motions, filed February 17, 1994; Plaintiffs' Memorandum in Support of Motion for Leave to File Second Amended Complaint (d.e. 140) at 2.

through 146, the Amended Complaint lists alleged general and specific misconduct designed by the defendants to monopolize the market for electrical power.

Generally, FPL's alleged misconduct against cogenerators includes: (1) actions "to forestall competition [*15] from plaintiffs and other cogeneration facilities within FPL's service area, so as to secure a competitive advantage over such facilities, and so as to prevent them from establishing and expanding their operations within FPL's service area," *id. at P 33*; (2) a corporate policy "of approaching customers interested in the cost savings and other advantages associated with cogeneration and attempting to dissuade them from entering the cogeneration market," *id. at P 45*; (3) via manuals and reports, misrepresentation of "the economic efficiency of and [overestimation of] the costs of cogeneration in general and plaintiffs' facility in particular so as to deter potential entrants into the cogeneration business and . . . to deter potential customers for cogeneration," *id. at P 46*; (4) discriminatory practices "against plaintiffs with respect to services, rates and interconnection of facilities," *id. at Ps 35, 48-65*; ¹⁰ (5) manipulation of the avoided cost rate through (i) improper influencing of the calculation of its avoided costs, (ii) untimely notification of the purchase price for energy and (iii) inadequate disclosure of its method for calculating these costs, *id. [*16]* at Ps 66-68; (6) the use of franchises to defeat cogeneration, *id. at Ps 69-70*; (7) the use of an unregulated subsidiary, ESI, to restrain trade by competing with, underbidding and buying out other cogenerators, *id. at Ps 71-82*; and (8) attempts by FPL to cut off cogenerators' access to natural gas. *Id. at Ps 83-99*.

Specifically, FPL's anticompetitive conduct directed [*17] towards the DGC facility includes: (1) efforts to discourage Dade County from cogeneration by

(i) making false and misleading statements about the economic efficiency of cogenerated power, (ii) offering economic incentives to the County in order to retain the County as an electric power customer, (iii) falsely suggesting that cogenerated power would be "less reliable" than power from FPL . . . and (iv) suggesting that the price that the County would have to pay to FPL for "as-available" power in the event of a power shutdown or blackout . . . would make the risks of cogeneration prohibitive,

id. at P 103; (2) imposition of burdensome charges and obstacles to interconnection, back-up power and operating and maintenance services, *id. at Ps 105-08*; (3) encumbering plaintiffs with unreasonable insurance requirements, *id. at Ps 109-15*; (4) attempts to cut off plaintiffs' access to natural gas, *id. at 116-17*; (5) interference with plaintiffs' chilled water sales, *id. at 118*; (6) denial of access to essential facilities, ¹¹ *id. at Ps 119-24*; (7) interference with efforts to build a direct transmission line from the DGC to Jackson Memorial, both by offering [*18] unusual price breaks and free consulting services to Jackson Memorial and by improperly influencing County Commissioners to defeat the transmission line proposal, *id. at Ps 125-33*; (8) attempts to induce Dade to enter a new franchise agreement with FPL, including a condition that Dade not use cogeneration services for its own needs, *id. at Ps 134-35*; and (9) plans to acquire the DGC facility after its actions caused the DGC to go out of business, *id. at P 140*.

Applying the two-prong test to the above allegations, the Court finds that plaintiffs have established antitrust standing under [Section 2](#) of the Sherman Act, [15 U.S.C. § 2](#).

HN5 "So long as the facts alleged, viewed in the light most favorable to Plaintiffs, indicate that Plaintiffs have suffered an antitrust injury, then Plaintiffs have met their threshold burden." [Davis, 755 F. Supp. at 1536-37](#). As alleged [*19] in Count One of the Amended Complaint, the facts indicate that plaintiffs suffered an antitrust injury

¹⁰ These practices include incentives for

interruptible rates, time-of-use rates, deferral rates and other terms designed to lower the customer's electric bill and deter the customers from using cogenerated power, . . . sometimes referred to by FPL personnel as 'creative rates.' [These incentives] were not offered by FPL to all its customers, but were aggressively marketed to customers whom FPL had identified as being 'at risk' to cogeneration, including customers whom FPL had discovered to be **negotiating with the Joint Venture or with plaintiffs Thermo Electron Corp. or Rolls-Royce, Inc.**

Id. at P 59 (emphasis added).

¹¹ This includes FPL's failure to wheel SFCA's power to other County locations.

arising from FPL's alleged competition. Plaintiffs cite nine examples of injuries suffered by them, all of which indicate specific harm caused by FPL's anticompetitive actions. See *infra* pp. 11-12. FPL's actions directly prevented the Joint Venture from displacing FPL at an additional County site (Jackson Memorial) and directly affected the Joint Venture in its existing role as supplier to the County at the DGC. Amended Complaint at Ps 69-82, 100-139. Moreover, Thermo and Rolls allegedly abandoned plans to pursue cogeneration projects within FPL's service territory. *Id.* at P 32. As in *Davis*, the facts in the present case, viewed in favor of plaintiffs and in their best light, allows this Court to infer the nexus between the alleged Section 2 violation and plaintiffs' injuries. 755 F. Supp. at 1537 (citing Mr. Furniture v. Barclays American/Commercial, Inc., 919 F.2d 1517, 1521 (11th Cir. 1990)).

Additionally, the Court finds that plaintiffs allegations fulfill the efficient enforcement prong of the standing inquiry. [*20] As determined above, plaintiffs' injuries are neither speculative nor indirect. See Thompson, 934 F.2d at 1571. Plaintiffs have alleged lost profits of over \$ 80 million and project a cumulative loss of \$ 59 million from the DGC for the initial 16-year period of its operation. Amended Complaint at P 147. While Dade may be another victim of FPL's alleged anticompetitive conduct, the County's interests do not completely outweigh plaintiffs.

In Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983), the Supreme Court found that the injuries suffered were too speculative to support standing. There, "the Union's complaint allege[d that] the Union suffered unspecified injuries in its 'business activities.'" Id. at 541. The Court found that injured subcontractors and the coerced third-parties suffered a more direct injury than the members of the Union and "any such injuries were only an indirect result of whatever harm may have been suffered by 'certain' construction [*21] contractors and subcontractors." *Id.* Therefore, the Union was not the proper plaintiff and, based on the allegations of the complaint, was "not a person injured by reason of a violation of the antitrust laws." Id. at 546.

Here, plaintiffs' stake in the outcome and alleged harm are quite substantial and direct. In particular, plaintiffs have not been able to transmit power to other facilities, allegedly at a lost profit. Unlike *Associated*, denying plaintiffs "a remedy on the basis of its allegations in this case is . . . likely to leave a significant antitrust violation undetected or unremedied." Id. at 542 (emphasis added). Also, plaintiffs, as the direct competitor of FPL have the ability to enforce any antitrust judgment in favor of their claims. Finally, the Court cannot find any potential for duplicative recovery or complex apportionment of damages since the alleged conduct primarily affects the plaintiffs herein.

B. Failure to State a Claim

Next, the Court must answer the question of whether plaintiffs' allegations are barred because [*22] they failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Plaintiffs claim that FPL, alone and in concert with others, used its monopoly power to prevent and defeat competition from cogenerators within FPL's service area. See Amended Complaint P 149. In paragraphs 30 through 146, the Amended Complaint lists alleged misconduct designed by the defendants to monopolize the market for electrical power. As stated above, *infra* pp. 10-12, plaintiffs assert eight instances of FPL's misconduct against cogenerators in general and nine allegations of FPL's misconduct against plaintiffs in particular.

Plaintiffs contend that SFCA's only alternative, as a result of FPL's actions, has been to attempt to minimize its losses by selling excess power to FPL at the "as-available" avoided energy cost rate. Since economic viability of SFCA depended on this rate, and because the rate changed hourly, SFCA required hourly information. Plaintiffs allege that FPL refused to provide this information even though FPL provided the rates to other utilities on a regular basis. As a result, SFCA exported power to FPL when it was not economical to do so and missed the opportunity [*23] to export power when it would have been profitable to do so.

Additionally, plaintiffs include a pendent state claim in Count IV of their Amended Complaint. Plaintiffs state that FPL and two FPL corporate affiliates intentionally interfered with plaintiffs' advantageous business relationship with Dade. To wit, plaintiffs assert that, under the terms of their contract with Dade, the Joint Venture had a contractual interest in Dade's use of excess power from the DGC facility and FPL was aware that Dade's use of excess power

at County buildings outside DGC was critical to the expected profitability of the cogeneration project. *Id.* at Ps 155-62. For the two remaining claims, plaintiffs seek damages (before trebling) of \$ 80 million, plus injunctive relief.

HN6[] The Court may dismiss a complaint only if "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Gonzalez v. McNary*, 980 F.2d 1418, 1419 (11th Cir. 1993); *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Upon reviewing a motion to dismiss for failure to state a claim [*24] upon which relief may be granted, this Court must take the allegations of the complaint as true, liberally construing the complaint in favor of the plaintiff. *Burch v. Apalachee Community Mental Health Services, Inc.*, 840 F.2d 797, 798 (11th Cir. 1988).

Under the circumstances of this case, and based on the analysis herein, this Court cannot conclude that plaintiffs could not be granted relief under any set of facts as alleged in the amended complaint. Consequently, the Court finds that the assertions, taken as a whole and as true, state a claim upon which antitrust relief may be granted.

C. Defenses to this Antitrust Suit

The Court must determine whether FPL's actions against plaintiffs was conducted pursuant to Florida's policies regarding FPL's monopoly in the power transmission field. Plaintiffs allege that FPL and the other defendants impermissibly used their monopoly power to prevent and defeat competition from cogenerators within FPL's service area. Defendants do not dispute the factual allegations asserted by plaintiffs. Instead, defendants wield two defenses as an aegis to plaintiffs' complaint - the state-action and *Noerr/Pennington* [*25] principles.

The state-action doctrine provides that a private party cannot be subjected to antitrust sanction for conduct that comported with regulatory policies and was subject to active state supervision. Under the *Noerr/Pennington* doctrine, antitrust claims cannot rest on a defendant's efforts to secure government action, including action by state regulatory commissions and municipal and county governments. If any of these defenses apply to all of plaintiffs' claims and no exception exists, then summary judgment must be granted in favor of defendants.

1. The State-Action Doctrine

In *Parker v. Brown*, 317 U.S. 341, 352, 87 L. Ed. 315, 63 S. Ct. 307 (1943), the Supreme Court first enunciated the rule that **HN7[]** the Sherman Act does "not apply to anticompetitive restraints imposed by the States 'as an act of government.'" ¹² *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 370, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991) (quoting *Parker*, 317 U.S. at 352). This holding is commonly known as the state-action [*26] defense. Under the defense, state regulatory agencies' and **private parties'** conduct is exempt from federal antitrust laws if it is undertaken pursuant to state regulation. *Parker*, 317 U.S. at 350-52. ¹³ In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980), the court "set forth a two-pronged test for determining whether state regulation of private parties is shielded from the federal antitrust laws. First, the challenged restraint [to displace competition with regulation] must be 'one clearly articulated and affirmatively expressed as state policy' . . . Second, the State must supervise actively any private anticompetitive conduct." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985) (citations omitted). See also *FTC v. Ticor Title Ins. Co.*, 119 L. Ed. 2d 410, 112 S. Ct. 2169, 2175 (1992); *Hallie v. Eau Claire*, 471 U.S. 34, 40-47, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985); [*27] and *Davis*, 755 F. Supp. at 1537-42.

a. Clear Articulation

¹² *Parker* involved a program under California's Agricultural Prorate Act which restricted the marketing of privately produced raisins. There, the Court held that such a program did not violate the Sherman Act.

¹³ While the Court had not applied *Parker* immunity to local governments, it acknowledged "that **HN8[]** a municipality's restriction of competition may sometimes be an authorized implementation of state policy." *Colombia*, 499 U.S. at 370. The Court stated that an "authorized implementation of state policy" occurred where a municipality's decision is substantively and procedurally correct. *Id. at 371-72*.

HN9 The clear articulation requirement is established if the "delegating statute explicitly permits the displacement of competition" or if suppression of competition is merely "the 'foreseeable' [*28] result" of what the statute authorizes." *Colombia, 499 U.S. at 372-73* (quoting *Hallie, 471 U.S. at 41-42*).¹⁴ In order to determine whether there is a clear articulation of state policy, the statutes regulating this field must be examined. These statutes do not have to "explicitly state what conduct is and is not permissible in order for that conduct to be undertaken pursuant to a clearly articulated state policy." *Consolidated Gas Co. v. City Gas Co., 880 F.2d 297, 302 (11th Cir. 1989)*, vacated and remanded, 499 U.S. 915 (1991) (citing *Souther Motor Carriers, 471 U.S. at 63-64*).¹⁵

[*29] In *Colombia*, Columbia Outdoor Advertising, Inc. ("COA"), controlled greater than 95% of the relevant outdoor billboard advertising market. Omni Outdoor Advertising, Inc. ("Omni"), sought to enter into the market. Allegedly, COA impermissibly met with city officials to seek the enactment of zoning ordinances that would halt new construction of billboards. In effect, this action simultaneously allowed COA to retain their monopoly and to force Omni out of the new market.

As stated by the Court, the purpose of the Columbia zoning regulation was "to displace unfettered business freedom in a manner that regularly [had] the effect of preventing normal acts of competition." *Id. at 373*. Since suppression of competition was the foreseeable result of the statute's restrictions, the Court held that the state policy clearly articulated an authorization of anticompetitive conduct. Thus, the city's limitation on billboard construction was entitled to *Parker* immunity.

Florida statutes define two dominant policies regarding power generation and transmission. First, **HN11** Florida promotes a policy favoring monopoly power in Florida electric utilities. Second, Florida encourages development of [*30] cogeneration facilities. This is evident from the 1981 Florida legislature's authorization to the FPSC to adopt a set of cogeneration-related rules. 1981 Fla. Laws ch. 81-131, § 1, currently codified at *Fla. Stat. § 366.051* (1991). This statute **requires** "the electric utility in whose service area a cogenerator . . . is located [to] purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator." *Fla. Stat. § 366.051*. The cogenerator also has the option to "sell such electricity to any other electric utility in the state." *Id.*

The legislation also requires the FPSC to establish guidelines for such purchases and to "set rates at which a public utility must purchase power or energy from a cogenerator." *Id.* The rate, pursuant to FPSC's authorization, must be "equal to the purchasing utility's full avoided costs," defined to be "the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators . . . such utility would generate itself or purchase from another source." *Id.* The rates for the purchase of cogenerated electricity are limited to a utility's avoided costs in order [*31] to avoid utility customers subsidizing cogenerators.

Furthermore, the statute allows a utility's customer to transfer power generated at one of the customer's facilities to another of the customer's facilities. This process is referred to as "wheeling." As stated, public utilities

shall provide transmission or distribution service to enable a retail customer[, i.e., plaintiffs,] to transmit electrical power by [plaintiffs] at one location to [plaintiffs'] facilities at another location, if the commission finds that the provision of this service, and the charges, terms, and other conditions associated with the provision of this service, are not likely to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers.

Id. (emphasis added).

¹⁴ See also *Lease Lights, Inc. v. Public Service Co., 849 F.2d 1330, 1333 (10th Cir. 1988)*, cert. denied, **488 U.S. 1019, 102 L. Ed. 2d 807, 109 S. Ct. 817 (1989)**.

¹⁵ **HN10** The Court acknowledges that it must give deference to the "state agencies when those bodies exercise their authority in furtherance of state policy in a direct and tangible fashion." *Energy Productivity Systems, Inc. v. Public Service Company of New Mexico*, Slip. Op. 88-0852-CIV-JEC (D.N.M. June 25, 1990).

Plaintiffs argue that FPL's conduct was not pursuant to the clearly articulated and affirmatively expressed state policy to displace competition. Here, plaintiffs claim, and the Court agrees, that the Florida regulatory scheme was intended to *promote* competition between electric utilities and cogenerators. [*32] PURPA was established by Congress to create competition in the electric power generation market by removing barriers to the development of cogeneration and Florida's regulatory scheme specifically was developed to implement PURPA. See [Fla. Stat. Ann. § 366.051](#). Plaintiffs maintain that affidavits, FPL's continuing refusal to wheel SFCA's power and FPL's Strategic Energy Business Studies ("SEBS") all generate genuine issues of material fact on the question of whether FPL's actions conformed to clearly articulated state policies.

First, plaintiffs contend that affidavits of two former FPSC Chairmen confirm that Florida's policy promotes competition between utilities and cogenerators. See Affidavits of John R. Marks, III at PP 7-11 (Sept. 20, 1990) and Katie Nichols at P 7 (Sept. 20, 1990). According to plaintiffs, the affidavits attest to the fact that FPL acted contrary to Florida policy favoring cogeneration and its actions were not brought to the FPSC's attention, much less reviewed or actively supervised.

Nevertheless, [HN12](#) official agency action cannot be reinterpreted or explained by former agency officials. In [Manatee County v. Estech Gen. Chemicals Corp., 402 So.2d 75, 76 \(Fla. 2nd DCA 1981\)](#), [*33] the court held that a petitioner cannot seek answers from a former county commissioner regarding his motives in denying an application for development of land in an action for reverse condemnation. There, the court held that "the motive of the governmental entity in taking the action, much less the motive of an individual commissioner in voting, has no relevance to this action, and, moreover, we do not see any path from the questions leading to relevant matter." *Id.* See also [Kent Corp. v. NLRB, 530 F.2d 612, 620-21](#) (5th Cir.), cert. denied, 429 U.S. 920, 50 L. Ed. 2d 287, 97 S. Ct. 316 (1976) (probing mental processes and motives of individual decision-makers, rather than questioning the objective legal validity of the institutional decision is "inconsistent with a basic principle of administrative law"); [Hillsborough County v. Pinellas County, 425 So.2d 1196, 1197 \(Fla. 2nd DCA 1983\)](#) (motive of commissioner irrelevant absent a claim of fraud). Since the Court may only consider evidence that will be admissible at trial, [Fed. R. Civ. P. 56\(e\)](#), the affidavits [*34] may not be considered when evaluating the merits of the Motion for Summary Judgment.

Next, plaintiffs state that FPL's continuing refusal to wheel is also directly contrary to Florida's policy. The Court recognizes that a utility has a "duty to take all prudent actions to minimize the adverse impacts of revenue losses to its ratepayers, including the voluntary provision of wheeling when it is reasonably likely that an even greater revenue loss would occur." ¹⁶ However, because the FPSC conclusively determined that the DGC facility was not a self-service wheeler, see Section I.C., *infra*, defendants cannot wheel power to Jackson Memorial. Defendants' refusal to do so is not contrary to, but consistent with, Florida's policies regarding cogeneration.

Finally, plaintiffs claim that FPL's SEBS identify FPL's policies regarding cogeneration and demonstrate [*35] the anticompetitive threat against them. Defendants, however, state that plaintiffs only cite from the work papers and draft SEBS, not final SEBS reports. Brunetti Deposition I at 115. Defendants claim that the final SEBS reports became FPL policy after a two-year period of study and did not form the basis for FPL's policies.

The interpretation of the SEBS reports is a matter of fact having a bearing on the issue of whether FPL's actions conformed with clearly articulated state policies. Since parties offer two explanations regarding the SEBS, there is a genuine issue of material fact which cannot be resolved by this Court.

[HN13](#) The Florida statutes governing the regulation of public utilities must be considered as extensive authority over the regulated entities. See *infra* pp. 20-21. The statutes provide sufficient basis for the Court to conclude that Florida has clearly articulated policies regarding utilities and cogenerators. Therefore, the Court finds that the defendants have established the first state-action immunity requirement for all actions except those contained in FPL's SEBS.

¹⁶ *In re: Petition of W.R. Grace & Co. for a Declaratory Statement*, Order No. 17389, Docket No. 861180-EU, 87 FPSC 4:147 (Apr. 9, 1987).

b. Active Supervision

HN14 [↑] The second prong, active supervision,

mandates that the State [*36] exercise ultimate control over the challenged anticompetitive conduct. . . . The mere presence of some state involvement or monitoring does not suffice. . . . This prong . . . requires that **state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.** Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Ticor, 112 S. Ct. at 2177 (quoting *Patrick v. Burget, 486 U.S. 94, 100-101, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)*) (emphasis added).

The purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement [*37] among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

Id.

Midcal, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980), provides guidance to determine the level of state supervision necessary for immunity from federal law. In *Midcal*, the Supreme Court invalidated a California statute forbidding licensees in the wine trade from selling below prices set by the producer. There, the Court held that **HN15** [↑] *actual state involvement, not deference to private price fixing arrangements under the auspices of state law, is the precondition for immunity from federal antitrust law.* *Id. at 105-106.* Since absence of state participation in the mechanics of the price posting was so apparent, the Court held that the requirement of active supervision had not been met.¹⁷ *Id.*

HN16 [↑] Here, the FPSC is the entity that establishes and enforces the guidelines [*38] for interconnection, self-service wheeling and many applicable price rates. Florida's regulatory scheme determines the initial inquiry into actual state involvement and direct FPSC supervision of the specific anticompetitive conduct allegedly committed by defendants concludes the examination. Since the Court finds that the FPSC did not directly supervise the specific anticompetitive conduct allegedly committed by defendants, FPL's actions are not entitled to state-action immunity.

[*39] (1) Florida's Statutory Scheme

HN17 [↑] Authority to apply the Florida utility and cogeneration statutes is vested in the FPSC. The Commission's powers include the authority: "to prescribe fair and reasonable rates and charges;" "to prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter;" "to

¹⁷ See also *Patrick v. Burget, 486 U.S. 94, 100-105, 100 L. Ed. 2d 83, 108 S. Ct. 1658, reh'g denied, 487 U.S. 1243, 101 L. Ed. 2d 952, 108 S. Ct. 2921 (1988)* (where there was no proof that Oregon's Health Division, Board of Medical Examiners, or judiciary could supervise private peer-review decisions regarding hospital privileges to determine whether they comport with state regulatory policy and to correct abuses, active state supervision was not established).

But see *Colombia, 499 U.S. at 372-73* (no more is needed to verify a city's active supervision when it has zoning power over the size, location and spacing of billboards); *Nugget Hydroelectric L.P. v. Pacific Gas and Electric Co., 981 F.2d 429, 435 (9th Cir. 1992), cert. denied, 124 L. Ed. 2d 247, 113 S. Ct. 2336 (1993)* (existence of published Commission decisions based on state statutes and state implementing regulations was enough to provide active state supervision).

regulate and supervise each public utility with respect to its rates and service;" through "planning, development, and maintenance of a coordinated electric power grid throughout Florida[,] to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and [to] avoid . . . further uneconomic duplication of generation, transmission, and distribution facilities;" and "to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service." [Fla. Stat. 366.05\(1\)](#) (1991), 366.04(1) and (5) (1991), and 366.06(1) (1991), respectively.

Since PURPA was enacted in 1978, the FPSC has engaged in extensive rulemaking, ratemaking and adjudicatory proceedings concerning cogeneration.¹⁸ For example, the FPSC has adopted rules [*40] to calculate avoided costs rates and set forth requirements and standards for cogenerator-utility interconnection, and required utilities to file tariffs setting out standard offer contracts for purchase of cogenerated energy. The FPSC has also ordered and reviewed these tariffs, conducted proceedings to set rates for energy sold to cogenerators, issued declaratory statements and conducted adjudicatory proceedings in which rights and obligations of utilities and cogenerators were determined.¹⁹

Specifically, on September 27, 1985, the FPSC repealed Rule 25-17.835²⁰ and adopted Rules 25-17.88 and 25-17.883 in its place, effective October 4, 1985.²¹ This action was done [HN18↑](#) in order to encourage the development of cogeneration and small power production. First, the FPSC promulgated a rule which allowed [*41] a cogenerator to wheel its generated power to another utility through a host facility. The regulation provided that "each electric utility in Florida shall provide, upon request, transmission service to wheel as-available energy or firm energy and capacity produced by a Qualifying Facility from the Qualifying Facility to another electric utility."²² Additionally, Rule 25-17.882 - Transmission Service Not Required for Self-Service provided that

public utilities [were] not required to provide transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location **to the customer's facilities at another location** unless the customer or the utility demonstrates that the provision of this service and the charges, terms, and other conditions associated with the provision of this service, [were] not likely to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers.²³

The FPSC summarized this rule as signifying that "public utilities [were] not required to provide transmission service [*42] to enable a Qualifying Facility to **serve itself at more than one location** unless it [could] be shown that it [was] unlikely that wheeling [would] cause an adverse economic impact on the utility's general body of ratepayers."²⁴ Thus, in certain circumstances, self-service wheeling was permissible under the Florida scheme.

(2) Supervision in This Case

¹⁸ See FPSC Rules Chapter 25-17, Part III - Utilities' Obligations with Regard to Cogenerators and Small Power Producers, 25-17.080, *et seq.*

¹⁹ See FPSC's Amicus Curiae Memorandum of Law at 4-5.

²⁰ See 25-17.0835 Wheeling.

²¹ However, on October 25, 1990, Rule 25-17.088 - Transmission Service for Qualifying Facilities, formerly 25-17.88, was repealed.

²² *In re: Repeal of Rule 25-17.835 and Adoption of Rules 25-17.88, 25-17.882 and 25-17.883 - Wheeling of Cogenerated Energy; Retail Sales*, Order No. 15053, Docket No. 840399-EU, 85 FPSC 9:298, [70 P.U.R.4th 143](#) (Sept. 27, 1985) at 5.

²³ *Id.* at 8 (emphasis added). This rule, now designated 25-17.0882, was repealed on October 25, 1990.

²⁴ *Id.* at 8 (emphasis added).

FPL's conduct has been carefully structured [*43] by the FPSC and supervised in many FPSC proceedings. [HN19](#)[
 The Florida statutes governing the regulation of public utilities must be considered as extensive authority over the regulated entities. However, for defendants to meet the second prong of the state-action defense, Florida must have actively supervised, substantially reviewed, or independently exercised judgment and control over FPL's overall anti-competitive campaign.

In the state supervision inquiry, the Court must ascertain whether "state officials [had] and [exercised] power to review particular anticompetitive acts of private parties and disapprove those that [failed] to accord with state policy." [Ticor, 112 S. Ct. at 2177](#). The FPSC *amicus* filings and defendants' appendices provide a detailed picture of the FPSC's regulatory actions relevant to plaintiffs' claims. In addition to FPSC regulation, the Florida Supreme Court has also been active in its role of judicial reviewer. See e.g., [C.F. Indus., Inc. v. Nichols, 536 So.2d 234 \(Fla. 1988\)](#) (standby rates for Qualifying Facilities ("QF")); [PW Ventures, Inc. v. Nichols, 533 So.2d 281 \(Fla. 1988\)](#) [*44] (third-party sales by QF).

Plaintiffs' complaints may be divided into three areas: (1) refusal to wheel, (2) predatory use of rates, i.e., Backup, Avoided Cost and Interruptible, and (3) interference with interconnection, including the Interconnection Agreement and insurance requirements. In summary, plaintiffs first contend that state supervision did not exist when the FPSC denied Dade's petition for self-service wheeling. Rather, the FPSC determined only that self-service wheeling could not be *compelled* because there was not an exact identity of ownership between the generator and consumer of electricity. See *In re: Petition of Metropolitan Dade County*, 85 FPSC 9:298. Next, plaintiffs argue that FPL's selective and improper marketing of the interruptible rate to customers considering cogeneration, proposed plan to increase the backup rate and abuse of the avoided cost rate²⁵ were not subject to FPSC review. Lastly, while standard interconnection agreements were the subject of FPSC proceedings, plaintiffs claim that the final modified standard interconnection agreement between parties required no specific FPSC approval. Under *Ticor*, plaintiffs [*45] suggest that this admission establishes lack of state supervision.

(a) Refusal to Wheel

In a 1987 proceeding, the FPSC held that Dade's request to allow SFCA to wheel power to Jackson Memorial did not comply with the FPSC cogeneration rule on "self-service" wheeling. *In re: Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of Self-Service Transmission*, Order No. 17510, Docket No. 860786-EI, 87 FPSC 5:32, 35-37 (May 5, 1987). In that order, the FPSC found that the financing arrangements of the DGC facility conferred no ownership interest in the equipment, and, therefore, transmission of electricity to County facilities would not be "self-service." Defendants contend that this determination [*46] is conclusive evidence of state supervision. However, plaintiffs' allegations do not contest the FPSC order and its reasoning. What plaintiffs are complaining about in this action are FPL's actions affecting the circumstances leading up to that hearing and the resulting FPSC order.

Since the inception of the SFCA-Dade agreement,²⁶ Dade agreed to use any excess power generated at DGC to power other County facilities. Throughout the negotiations, FPL was aware that the SFCA-Dade contract contemplated that any excess power would either be wheeled to other County locations by FPL, be conveyed through a direct transmission line to other County locations, or be sold to FPL at the Avoided Cost Rate.²⁷ In fact, FPL raised objections to the proposed agreements during negotiations between SFCA and Dade.²⁸ After SFCA and Dade ratified the agreement, FPL began its campaign to prevent plaintiffs from wheeling power to Jackson Memorial and other County locations. It is these actions, not discussed in the FPSC order, that plaintiffs contend are anticompetitive and in violation of Florida's articulated policies. Plaintiffs assert that the actions undertaken by

²⁵ Plaintiffs state that FPL's methodology for calculating avoided cost payments was improperly manipulated, resulting in an artificially low level of payment to plaintiffs. Therefore, there was no effective review of the manipulated data by the FPSC.

²⁶ Sometimes referred to by parties as the "Energy Purchase Contract."

²⁷ See Alper Deposition I at 117-22; Denis Deposition I at 71-71; Davis Affidavit at P 15; and Flannery Affidavit at P 8.

²⁸ Denis Deposition I at 72-85; Alper Deposition I at 117-120; Dellapa Deposition VI at 38; and Flannery Affidavit at P 9-15.

FPL led to the FPSC order concluding [*47] that plaintiffs were not self-service wheelers. Subsequently, FPL based its continuing refusal to wheel the DGC's excess power on the above FPSC order.

Plaintiffs contend that FPL facilitated the SFCA-Dade agreement with full knowledge of the conditions, that they detrimentally relied on FPL's actions and that FPL should have been estopped from petitioning against such wheeling. Dellapa Deposition VI at 228-29; Alper Deposition I at 125-31. Had the Joint Venture been aware of FPL's true position with respect to the excess power, plaintiffs state that they would have never proceeded with the project as planned.²⁹

[*48] There is no question as to the fact that the SFCA-Dade arrangement is not self-service wheeling. [HN20](#) There is, however, dispute as to whether FPL acted in accordance with clearly articulated state policies supporting cogeneration projects. Review of the FPSC order discloses that there is no mention of FPL's actions towards plaintiffs that occurred prior to the FPSC hearing and order. Upon review of the pleadings and affidavit testimony, the Court finds that there is a genuine issue of material fact on the question of whether defendants acted contrary to state policy when they participated in the genesis of the SFCA-Dade agreement and subsequently lobbied against wheeling plaintiffs' excess power. These actions bring into question, not whether the FPSC properly ruled on the self-service claim, but whether the FPSC ever had the opportunity to exercise power to review FPL's specific anticompetitive acts which occurred prior to the FPSC hearing and to disapprove those that failed to accord with state policy.

(b) Predatory Use of Rates

Next, plaintiffs contend that FPL, through its monopoly power, impermissibly manipulated certain rates to plaintiffs' detriment. Plaintiffs state that [*49] FPL's policies, practices and decisions regarding establishment of the backup, interruptible and avoided cost rates, all occurred prior to FPSC hearings and were not disclosed to the FPSC during the hearings. Even though the FPSC heard argument and issued orders setting and enforcing the various rates, plaintiffs argue that FPL's specific anticompetitive actions were not actively supervised by the FPSC.

In 1987, the FPSC heard argument on the issue of appropriate rates for supplemental, backup and maintenance services to utility customers. *In re: Generic Investigation of Standby Rates for Electric Utilities*, Order No. 17519, Docket No. 850673-EU, 87 FPSC 2:43, 45, [81 P.U.R.4th 1](#) (Feb. 6, 1987), aff'd, [C.F. Indus., Inc. v. Nichols, 536 So.2d 234 \(Fla. 1988\)](#). During the investigation, the FPSC identified fifty-one issues, seven parties participated in the proceedings and the FPSC staff conducted workshops over a period of five, non-consecutive days, hearing testimony from eleven witnesses. *Id.* At that time, the FPSC held that "the rate schedules, availability, and terms and conditions for standby [*50] electric service required by [the] Order [were] fair and reasonable and fully [complied] with the intent of PURPA and the applicable FERC rules." *Id.* at 2:65.

Plaintiffs allege, however, that unbeknownst to the FPSC, FPL developed a lower interruptible rate³⁰ to offer customers "at risk" to cogeneration. Atkinson Deposition I at 139-42; III at 373; and IV at 542-43. At the same time, FPL developed a higher rate for those services, such as backup power, which a customer would require if it opted to cogeneration. *Id.*³¹ Use of the interruptible rate was allegedly designed to reduce the number of qualifying cogeneration facilities. Atkinson Deposition II at 318-19; Tallon Deposition I at 45. Internally, plaintiffs assert, FPL discussed the interruptible rate as the development of a "predatory" rate to "compete" with cogeneration. Bell

²⁹ "If I had been advised at any time at or prior to the November 15, 1983 meeting of the Board of County Commissioners that FPL would later vigorously oppose efforts by the Joint Venture and the County to dispose of power from the DGC Facility at other County buildings and facilities, I would not have recommended approval of the project as it stood." Affidavit of Jerry P. Davis at P 22. See Alper Deposition I at 117-22 and Denis Deposition at 71-72. See also Davis Affidavit at P 43, Hatsopoulos Affidavit at P 16 and Whetton Affidavit at P 6, to support the proposition that Thermo and Rolls abandoned plans to pursue cogeneration projects within FPL's service territory.

³⁰ A customer on an "interruptible rate" agrees to allow its electrical service to be periodically suspended by the utility in order to effectuate a savings.

³¹ FPL also studied other utilities' rate designs used to defer cogeneration projects in their areas. Tallon Deposition at 83-84.

Deposition I at 191-98; II at 202-05. After preliminary discussions, FPL actually offered the interruptible rate to customers at risk to cogeneration, Hudiburg Deposition at 56-57, even though FPL's in-house experts warned that "as a matter of the numbers, the numbers of planning," the interruptible rate made no economic sense. Bestard Deposition [*51] I at 142-43. Plaintiffs claim that this offering directly contradicted established Florida policy favoring cogeneration.

In addition to offering the interruptible rate to customers as an incentive to reject cogeneration, plaintiffs state that FPL attempted to raise the spectre of higher back-up rates in order to dissuade those customers from employing cogeneration technology. An FPL official allegedly complained that the proposed back-up rate described in the SEBS was higher than a true "cost-based" rate should be. Bell Deposition I at 132-34. This admission, plaintiffs contend, is fatal to establishing the state supervision requirement and is completely at odds with clearly articulated Florida policies favoring cogeneration.

[*52] Finally, the FPSC has actively regulated the avoided cost rates. In 1981, the Commission initially denied approval of tariffs submitted by FPL and other utilities. *In re: Adoption of Tariffs Filed Pursuant to Rules 25-17.80 through 25-17.89 Regarding Utilities' Obligations to Cogenerators and Small Power Producers*, Order No. 10198, Docket No. 810296-EU, 81 FPSC 8:130 (Aug. 11, 1981) (rejecting initial FPL proposed avoided cost tariff). In an attempt to expedite the implementation of its rules regarding tariffs, the FPSC developed a sample tariff to inform QFs of the conditions and terms of interconnection and rates for purchases of energy. *Id. at 130-31*. Even though each of the utilities had "ample opportunity to provide the Commission with 'estimated avoided costs (or purchase rates), as calculated by that party,'" only one of the submissions, from Florida Power Corporation, complied with the FPSC's guidelines. *In re: Adoption of Tariffs Filed Pursuant to Rules 25-17.80 through 25-17.89 Regarding Utilities' Obligations to Cogenerators and Small Power Producers*, Order No. 10331, Docket No. 810296-EU, 81 FPSC 10:46, 46-47 [*53] (Oct. 12, 1981). Consequently, the FPSC set purchase prices for energy for the period beginning October 1, 1981, through March 31, 1982. *Id. at 47*.

Subsequently, the FPSC held hearings on the implementation of the new cogeneration rules with respect to pricing a statewide avoided cost unit. *In re: Proceedings to Implement Cogeneration Rules*, Order No. 13247, Docket No. 830377-EU, 84 FPSC 5:4 (May 1, 1984) (approval of revised FPL methodology). With respect to its methodology in setting the avoided rates, the Commission stated that the "approach to pricing QF capacity and energy reflects the Commission's long standing policy that the need for additional capacity by Florida utilities should be determined from a statewide perspective rather than simply focusing on the isolated needs of the individual Florida utility systems." *Id.* "During these proceedings, considerable debate was fostered by the QF intervenors as to which load forecast should be used to determine the in-service date of the statewide avoided unit." *Id.* at 6. Based on the evidence, the Commission set the in-service date at [*54] April 1, 1992. *Id.* The Commission stated that the record was "void of any substantial evidence demonstrating that the individual generation expansion plans presented by the utilities represent[ed] anything more than each individual utility's isolated perception of the need on its own system." *Id.* at 7. Thus, the FPSC held that the rate should be based from a peninsular Florida standpoint. *Id.* Consequently, the FPSC approved a template of plant parameters and cost factors to be used for establishing the standard offer rates based on the value of deferring the statewide avoided unit. *Id.* at 9. The FPSC addressed many other issues in its order, rejecting some and accepting others.³²

[*55] While these proceedings could be argued as conclusive evidence to support active state supervision of the avoided cost rate, there would be an inherent flaw to the argument. The order only contains statements that the FPSC supervised the establishment of a statewide avoided cost rate calculation, not that the FPSC supervised defendants' conduct which contributed to and formed the basis of defendants' recommendations and arguments to the FPSC during the proceedings. Plaintiffs maintain that defendants' policies and actions that engendered the proposed avoided cost rate was not subject to review by the FPSC.

³² For example: Changes to a QF's Capacity Commitment, *id.* at 13-14; the Basis for Standard Offer Avoided Energy Payments, *id.* at 14-15; the Methodology for Calculating Actual Avoided Energy Costs, *id.* at 15; Performance Criteria under Rule 25-17.83(3)(a), *id.* at 15-16; and, *most importantly*, Wheeling, Line Losses, Transaction Costs, and the Utility's Obligation to Purchase, *id.* at 19-20.

First, plaintiffs claim that FPL did not supply plaintiffs with the hour-by-hour fuel cost information available to it, even though FPL routinely made this information available to other utilities via the Florida Power Broker System. Perez-Alonso Deposition II at 349-351. FPL acknowledged that it had no reason not to provide the information to cogenerators and that no FPSC rule prevented it from doing so. *Id. at 371*; Denis Deposition I at 197. Plaintiffs state that failure to provide this information caused them injury because SFCA sold power to FPL when it was not economical [*56] to do so. Remen Affidavit at P 6; Dellapa Deposition I at 89-90. In fact, at that time, "utility systems in other jurisdictions provide[d] timely information on avoided cost rates to cogenerators." Pifer Affidavit at P 34. Additionally, plaintiffs contend that FPL manipulated its calculation of the as-available rate to significantly reduce payment to the Joint Venture. *Id.* at Ps 33-39.

HN21 All of FPL's actions regarding rates which they have the capability, authority and ability to alter, as stated above, have not been reviewed by the FPSC. After examination of all relevant FPSC orders, the Court finds that there is a genuine issue of material fact as to whether the FPSC supervised FPL's conduct regarding these rates.

(c) Interference with Interconnection

The FPSC conducted extensive proceedings, developing detailed instructions on interconnection agreements in general and fixing the terms of FPL's **standard** agreement.³³ [*58] While FPL admits that its **standard** interconnection agreement was the subject of FPSC proceedings, the interconnection agreement which was *actually* negotiated with the plaintiffs, and which modified FPL's standard agreement, required no specific [*57] FPSC approval to become effective.³⁴ Plaintiffs assert that the above admission - that FPSC did not review the final agreement - is fatal under *Ticor*, where the Supreme Court held that agreements among title insurers which automatically took effect upon filing, under a so-called "negative option," were *not* subject to active state supervision. As *Ticor* states, **HN22** "the mere potential for state supervision is not an adequate substitute for a decision by the State." *112 S. Ct. at 2179*.

Plaintiffs also claim that FPL's change of position regarding interconnecting SFCA and Jackson Memorial violated the policies favoring cogeneration. As stated above, FPL allegedly advised and imposed requirements upon parties to the Interconnection Agreement.³⁵ [*59] Thereafter, FPL began its campaign to prevent such interconnection.³⁶ Roberto Denis, Director of System Planning for FPL, confirmed that he could think of no situation where FPL would ever perceive either self-service wheeling or the construction of a separate transmission line in the Miami area to be in the best interests of FPL's ratepayers. Denis Deposition I at 37-38, 117-18. Plaintiffs contend that this change of heart, supports a conclusion that FPL never intended to support cogeneration even though Florida statutes instruct otherwise.

Plaintiffs also maintain that FPL began a concerted effort to dissuade the County from building a separate transmission line from the DGC to Jackson Memorial. This effort included questionable negotiation with plaintiffs and successful attempts to delay the County Commission's vote on the transmission line by several months. Dellapa Deposition VI at 14, 17-19, 252-53. Also, FPL representatives specifically discussed using the interconnection process under Fla. Admin. Code Rule 25-17.087(2) as a means of deterring the development of cogeneration facilities. Seelke Deposition I at 95-96. Plaintiffs claim that all of these above actions violated Florida's policy regarding cogeneration.

³³ See *In re: Adoption of Rules 25-17.80 through 25-17.89 - Utilities' Obligations with Regard to Cogenerators and Small Power Producers*, Order No. 9970, Docket No. 780235-EU, 81 FPSC 4:130, 135 (April 22, 1981); *In re: Amendment of Rules 25-17.80 through 25-17.89 Relation to Cogeneration*, Order No. 12443, Docket No. 820406-EU, 83 FPSC 9:14, 18 (Sept. 2, 1983); and *In re: Proceedings to Implement Cogeneration Rules*, Order No. 13247, Docket No. 830377-EU, 84 FPSC 5:4 (May 1, 1984).

³⁴ Plaintiffs and/or Dade admit that did not request FPSC scrutiny of the final agreement pursuant to Fla. Admin. Code Rule 25-17.087(3). This, however, is not dispositive.

³⁵ Denis Deposition I at 73; Dellapa Deposition VI at 228-29; and Alper Deposition I at 125-31.

³⁶ Adams Deposition I at 140-44; III at 380-81, 388-89.

According to plaintiffs, the interconnection process was also used to impose excessive and unreasonable insurance requirements for failure-to-supply coverage. Somerville Deposition I at 87-96. See Fla. Admin. Code Rule 25-17-087(6)(c). Plaintiffs state that failure-to-supply coverage was unnecessary in the amounts proposed by FPL because it was technically [*60] almost impossible to overload FPL's grid. Somerville Deposition I at 94-95. In fact, plaintiffs state that the SFCA was more at risk than FPL's grid. *Id.* Therefore, any requirement for substantial failure-to-supply insurance was unreasonable and only imposed to prevent cogeneration from succeeding.

(d) Conclusion

HN23 Caselaw does not require that the state actively supervise every action taken by an entity with the monopoly power. *Ticor* merely holds that state officials *have and exercise* power to review particular anticompetitive acts. The Florida legislature delegated rule-making authority and enforcement of those rules to the FPSC. See *Fla. Stat. 366.05(1)* (1991), 366.04(1) and (5) (1991), and 366.06(1) (1991). Based on the preceding three sections, the Court finds that the FPSC *had* power to review the anticompetitive acts but was not given the opportunity to exercise its authority to review FPL's actions towards plaintiffs. Therefore, defendants have not established the second requirement for state-action immunity for FPL's actions pertaining to wheeling, use of rates and interconnecting the DGC facility and Jackson Memorial.

2. The Noerr/Pennington [*61] Doctrine

This principle has developed as a corollary to *Parker's* state-action immunity as follows: **HN24** "The federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government." *Colombia, 499 U.S. at 379-80*. This doctrine, established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523*, reh'g denied, 365 U.S. 875, 5 L. Ed. 2d 864, 81 S. Ct. 899 (1961), "shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose," *Colombia, 499 U.S. at 380* (quoting *United Mine Workers v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*), and holds that efforts to influence certain legislative and executive governmental action do not violate the antitrust laws irrespective of their anticompetitive [*62] intent or effect.

With respect to the stimulus producing the legislation governing the anti-competitive action, the Court has held that an action "of the State itself . . . is exempt from antitrust liability regardless of the State's motives in taking the action." *Columbia, 499 U.S. at 377-378* (quoting *Hoover v. Ronwin, 466 U.S. 558, 579-580, 80 L. Ed. 2d 590, 104 S. Ct. 1989 (1984)*). Thus, whether or not a group of private citizens urges a municipality to implement a regulation that ultimately provides a monopoly to that group is immaterial to the question of whether the state acted in a regulatory capacity.

HN25 There are, however, certain exceptions to the *Noerr-Pennington* principle. The first occurs where "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." *Noerr, 365 U.S. at 144* (emphasis added). The sham exception includes [*63] circumstances where entities "use the governmental process - as opposed to the *outcome* of that process - as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *Colombia, 499 U.S. at 380*. *Columbia* instructs that "the purpose of delaying a competitor's entry into the market does not render lobbying activity a 'sham,' unless . . . the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks." *Id. at 381.*³⁷

³⁷ **HN26** Another exception to the doctrine applies when fraud is committed in an anticompetitive manner. However, fraudulent conduct overrides *Noerr* immunity *only* with respect to conduct in a judicial or quasi-judicial settings, *Woods Exploration & Producing Co. v. Aluminum Co., 438 F.2d 1286 (5th Cir. 1971)*, cert. denied, 404 U.S. 1047, 30 L. Ed. 2d 736, 92 S. Ct. 701 (1972). In this case, all conduct was committed before regulatory or administrative agencies. The Court cannot find that the evidence compels a conclusion that FPL committed fraud. Therefore, the fraud exception to *Noerr* immunity does not apply here.

[*64] The commercial exception to *Noerr* doctrine is the final method upon which a plaintiff may establish antitrust liability. This exception was first examined in this Circuit in *Hill Aircraft*, 561 F. Supp. 667, 675 (N.D. Ga. 1982), aff'd, 729 F.2d 1467 (11th Cir. 1984). There, the district court drew upon *Noerr* stating that upon the individual factual considerations of a case the Sherman Act regulates only business activities, not political activities. *Id.* Recognition of the commercial exception was confirmed in *Todorov*, 921 F.2d at 1446 n.14 and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 505-07, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988).³⁸ The "doctrine is premised on the need to protect the *first amendment* right to petition the government from censure by the antitrust laws and the belief that the Sherman Act is concerned with economics and not with politics." *Todorov*, 921 F.2d at 1446 n.14. When evaluating whether *Noerr* immunity applies, the Court must not only [*65] look at the activity's "impact, but also on the context and nature of the activity." *Allied Tube*, 486 U.S. at 504.

Under the *Allied Tube* test, [HN28](#)³⁹ if the alleged anticompetitive actions took place in the open political arena, then the conduct enjoys immunity from antitrust liability under *Noerr*. 486 U.S. at 506. If, however, the conduct took place within the confines of a private standard-setting process, then the actions are not entitled to *Noerr* immunity. For example, in *Allied Tube*, [*66] *Noerr* immunity was not established because the private association independently recommended building codes which the several states adopted in every case essentially without review.

All *Noerr* exceptions emerged and have been interpreted narrowly under *First Amendment* principles. Because of this, the burden is on plaintiffs in this case to show that *Noerr* immunity did not attach to FPL's actions. *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1558 n.9 (11th Cir. 1992).

In the present case, the only actions to which the *Noerr* doctrine conceivably applies are FPL's efforts (1) to lobby the Dade County Board of Commissioners ("DCBC") to deny approval of the transmission line between the DGC facility and Jackson Memorial; (2) to retain Jackson Memorial as its customer; and (3) to lobby the FPSC to deny plaintiffs' self-service wheeling claim. Plaintiffs only address the first and second instances, apparently conceding that FPL's lobbying efforts during FPSC hearings were immune from antitrust liability.

Applying the tests for the sham and commercial exceptions, the Court finds that only the latter has been established. First, the circumstances [*67] in this case do not point towards a conclusion that FPL's lobbying efforts towards the DCBC and FPSC were a sham to cover their attempt to hinder plaintiffs' competition. Plaintiffs have not alleged sufficient evidence to support a claim that plaintiffs undertook their actions solely to use the DCBC's and the FPSC's hearing processes to otherwise delay or hinder plaintiffs' cogeneration efforts. Thus, the sham exception does not establish defendants' antitrust liability.

However, the Court holds otherwise with respect to whether FPL's conduct falls within the commercial exception to the *Noerr* doctrine because FPL's actions were part of a broader, allegedly illegal, effort to retain Jackson Memorial as FPL's customer. This effort was in direct contravention to Florida's policies promoting cogeneration and was aimed at a commercial purchasing decision of the County; that is, whether Dade should purchase electricity for Jackson Memorial from FPL or from the Joint Venture. Since FPL sought a commercial or proprietary decision from the County and not a political or "policy" decision, and because FPL's actions violated state policies, the commercial exception applies. See *Allied Tube*, 486 U.S. at 505-07; [*68] *Todorov*, 921 F.2d at 1446 n.14; and *Hill Aircraft*, 561 F. Supp. at 675.

The Supreme Court also foreclosed the possibility that a "conspiracy" exception to the *Noerr/Pennington* doctrine exists "when government officials conspire with a private party to employ government action as a means of stifling competition." *Columbia*, 499 U.S. at 382-84.

³⁸ [HN27](#)⁴⁰ Where "an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace." *Allied Tube*, 486 U.S. at 510.

Looking at the impact, context and nature of FPL's actions at issue, *Allied Tube, 486 U.S. at 504*, this case is unlike *Noerr* in that defendants did not seek passage of favorable legislation in general.³⁹ Considering the nature of the activity addressed herein, the Court finds that FPL's actions towards the DCBC was not designed to influence DCBC policy, but to prevent competition from plaintiffs. This case, like *Todorov*, "involves activity that is more economic than political in nature." *921 F.2d at 1446 n.14*. FPL's lobbying efforts towards the DCBC affected defendants in a pecuniary manner. If the transmission line passed the vote of the DCBC then FPL would have lost a valued customer - Jackson Memorial.

[*69] As a matter of law, the Court finds that FPL acted solely with regard to a commercial activity when it undertook action to prevent construction of the DGC-Jackson Memorial transmission line. With respect to FPL's efforts to lobby the County to retain Jackson Memorial as its customer, the Court finds that FPL acted as a direct competitor would act when one of its favored customers was about to abandon it for another provider. Consequently, the Court finds that FPL's actions towards the County during negotiations of the SFCA-Dade contract were commercial in nature and not protected by *Noerr* immunity. Therefore, the Court cannot grant defendants' Motion for Summary Judgment based on *Noerr* immunity.

IV. CONCLUSION

Upon due consideration of the parties' memoranda and relevant caselaw, it is

ORDERED AND ADJUDGED that defendants' Renewed Motions to Dismiss for Failure to State a Claim and for Lack of Standing (d.e. 334-2 and -3, respectively) and, in the alternative, Motion for Summary Judgment (d.e. 334-1) are hereby **DENIED**.

DONE AND ORDERED at Miami, Florida, this 21st day of February, 1994.

Clyde Atkins

SENIOR UNITED STATES DISTRICT JUDGE

End of Document

³⁹ At least insofar as defendants' actions were directed toward obtaining FPSC action, the legality of defendants efforts to sway the FPSC may not be questioned. See *Noerr, 365 U.S. at 140*.



Crown Homes, Inc. v. Landes

Court of Appeal of California, Second Appellate District, Division Five

February 23, 1994, Decided

No. B078210.

Reporter

22 Cal. App. 4th 1273 *; 27 Cal. Rptr. 2d 827 **; 1994 Cal. App. LEXIS 147 ***; 94 Cal. Daily Op. Service 1345; 93 Daily Journal DAR 2351; 1994-1 Trade Cas. (CCH) P70,523

CROWN HOMES, INC., et al., Plaintiffs and Appellants, v. NEIL LANDES et al., Defendants and Respondents.

Notice: [***1] Opinion certified for partial publication. *

Prior History: Superior Court of Los Angeles County, No. BC009180, Ronald E. Cappai, Judge.

Disposition: The judgment is affirmed. All defendants shall separately recover their costs on appeal jointly and severally from all plaintiffs.

Core Terms

arbitration, antitrust, Cartwright Act, disputes, arbitration agreement, antitrust claim, provisions, subject to arbitration, mobilehomes, domestic, parties, courts, anti trust law, transactions, lease

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Adhesion Contracts

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN1 [blue icon] Regulated Practices, Private Actions

The mere appearance of an antitrust dispute does not warrant invalidation of arbitration as a selected forum when there is no showing or basis for assuming the arbitral process is inadequate or unfair.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication except parts II(A)-II(D) and II(F).

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

International Law > Dispute Resolution > Arbitration & Mediation > Agreements

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN2 [down] **Private Actions, Remedies**

The importance of private damages remedies in enforcing antitrust laws does not warrant the conclusion that a remedy may not be sought outside the courts.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

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

Because the Cartwright Act, [Cal. Bus. & Prof. Code § 16700 et seq.](#), is patterned after the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), federal cases interpreting the Sherman Act are applicable in construing the state Cartwright Act.

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

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN4 [down] **Private Actions, Remedies**

There is nothing in the state arbitration statutes, [Cal. Code Civ. Proc. § 1280 et seq.](#), or the Cartwright Act, [Cal. Bus. & Prof. Code § 16700 et seq.](#), which indicates that an antitrust claim is not arbitrable.

Governments > Legislation > Interpretation

HN5 [down] **Legislation, Interpretation**

The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the law's purpose. In determining this intent, a court begins by examining the language of the statute. However, it is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the legislature did not intend. Words used in a statute should be given the meaning they bear in ordinary use. If the language is clear and unambiguous there is no need for

construction, nor is it necessary to resort to indicia of the intent of the legislature. The plain meaning rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute.

Governments > Legislation > Interpretation

HN6 Legislation, Interpretation

The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. An interpretation that renders related provisions nugatory must be avoided; each sentence must be read not in isolation but in the light of the statutory scheme; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN7 Contract Conditions & Provisions, Arbitration Clauses

See [Cal. Code Civ. Proc. § 1280](#).

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

HN8 Alternative Dispute Resolution, Validity of ADR Methods

See [Cal. Code Civ. Proc. § 1281](#).

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN9 Contract Conditions & Provisions, Arbitration Clauses

See [Cal. Code Civ. Proc. § 1281.2](#).

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN10 [] Contract Conditions & Provisions, Arbitration Clauses

Title 9 of the Code of Civil Procedure, [Cal. Code Civ. Proc. § 1280 et seq.](#), represents a comprehensive statutory scheme regulating private arbitration in California. Through this detailed statutory scheme, the legislature has expressed a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. Consequently, courts will indulge every intendment to give effect to such proceedings.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Mobilehome park residents and two corporate mobilehome dealerships brought an action against the mobilehome park owners, a mobilehome dealer, and two manufactured housing companies, alleging that defendants violated the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) by illegally tying the lease of space in the park to the purchase of mobilehomes and "dig-in" packages from defendant mobilehome dealer. The trial court ordered the dispute to arbitration as to the resident plaintiffs under the arbitration provision contained in the mobilehome park leases. The arbitrator issued an award favoring defendants, and the trial court granted defendants' motion to confirm the award. (Superior Court of Los Angeles County, No. BC009180, Ronald E. Cappai, Judge.)

The Court of Appeal affirmed. It held that the trial court did not err in ordering the dispute to arbitration. A California appellate case determining that parties cannot privately agree to exclude from judicial scrutiny antitrust issues under the Cartwright Act relied on authority that is no longer viable by reason of subsequent United States Supreme Court decisions. Further, there is nothing in the arbitration statutes ([Code Civ. Proc., § 1280 et seq.](#)) or the Cartwright Act indicating that antitrust violations are not subject to arbitration, there is a strong public policy favoring arbitration, and the arbitration agreement in question did not exclude antitrust violations. (Opinion by Turner, P. J., with Armstrong and Godoy Perez, JJ., concurring.)

Headnotes

CA(1a) [] (1a) **CA(1b)** [] (1b)

Arbitration and Award § 1—Antitrust Disputes as Arbitrable: Monopolies and Restraints of Trade § 6—Under Cartwright Act—Arbitrability of Disputes.

--In an action by mobilehome park residents and two corporate mobilehome dealerships against the mobilehome park owners, a mobilehome dealer, and two manufactured housing companies, alleging that defendants violated the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) by illegally tying the lease of space in the park to the purchase of mobilehomes and "dig-in" packages from defendant mobilehome dealer, the trial court did not err in

ordering the dispute to arbitration under the arbitration provision in the mobilehome park leases. A California appellate case holding that parties cannot privately agree to exclude from judicial determination antitrust issues under the Cartwright Act relied on authority that is no longer viable by reason of subsequent United States Supreme Court decisions. Further, there is nothing in the arbitration statutes ([Code Civ. Proc., § 1280 et seq.](#)) or the Cartwright Act indicating that antitrust violations are not subject to arbitration, there is a strong public policy favoring arbitration, and the arbitration agreement in question did not exclude antitrust violations.

CA(2) [2] (2)

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Applicability of Case Law Interpreting Sherman Act.

--Because the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) is patterned after the Sherman Act ([15 U.S.C. § 1 et seq.](#)), federal cases interpreting the Sherman Act are applicable in construing state law.

[See 1 *Witkin*, Summary of Cal. Law (9th ed. 1987) Contracts, § 580.]

Counsel: Endman, Lincoln, Turek & Heater, Linda B. Reich and Henry E. Heater for Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton, Don T. Hibner, Jr., Dani Jo Merryman and Samantha M. Phillips for Defendants and Respondents.

Judges: Opinion by Turner, P. J., with Armstrong and Godoy Perez, JJ., concurring.

Opinion by: TURNER, P. J.

Opinion

[*1275]

[**828] I. BACKGROUND

This is an appeal from a judgment granting a motion to confirm an arbitration award pursuant to [Code of Civil Procedure section 1286](#).¹ [***3] Plaintiffs are seven residents of the Stallion Meadows Mobile Home Park: Lydia McGregor; Barbara Robinson; Michael Robinson; David Seim; Pamela Seim; Jerald Vincent; and Marilyn Jewell-Vincent as well as two corporate mobilehome dealerships, Apple Homes, Inc., and Crown Homes, Inc. The complaint [***2] named as defendants: Neil Landes; Cynthia Landes; and Ernest Goldenfeld; the general partners of Goldland Associates (Goldland), which in turn is alleged to be the developer and owner of Stallion Meadows Mobile Home Park (Stallion). The complaint also named as defendants: L.C. Homes Inc., a mobilehome dealer; L.C. Manufactured Housing, Inc.; and Manufactured Housing Construction, Inc.² Plaintiffs alleged that defendants violated state antitrust laws under the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) by illegally tying the lease of space in the park to the purchase of mobilehomes and "dig-in" packages from L.C. Homes, Inc. As a result, plaintiffs alleged they were forced to pay higher than market prices for their mobilehomes and dig-in packages. Apple Homes and Crown Homes alleged they were precluded from selling mobilehomes to be placed in the park. The resident plaintiffs also asserted that Mr. Landes, Mr. Goldenfeld, and Mr. Goldland violated [Civil Code sections 798.37](#) and [798.31](#), which are part of California's [**829] Mobilehome Residency Law. ([Civ. Code, § 798 et seq.](#))

¹ Unless otherwise indicated, all future statutory references are to the Code of Civil Procedure.

² Plaintiffs voluntarily dismissed the complaint against defendant Manufactured Housing Construction, Inc.

In February 1992, defendants filed a motion to compel arbitration as to the *resident* plaintiffs. Commissioner Robert W. Zakon granted the motion and the arbitration began on October 19, 1992, before retired Judge Leon Savitch. On April 6, 1993, the arbitrator issued an award in favor of defendants in a "Report of Arbitration Proceedings and Statement of Decision by Arbitrator" which was subsequently modified by letter dated May 26, 1993. Defendants moved to confirm the award. Plaintiffs moved to vacate it on the grounds the arbitrator exceeded his powers under California law and the arbitration agreement. The trial court denied plaintiffs' motion to vacate the award; granted defendants' motion to confirm the award; and entered judgment on August 9, 1993, in defendants' favor. Plaintiffs filed a timely appeal [*1276] from the judgment. In the published portion of his opinion, we hold that antitrust claims arising under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) are arbitrable. [***4] In so concluding, we disagree with the holding of *Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal.App.3d 99, 109-112 [186 Cal.Rptr. 740]*, not because it was wrongly decided in 1982, but the authority it relied upon is no longer viable and persuasive by reason of subsequent United States Supreme Court decisions.

II. DISCUSSION

A. -D. *

E. Arbitration of an Antitrust Cause of Action

CA(1a)[↑] (1a) Plaintiffs argue the arbitration agreement in the leases violated California law insofar as it allowed the parties to agree to arbitrate an antitrust cause of action contrary to the decision of *Bos Material Handling, Inc. v. Crown Controls Corp., supra, 137 Cal.App.3d at pages 109-112*. *Bos* held that it would "follow the mainstream of judicial thought . . . [and conclude] parties . . . cannot agree privately to exclude antitrust issues under the Cartwright Act from judicial [***5] scrutiny and determination." (*Id. at p. 111*, fn. omitted.) The prevailing judicial thought to which *Bos* referred to was *American Safety Equipment Corp. v. J. P. Maguire & Co. (2d Cir. 1968) 391 F.2d 821, 825-828* and *Wilko v. Swan (1953) 346 U.S. 427, 437-438 [98 L.Ed. 168, 176-177, 74 S.Ct. 182]*.¹¹ *American Safety* held ". . . the pervasive public interest in enforcement of the [Sherman Anti-Trust Act], and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration." (*American Safety Equipment Corp. v. J.P. Maguire & Co., supra, 391 F.2d at pp. 827-828*.) *Wilko* held a securities dispute was not arbitrable. (*Wilko v. Swan, supra, 346 U.S. at p. 438 [98 L.Ed. at p. 177]*.)

[***6] To begin with, *American Safety* is no longer viable authority. As discussed below, plaintiffs' assertion that *Bos* controls the disposition of this case is unpersuasive. This is because the "mainstream of judicial thought" relied on in *Bos* has since changed course with the advent of the United States Supreme Court decision of *Mitsubishi Motors v. Soler Chrysler-Plymouth* [*1277] (1985) 473 U.S. 614, 628-629 [87 L.Ed.2d 444, 456-457, 105 S.Ct. 3346], which although not directly overruling *American Safety*, discussed and rejected its analysis. *Mitsubishi* concluded that nothing in the federal antitrust laws prohibited parties from agreeing to arbitrate antitrust claims which arose out of international commercial transactions. (*Ibid.*) Although the court found it unnecessary to resolve the legitimacy of the *American Safety* doctrine as it applied to agreements to arbitrate disputes arising out of domestic transactions, the court "confess[ed] to some skepticism of certain aspects of the *American Safety* doctrine." (*Id. at p. 632 [87 L.Ed.2d at pp. 458-459]*.) [***7] At another point, the *Mitsubishi* court noted the "absence of any explicit support for such an exception [to the general rule providing for arbitrations] in either the Sherman Act or the Federal Arbitration" [**830] Act." (*Id. at pp. 628-629 [87 L.Ed.2d at pp. 456-457]*.)

Mitsubishi declared that the *American Safety* doctrine was premised upon the following four considerations: first, ". . . private parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages"; second, " 'the strong possibility that contracts which generate antitrust disputes may be

* See footnote, *ante*, page 1273.

¹¹ The *Bos* court also cited two Ninth Circuit cases, *A. & E. Plastik Pak Co. v. Monsanto Company* (9th Cir. 1968) 396 F.2d 710, 715-716 and *Power Replacements, Inc. v. Air Preheater Co.* (9th Cir. 1970) 426 F.2d 980, 983-984, both of which relied upon *American Safety*.

contracts of adhesion militates against automatic forum determination by contract"; third, antitrust issues which are prone to complexity, require sophisticated legal and economic analysis, and are therefore "ill-adapted to strengths of the arbitral process, *i.e.*, expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity"; and fourth, "just as 'issues of war and peace are too important to be vested in the generals, **[***8]** . . . decisions as to antitrust regulation of business are too important to be lodged in the arbitrators chosen from the business community . . . !'" ([*Mitsubishi Motors v. Soler Chrysler-Plymouth, supra, 473 U.S. at p. 632 \[87 L.Ed.2d at pp. 458-459\]*](#), original italics.)

The *Mitsubishi* court then proceeded to address each of these ingredients and found them unpersuasive in terms of prohibiting arbitration of antitrust disputes arising from international business transactions. ([*Mitsubishi Motors v. Soler Chrysler-Plymouth, supra, 473 U.S. at pp. 632-640 \[87 L.Ed.2d at pp. 458-464\]*](#).) First, in terms of the role of the treble damage provisions of the Sherman Act, being part of the national policy designed to enforce antitrust laws, the *Mitsubishi* court held: "The importance of the private [treble]-damages remedy, however, does not compel the conclusion that it may not be sought outside an American court. Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by § 4 of the Clayton **[***9]** Act, [15 U.S.C. § 15](#), and pursued by [the defendant] by way of its third counterclaim, seeks primarily to enable an injured competitor to gain compensation for that injury. [P] 'Section 4 . . . **[*1278]** is in essence a remedial provision.' ("*Id. at p. 635 [87 L.Ed.2d at pp. 460-461]*.) The *Mitsubishi* court stated the second concern cited in *American Safety* relating to adhesion contracts was unjustified because **HN1**¹² the mere appearance of an antitrust dispute did not warrant invalidation of arbitration as a selected forum when there was no showing or basis for assuming the arbitral process was inadequate or unfair. ([*Id. at pp. 632-633 \[87 L.Ed.2d at pp. 458-459\]*](#).) The court also rejected the notion that the potential complexity of the issues was sufficient "to ward off arbitration." ([*Id. at p. 633 \[87 L.Ed.2d at p. 459\]*](#).) *Mitsubishi* further concluded that an arbitration panel did not "pose too great a danger of innate hostility to the constraints on business conduct **[***10]** that **antitrust law** imposes." ([*Id. at p. 634 \[87 L.Ed.2d at pp. 459-460\]*](#).) In so doing, the court "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." (*Ibid.*) Finally, the court concluded that the core of *American Safety* doctrine --the **HN2**¹² importance of private damages remedies in enforcing the antitrust laws--did not warrant the conclusion that the remedy may not be sought outside the American courts. ([*Id. at pp. 634-635 \[87 L.Ed.2d at pp. 459-461\]*](#).) Accordingly, the *Mitsubishi* court held American courts should "enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction." ([*Id. at pp. 624, 639-640 \[87 L.Ed.2d at pp. 453, 463-464\]*](#)).¹²

[*11]** The United States Supreme Court subsequently applied the principles of *Mitsubishi* in the context of domestic securities transactions to hold that claims under the Securities Act of 1933 were arbitrable, thereby overruling *Wilko v. Swan, supra*, 346 U.S. at page 438 [98 L.Ed.2d at page 177] which was the second major case relied upon by *Bos.* (See [*Rodriguez de Quijas v. Shearson/Am. Exp. \(1989\) 490 U.S. 477, 479-485 \[104 L.Ed.2d 526, 533-537, 109 S.Ct. 1917\]*](#).) The Supreme Court also applied *Mitsubishi* **[**831]** to hold that claims under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act were arbitrable. ([*Shearson/American Express Inc. v. McMahon \(1987\) 482 U.S. 220, 227-242 \[96 L.Ed.2d 185, 194-204, 107 S.Ct. 2332\]*](#).) Likewise, California courts have concluded securities claims are arbitrable, thereby disregarding *Wilko*. ([*Baker v. Aubrey \(1989\) 216 Cal.App.3d 1259, 1266 \[265 Cal.Rptr. 381\]*](#) [citing **[***12]** [*Shearson/American Express, Inc. v. McMahon, supra, 482 U.S. at pp. 226-227 \(96 L.Ed.2d at pp. 193-194\)*](#); [*Elliot v. Albright \(1989\) 209 Cal.App.3d 1028, 1033-1037 \[257 Cal.Rptr. 762\]*](#)].)

More importantly, however, the federal courts have interpreted *Mitsubishi* and its progeny to have eroded *American Safety* in the case of domestic **[*1279]** transactions and concluded that such antitrust claims are subject to arbitration. (See [*Kowalski v. Chicago Tribune Co. \(7th Cir. 1988\) 854 F.2d 168, 173*](#) ["An argument could be made that arbitrators are not authorized to decide questions of federal **antitrust law** with binding effect, and at one time the argument would have carried the day [citations]--but no longer" because of *Mitsubishi*.]; [*Western Intern. Media*](#)

¹² Plaintiffs have failed to explain why the policies of the Sherman Act and the Federal Arbitration Act are furthered by resolution of international trade antitrust dispute in the arbitral arena but frustrated by arbitration of such disputes arising from domestic contracts.

Corp. v. Johnson (S.D.Fla. 1991) 754 F. Supp. 871, 873-874 ["[T]he Court's reliance on arbitration principles and the legislative histories of antitrust provisions suggests that the result arrived at in *Mitsubishi* would be forthcoming in the domestic situation."]; **[***13]** Hough v. Merrill Lynch, Pierce, Fenner & Smith (S.D.N.Y. 1991) 757 F.Supp. 283, 286 affirmed *sub nom.* Hough v. Merrill Lynch (S.D.N.Y. 1992) 946 F.2d 883 ["[I]t seems unlikely that the principle of *Mitsubishi* will be limited to international transactions."]; GKG Caribe, Inc. v. Nokia-Mobira, Inc. (D.Puerto Rico 1989) 725 F.Supp. 109, 111 ["Legal developments occurring after [American Safety] have significantly eroded its vitality to the extent that the Supreme Court, if confronted squarely with the issue of its continued applicability, would most certainly discard said doctrine."]; Gemco Latinoamerica, Inc. v. Seiko Time Corp. (S.D.N.Y. 1987) 671 F.Supp. 972, 980 [Given the *Mitsubishi* ruling, "none of the justifications for the American Safety doctrine retain their vigor and . . . our Court of Appeals would now hold that domestic antitrust claims are subject to arbitration."].

Other courts have questioned whether *American Safety* is any longer reliable authority, given the analysis in *Mitsubishi*. (Mayaja, Inc. v. Bodkin (5th Cir. 1986) 803 F.2d 157, 162-163, fn. 6 **[***14]** ["*Mitsubishi* rejected so much of *American Safety*'s reasoning it is difficult to say what is left of the opinion to rely on."]; Smoky Greenhawk Cotton Co., Inc. v. Merrill Lynch (W.D.Texas 1986) 650 F.Supp. 220, 222 ["[T]he analytical framework set out in *Mitsubishi Motors* should not be strictly limited to situations involving international disputes and is equally applicable to domestic statutory claims."].) Further, commentators have noted that the rationale of *American Safety* is of doubtful continuing validity given the *Mitsubishi* holding. (Comment, *Arbitrating Civil RICO and Implied Causes of Action Arising Under Section 10(b) of the Securities Exchange Act of 1934* (1987) 36 Cath. U.L.Rev. 455, 480 [the *Mitsubishi* court "not only strongly criticized the *American Safety* exception to the Arbitration Act, but held that all federal statutory rights may be arbitrable unless expressly indicated to the contrary by Congress." (fn. omitted)]; Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience* (1987) 38 Hastings L.J. 239, 262 [the **[***15]** *Mitsubishi* court "rejected the rationale of *American Safety* . . ."]; Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies* (1986) 64 N.C. L.Rev. 219, 235, fn. 123 [the *Mitsubishi* decision "cast doubt on some of the rationales that had been employed to deny arbitrability to domestic antitrust claims."].)

[*1280] CA(2)[↑] (2) The California Supreme Court has held HN3[↑] because "the Cartwright Act is patterned after the Sherman Act (15 U.S.C. § 1 et seq.), federal cases interpreting the Sherman Act are applicable in construing our state laws. [Citation.]" (Mailand v. Burkle (1978) 20 Cal.3d 367, 376 [143 Cal.Rptr. 1, 572 P.2d 1142], fn. omitted.) In this case, we decline to breath life into all but defunct *American Safety* doctrine because of the existence **[**832]** of *Bos*, a decision which predates *Mitsubishi*, *McMahon*, and *Rodriguez*.

CA(1b)[↑] (1b) Additionally, HN4[↑] there is nothing in the arbitration statutes or the Cartwright Act which indicates that an antitrust claim is not arbitrable. In **[***16]** construing a statute, our responsibility is as follows: "HN5[↑] 'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But "[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." ' [Citation.]' (" People v. King (1993) 5 Cal.4th 59, 69 [19 Cal.Rptr.2d 233, 851 P.2d 27].) In Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299], our Supreme Court held: "Words used in a statute . . . should be given the meaning they bear in ordinary use. [Citations.] If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature . . . [Citations.] [P] But the 'plain meaning' rule does not prohibit a court from determining whether the **[***17]** literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. HN6[↑] The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be

followed [citation]." It is with these thoughts in mind that we examine the language of the arbitration statutes and the Cartwright Act.

To begin with, the type of controversy which is subject to the arbitration statutes is very broad. [Section 1280](#) defines in pertinent **[***18]** part the types of disputes which are subject to the arbitration statutes as follows: [HN7](#)¹³ "As used in this title: [P] . . . [P] . . . [c] 'Controversy' means *any questions arising* [*1281] between parties to an agreement whether such question is one of law or of fact or both." (Italics added.) The broad nature of the enforceability of arbitration agreements is described in [section 1281](#) as follows: [HN8](#)¹⁴ "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon grounds as exist for the revocation of any contract." [Section 1281](#) does not exclude written agreements to submit controversies concerning potential violations of the Cartwright Act from the scope of the arbitration statutes. Further, [section 1281.2](#), sets forth other statutory exceptions to the duty of a trial court to order arbitration of a controversy. A Cartwright Act dispute is not listed in [section 1281.2](#).¹³ Also, **[**833]** section 1281.5, subdivision (b) provides for a special waiver rule that comes into play when a party fails to seek arbitration of a dispute subject to a mechanic's lien. Accordingly, none of the provisions which **[***19]** relate to the enforcement of arbitration agreements contain an exception for disputes premised upon the Cartwright Act.

[*20]** In addition to the foregoing statutory language, our Supreme Court has repeatedly emphasized the strong public policy in favor of arbitration. In [Moncharsh v. Heily & Blase \(1992\) 3 Cal.4th 1 at page 9 \[10 Cal.Rptr.2d 183, 832 P.2d 899\]](#), our Supreme Court held: "Title 9 of the Code of Civil [*1282] Procedure, as enacted and periodically amended by the Legislature, [HN10](#)¹⁵ represents a comprehensive statutory scheme regulating private arbitration in this state. ([§ 1280 et seq.](#)) Through this detailed statutory scheme, the Legislature has expressed a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' [Citations.] Consequently, courts will 'indulge every intendment to give effect to such proceedings.' [Citations.] Indeed, more than 70 years ago this court explained: 'The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.' [Citations.] 'Typically, those who **[***21]** enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts.' [Citation.]"

Additionally, there is nothing in the Cartwright Act to suggest that resolution of disputes arising from it must be resolved in a court of law rather than by means of arbitration. ([Bus. & Prof. Code, § 16700 et seq.](#)) Moreover, a

¹³ [Section 1281.2](#) states: [HN9](#)¹⁶ "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [P] (a) The right to compel arbitration has been waived by the petitioner; or [P] (b) Grounds exist for the revocation of the agreement. [P] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295. [P] If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit. [P] If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies. [P] If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or other special proceeding."

careful review of the language in the arbitration agreement in the present case indicates that there is no evidence of a desire that antitrust disputes be excluded from the scope of arbitral resolution. Section 41.1 of the lease agreement provided: "It is agreed that any dispute between us with respect to the provisions of this Agreement and tenancy in the Park shall be submitted to arbitration conducted under the provisions of [Code of Civil Procedure section 1280 et seq.](#)" Section 41.2 of the lease agreement contains the only exceptions to the arbitration clause and it stated: "The only non-arbitration exceptions are any contested rights of owner which relate to: (a) termination of tenancy due to (i) failure to pay rent or other charges under *Civil Code section 798.56(d)*, (ii) for substantial annoyance to [**22] other homeowners, other residents or others under *Civil Code section 798.56(b)*; (b) forcible detainer; (c) injunctive relief pursuant to (i) [Code of Civil Procedure section 527.6](#), or (ii) [Civil Code section 798.87\(b\)](#), or (iii) payment of the maintenance fee provided for in [Civil Code section 798.36](#), or (iv) condemnation or a change of the use of the Park as provided in [Civil Code section 798.56\(e\) and \(f\)](#), or (v) to preserve the equitable rights appertaining to any arbitrable dispute before resolution by arbitration. All other disputes of any kind, excepting the foregoing exceptions set forth in this subparagraph 41.2, shall be subject to arbitration." Finally, section 41.3 of the lease provided in pertinent part: " 'Dispute' includes by way of illustration, but is not limited to . . . business administration or practices of the owner; . . . 'Dispute' includes not only disputes you may have with us, but also disputes against any of our contractors or agents." Clearly, there is nothing in the language of the contract which would exclude disputes concerning the Cartwright Act.

[*1283] [**834] To sum up, plaintiffs' Cartwright Act claims are subject to the [***23] arbitration agreement in the present case. [Bos Material Handling, Inc. v. Crown Controls Corp., supra, 137 Cal.App.3d at pages 109-112](#), while certainly consistent with the mainstream of judicial thought at the time it was decided, no longer is. Intervening United States Supreme Courts decisions have rendered it no longer probative and persuasive authority. Also, there is nothing in the language of the arbitration statute or the Cartwright Act which supports plaintiffs' argument that antitrust violations are not subject to arbitration. Further, the California Supreme Court has repeatedly emphasized the strong public policy favoring arbitration. Finally, the arbitration agreement with its broadly inclusive language did not exclude antitrust violations from the scope of the type of disputes which would be arbitrable. It is for these combined reasons that we affirm the order of the trial court.

F. The Mobilehome Residency Law *

[***24] III. DISPOSITION

The judgment is affirmed. All defendants shall separately recover their costs on appeal jointly and severally from all plaintiffs.

Armstrong, J., and Godoy Perez, J., concurred. A petition for a rehearing was denied March 11, 1994, and appellants' petition for review by the Supreme Court was denied May 19, 1994. Mosk, J., was of the opinion that the petition should be granted.

End of Document

* See footnote, *ante*, page 1273.

Phoenix Elec. Co. v. Nat'l Elec. Contrs. Ass'n

United States District Court for the District of Oregon

February 24, 1994, Decided ; February 24, 1994, Filed

Civil No. 91-436-JE

Reporter

867 F. Supp. 925 *; 1994 U.S. Dist. LEXIS 7505 **

PHOENIX ELECTRIC COMPANY, an Oregon corporation, et al, Plaintiffs, v. NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, et al., Defendants. NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, Counterclaim Plaintiff, v. ASSOCIATED BUILDERS AND CONTRACTORS, INC., Counterclaim Defendant.

Subsequent History: [\[**1\]](#) Adopting in Part Order of May 9, 1994, Reported at: [1994 U.S. Dist. LEXIS 7082](#). Reported at: *861 F. Supp. 1498* at 1503.

Prior History: *Phoenix Elec. Co. v. Nat'l Elec. Contrs. Ass'n*, *861 F. Supp. 1498*, 1994 U.S. Dist. LEXIS 21778 (D. Or., 1994)

Core Terms

contractors, pricing, nonunion, targeted, exemption, projects, bids, monopolize, predatory, summary judgment motion, plaintiffs', electrical, counterclaims, entitled to summary judgment, anti trust law, competitors, conspiracy, antitrust, monopoly, wages, Sherman Act, recommend, actual malice, trier of fact, costs, non-statutory, bargaining, combinations, defendants', statutory exemption

LexisNexis® Headnotes

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

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

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

[**HN1**](#) **Entitlement as Matter of Law, Genuine Disputes**

[Federal Rule of Civil Procedure 56\(c\)](#) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. The moving party may discharge this burden by showing that there is an absence of evidence to support the nonmoving party's case. When the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and show that there is a genuine issue for trial.

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

[HN2](#) Entitlement as Matter of Law, Genuine Disputes

The substantive law governing a claim or defense determines whether a fact is material. Reasonable doubts concerning the existence of a factual issue should be resolved against the moving party. The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in the nonmoving party's favor. No genuine issue for trial exists however, where the record as a whole could not lead the trier of fact to find for the nonmoving party.

Torts > ... > Defamation > Elements > General Overview

[HN3](#) Defamation, Elements

To prevail on a defamation claim, a public official or public figure must establish that the defendant published false statements with actual malice. "Actual malice" is defined as making statements with knowledge, or reckless disregard, of their falsity. Only statements made with a high degree of awareness of their probable falsity are made with actual malice.

Torts > ... > Defamation > Elements > General Overview

[HN4](#) Defamation, Elements

A plaintiff's status as a public figure is a question of law for the court. A party may be an "all purpose" public figure, or may be accorded that status as to a particular issue of public concern.

Torts > ... > Defamation > Elements > General Overview

[HN5](#) Defamation, Elements

A finding that a defendant made defamatory statements with actual malice must be supported by sufficient evidence that the defendant entertained serious doubt as to the truth of the publication. Proof sufficient to satisfy this difficult standard will usually consist of evidence that the story in question was either (1) fabricated; (2) so inherently improbable that only a reckless man would have put it in circulation; or (3) based wholly on an unverified anonymous telephone call or some other source that the defendant had obvious reasons to doubt.

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

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

[HN6](#) Sherman Act, Scope

Section 1 of the Sherman Act, [15 U.S.C.S. § 1](#), prohibits contracts, combinations, and conspiracies in restraint of trade. Section 2 of the Act, [15 U.S.C.S. § 2](#), prohibits monopolization and attempted monopolization.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

[HN7](#) Scope, Exemptions

867 F. Supp. 925, *925L 1994 U.S. Dist. LEXIS 7505, **1

See § 6 of the Clayton Act, [15 U.S.C.S. § 17.](#)

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN8[] Scope, Exemptions

Enactment of labor exemption statutes clearly recognizes that combinations of workers eliminating competition among themselves and restricting competition based on wage cutting are not contrary to public policy.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN9[] Scope, Exemptions

Courts are required to consider the policies underlying the Clayton Act, the Norris-LaGuardia Act, and the Sherman Act. The labor exemption applies so long as a union acts in its self-interest and does not combine with non-labor groups.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN10[] Labor, Nonstatutory Exemptions

Courts have recognized a non-statutory labor exemption to antitrust laws that might otherwise proscribe certain labor activities. This exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN11[] Labor, Nonstatutory Exemptions

Parties to an employment agreement that restrains trade are exempt from antitrust liability only if: (1) the restraint on trade primarily affects only the parties; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the agreement results from bona fide arm's-length bargaining.

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

HN12[] Sherman Act, Scope

Section 1 of the Sherman Act, [15 U.S.C.S. § 1](#) prohibits every contract, combination in the form of trade or otherwise, or conspiracy in restraint of trade.

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

[**HN13**](#) [L] Sherman Act, Scope

In evaluating restraints imposed by contracts or agreements, two complimentary categories of antitrust analysis have been developed. The first category includes 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. The second category covers 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. Under this second prong of analysis, commonly referred to as the "rule of reason," the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

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

[**HN14**](#) [L] Scope, Monopolization Offenses

Section 2 of the Sherman Act proscribes monopolization, attempted monopolization, and conspiracies to monopolize. If a monopolization does not offend that section because it is shared, liability cannot logically be premised on an attempt to create such a monopoly.

Counsel: For Plaintiffs: Thomas M. Triplett, Schwabe, Williamson & Wyatt, Portland, OR. Maurice Baskin, Edward F. Glynn, Jr., Venable, Baetjer, Howard & Civiletti, Washington, D.C.

For Oregon-NECA, Atlas Electrical and Oregon Electric, Defendants: Wayne Hilliard, Milo Petranovich, Lane, Powell, Spears & Lubersky, Portland, OR. For National Electrical Contractors Association, Inc., Defendant: Jack L. Kennedy, Susan E. Watts, Kennedy, King & Zimmer, Portland, OR. John A. McGuinn, Gary L. Lieber, Paul Monroe Heylman, Karen S. Russell, Henry A. Platt, Schmeltzer, Aptaker & Shepard, P.C., Washington, D.C. For International Brotherhood of Electrical Workers Local 48, Defendant: Paul C. Hays, James W. Kasameyer, Carney, Buckley, Kasameyer & Hays, Portland, OR.

Judges: Jelderks

Opinion by: JOHN JELDERKS

Opinion

[*930] FINDINGS AND RECOMMENDATION

JELDERKS, Magistrate Judge:

Plaintiffs Associated Builders and Contractors, Inc. (ABC), Phoenix Electric Company (Phoenix), and New Tech Electric (New Tech) bring this antitrust action against defendants National Electrical Contractors Association (National NECA), the Oregon-Columbia Chapter of [*931] NECA (Oregon NECA), Atlas Electrical Contractors, Inc. (Atlas), Oregon [*931] Electrical Construction, Inc. (Oregon Electric) and Local 48 of the International Brotherhood of Electrical Workers (Local 48). Defendant National NECA asserts two counterclaims for defamation against plaintiff ABC.

Before the court are plaintiff ABC's motion for partial summary judgment as to its second antitrust claim, plaintiff ABC's motion for summary judgment on defendant National NECA's counterclaims, defendant National NECA's motion for summary judgment on plaintiffs' claims, and defendants Oregon NECA and Local 48's motion for summary judgment on plaintiffs' claims.

These motions should be granted in part and denied in part. Plaintiff ABC's motion for partial summary judgment on its second antitrust claim should be denied, and its motion for summary judgment on defendant National NECA's counterclaims should be granted. Defendant National NECA's motion for summary judgment on plaintiffs' claims should be granted. Defendants Oregon NECA and Local 48's motion for summary judgment on plaintiffs' claims should be granted. Adoption of these recommendations will fully resolve all issues pending in this action.

[**3] BACKGROUND

Plaintiff ABC is a trade association whose members are engaged in the construction industry. Plaintiffs Phoenix and New Tech are nonunion ABC members operating as electrical construction contractors in Oregon.

Defendant National NECA, a trade association of electrical contractors, negotiates and administers collective bargaining agreements on behalf of electrical contractors with local IBEW unions. It charters local chapters such as Oregon NECA throughout the United States.

Oregon NECA, a local chapter of National NECA, is a trade association made up of electrical contractors in Western Oregon and Washington State. Oregon NECA has an ongoing collective bargaining relationship with Local 48, and serves as the collective bargaining representative for its members as well as for certain nonmember electrical contractors. Oregon NECA and Local 48 have negotiated separate collective bargaining agreements covering commercial/industrial and residential construction work.

Atlas and Oregon Electric, members of Oregon NECA operating in Western Oregon, have signed labor agreements with Local 48.

1. Plaintiffs' Claims

In this action, plaintiffs challenge Local 48's "Market [**4] Recovery Program" (MRP), otherwise referred to as the Oregon Job Targeting Program (OJTP). Under the OJTP, unions use various methods to improve their members' ability to secure work. As part of this effort, union members contribute a percentage of their dues to a fund used to assist employers using union labor on certain targeted projects. The unions sometimes inform union contractors that, on a particular job, the job targeting fund will be available to effectively reduce the standard hourly wages normally paid to union laborers. In other targeted jobs, the fund will reimburse the employer for a portion of the union scale wages after the employer pays the union workers at the collectively-bargained rate.

Plaintiffs characterize the OJTP as a conspiracy to "exclude from commercial/industrial electrical construction industry in the metropolitan Portland area, a relevant market under the antitrust [laws], nonunion electrical construction companies, including plaintiffs." They allege that the OJTP is used to identify nonunion contractors who are expected to bid on given projects, and to specify the number of hours of electrical work to be performed. Plaintiffs add that selection of [**5] targeted projects is based "upon the identity of the nonunion bidder and/or the nature of the project in order to obtain maximum exclusionary effect."

Plaintiffs allege that defendants' job targeting program allows members of Oregon NECA to bid for jobs against nonunion firms at "predatory prices . . . explicable only by an intent to discipline or eliminate nonunion competition from the market." They contend that the subsidized bids submitted by Oregon NECA members are so low that

- [*932] (1) The benefit of the bids is dependent upon their tendency to discipline or eliminate competition and thereby to enhance long-term ability to reap the benefits of monopoly power;
- (2) Absent the subsidy, the bids would generally be below total costs; and/or
- (3) Absent the subsidy, in selective cases, the bids are below variable costs of the bidders.

As other evidence of defendants' "specific intent" to exclude nonunion firms from the electrical contracting market plaintiffs cite "threats" to general contractors using nonunion contractors, agreements with owners and developers to use only union labor on projects, and agreements with Taft-Hartley Trusts to invest funds in projects on the condition [**6] that nonunion contractors be excluded.

Plaintiffs allege that the OJTP has allowed members of Oregon NECA to increase their market share of the "commercial/industrial electrical construction projects in the Portland metropolitan area" from 30-40% to more than 70%. They add that, by the end of the fourth quarter of 1990, the OJTP "was successful in procuring 68% of the targeted jobs; and had been used on more than 4,000 jobs; and has secured projects in excess of \$ 90,000,000." Plaintiffs contend that their costs are lower than those of Oregon NECA members, both because they have lower labor costs, and because they use their labor more efficiently than do union contractors. They add that the OJTP has substantially weakened the financial position of nonunion contractors, threatened to drive them from the market, and deterred nonunion contractors from bidding on some projects. Plaintiffs contend that prices for electrical labor will rise to "supra-competitive" levels once efficient nonunion contractors have been driven from the market.

Plaintiffs bring claims for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. In the first [**7] claim, alleging violation of 15 U.S.C. § 1, plaintiffs assert that low bids by defendant union contractors reflect "an intention to create entry barriers and to discipline or eliminate competition from non-union firms and thereby enhance the long-term ability of members of Oregon NECA to raise prices above competitive levels." They characterize defendants' prices as predatory, and contend that, in the long run, these prices will drive competition from the market. After nonunion competition has been eliminated, they assert, the threat of renewed subsidies will prevent other would-be competitors from entering the market.

Plaintiffs' second claim alleges violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. In this claim, plaintiffs allege that the OJTP "constitutes a combination or conspiracy to monopolize the market" by excluding non-Oregon NECA members from the market. As overt acts in furtherance of the "combination or conspiracy," plaintiffs cite "the exchange of information on projects selected for job targeting and the exchange of competitively-sensitive information by members of Oregon NECA." They further [**8] allege that the OJTP "was undertaken, and is carried out, with a specific intent . . . to monopolize the market" for commercial/industrial electrical construction business in the Portland metropolitan area.

Plaintiffs seek recovery of treble damages pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15. They also seek an injunction "restraining violations by defendants of the antitrust laws of the United States" as described in the complaint.

2. National NECA's Counterclaims

National NECA's answer includes two counterclaims for defamation against ABC. The first counterclaim alleges that ABC issued a defamatory press release concerning this action on May 14, 1991, in the District of Columbia. National NECA asserts that the following statements concerning it in that press release were defamatory:

- (a) "NECA . . . violated the Sherman-Clayton Antitrust Act by conspiring to exclude open shop contractors from Oregon's electrical construction market."
- (b) ". . . the defendants are restraining trade and violating antitrust laws."
- (c) "But NECA itself has taken an active role in the conspiracy."

[*933] (d) "NECA has . . . encouraged or directed [**9] its members to participate in unlawful job targeting conspiracies, both in Oregon and elsewhere in the country."

National NECA alleges that plaintiff ABC made these statements with knowledge of their falsity or with reckless disregard of their truth. In the alternative, National NECA alleges that the statements were made "in negligent disregard for their truth or falsity." National NECA adds that the statements "were made maliciously, in bad faith, and without privilege," and with the "actual intent to defame National NECA."

The second counterclaim alleges that ABC published an article concerning this litigation, including the same statements as are cited in its first counterclaim, in its newsletter. This counterclaim asserts that the statements at issue "implied illegal conduct by National NECA," and are actionable *per se*.

STANDARDS FOR SUMMARY JUDGMENT

HN1 [↑] [Federal Rule of Civil Procedure 56\(c\)](#) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. [Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#). [**10] The moving party may discharge this burden by showing that there is an absence of evidence to support the nonmoving party's case. *Id.* When the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and show that there is a genuine issue for trial. [Id. at 324](#).

HN2 [↑] The substantive law governing a claim or defense determines whether a fact is material. [T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 \(9th Cir. 1987\)](#). Reasonable doubts concerning the existence of a factual issue should be resolved against the moving party. [Id. at 630-31](#). The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in the nonmoving party's favor. [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1985\)](#). No genuine issue for trial exists however, where the record as a whole could not lead the trier of fact to find for the nonmoving party. [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#). [**11]

DISCUSSION

I. Plaintiff ABC's motion for summary judgment on Defendant National NECA's Counterclaims

Plaintiff ABC earlier moved to dismiss National NECA's counterclaims for lack of jurisdiction and for failure to state a claim upon which relief could be granted. In the alternative, it sought summary judgment on these claims. I recommended that those motions be denied. [Tigard Elec., et al. v. National Elec. Contractors Ass'n, Inc., et al., 790 F. Supp. 1498, 1504-05 \(D. Or. 1992\)](#). I based my recommendation on the existence of several discrepancies between the complaint and the allegedly defamatory statements, and the submission of materials demonstrating that National NECA and ABC have been engaged in a struggle over the legality of the job targeting program for some time. I concluded that a single affidavit denying malice was insufficient to support granting a motion for summary judgment in the face of the opposing submissions, and that material issues of fact remained concerning privilege defenses and malice.¹ *Id. at 1505*.

[**12] National NECA contends that my earlier recommendation to deny the motion against its counterclaims renders the present motion against those claims an inappropriate "second bite at the apple," and that it should be awarded costs and attorneys' fees for "opposing the same motion for a second time." I disagree. My earlier recommendation was made before the parties had conducted significant discovery. ABC's present [*934] motion is based upon the much more thorough factual record now before the court. Having reviewed that record, I conclude that plaintiff ABC is entitled to summary judgment on National NECA's counterclaims.

Plaintiff ABC contends that it is entitled to summary judgment on the counterclaims because National NECA cannot establish that it acted with actual malice, and because ABC's statements were privileged as a fair and accurate report of its complaint. Because I agree with the former proposition, I need not reach the latter.

HN3 [↑] To prevail on a defamation claim, a public official or public figure² must establish that the defendant published false statements with "actual malice." See, [Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-46, 41 L. Ed.](#)

¹ The parties agree that the defamation laws of the District of Columbia apply to this action. [Tigard Elec., 790 F. Supp. at 1505, n. 3](#).

² **HN4** [↑] A plaintiff's status as a public figure is a question of law for the court. [Tavoulareas v. Piro, 260 U.S. App. D.C. 39, 817 F.2d 762, 772 \(D.C. Cir.\), cert. denied, 484 U.S. 870, 98 L. Ed. 2d 151, 108 S. Ct. 200 \(1987\)](#). A party may be an "all

2d 789, 94 S. Ct. 2997 (1974). [**13] "Actual malice" is defined as making statements with knowledge, or reckless disregard, of their falsity. New York Times v. Sullivan, 376 U.S. 254, 280, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). Only statements made with a high degree of awareness of their probable falsity are made with actual malice. Garrison v. Louisiana, 379 U.S. 64, 74, 13 L. Ed. 2d 125, 85 S. Ct. 209 (1964).

[**14] **HN5** A finding that a defendant made defamatory statements with actual malice must be supported by sufficient evidence that the defendant "entertained serious doubt as to the truth of [the] publication." St. Amant v. Thompson, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968). Proof sufficient to satisfy this difficult standard will usually consist of evidence that the story in question was either (1) "fabricated"; (2) "so inherently improbable that only a reckless man would have put [it] in circulation"; or (3) "based wholly on an unverified anonymous telephone call" or some other source that the defendant had "obvious reasons to doubt." Id. at 732.

Defendant NECA has not shown evidence from which a trier of fact could conclude that ABC acted with actual malice in publishing the statements at issue. Plaintiff ABC has shown evidence that it had ample reason to believe that National NECA was directly involved with job targeting programs in Oregon and elsewhere in the United States, and that it encouraged and assisted its members' participation in these programs. [**15] National NECA therefore cannot establish that statements concerning its role in the alleged conspiracy were made with actual malice.

National NECA likewise has not shown sufficient evidence to allow a trier of fact to conclude that ABC's statements concerning the alleged unlawful nature of its job targeting activities were made with actual malice. My conclusion that the OJTP does not violate antitrust laws does not come close to establishing that ABC's statements concerning job targeting programs were made with actual malice. ABC's assertions that job targeting programs violate **antitrust law** are supported by the legal opinion of competent counsel. They are in no way based upon the kind of fabrication, obviously inherent improbability, or reliance upon obviously dubious sources generally required to establish actual malice.

That some of the allegedly defamatory statements go beyond the precise allegations of ABC's complaint is not significant. The statements at issue substantially reiterate key allegations of the complaint. The relatively minor differences between the complaint, which is supported by legal opinion, and the published statements, are insufficient [*935] to support the conclusion [**16] that ABC acted with actual malice.

ABC's motion for summary judgment on National NECA's counterclaims should be granted.

II. National NECA's, Oregon NECA's, and IBEW 48's Motions for Summary Judgment on Plaintiffs' Claims

As noted above, plaintiffs allege that defendants have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. **HN6** Section 1 prohibits contracts, combinations, and conspiracies in restraint of trade. Section 2 prohibits monopolization and attempted monopolization.

Defendants contend that they are entitled to summary judgment on plaintiffs' claims because statutory and nonstatutory exemptions applicable to certain labor activities preclude liability under the facts at issue here, and because plaintiffs' antitrust claims fail upon other grounds as well. Defendant National NECA also contends that it is entitled to summary judgment on plaintiffs' claims because it cannot be held vicariously liable for the acts of Oregon NECA, and because there is no evidence that it had a "conscious commitment" to the alleged predatory pricing scheme.

A. Statutory and Non-Statutory Labor Exemption

purpose" public figure, or may be accorded that status as to a particular issue of public concern. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 246 n. 3, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

In response to a request for admissions, National NECA stated that it "may be a limited public figure in the electrical construction industry for some purposes. . . ." In its opposition to ABC's motion for summary judgment on the counterclaims, National NECA notes that it "does not contest that it is required to prove that ABC made its defamatory statements with actual malice." Even in the absence of that concession, I would conclude that the job targeting issue presented in this action is a matter of public interest, and that defendant National NECA is a public figure for the purposes of the statements at issue here.

1. Statutory Exemption

Congress has [**17] exempted a number of labor activities from antitrust liability. Under Section 6 of the Clayton Act, [15 U.S.C. § 17](#),

HN7[[↑]] 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, constituted for the purposes of mutual help . . . 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, [29 U.S.C. § 52](#), likewise prohibits injunctions of certain work-related activities. In addition, the Norris-LaGuardia Anti-Injunction Act, [29 U.S.C. § 101 et seq.](#), and the Wagner Act, [29 U.S.C. § 157 et seq.](#), prohibit labor injunctions as a means to enforce antitrust laws, and establish organized labor's collective bargaining rights.

The labor antitrust [**18] exemption is not boundless, and several Supreme Court decisions have interpreted its scope. In [Apex Hosiery Co. v. Leader](#), *310 U.S. 469, 504 n. 24, 84 L. Ed. 1311, 60 S. Ct. 982 (1940)*, the Court observed that **HN8**[[↑]] enactment of the labor exemption statutes "clearly recognizes that combinations of workers eliminating competition among themselves and restricting competition . . . based on wage cutting are not contrary to public policy."

In [United States v. Hutcheson](#), *312 U.S. 219, 231, 85 L. Ed. 788, 61 S. Ct. 463 (1941)*, the Court noted that **HN9**[[↑]] courts are required to consider the policies underlying the Clayton Act, the Norris-LaGuardia Act, and the Sherman Act. The Court concluded that the labor exemption applies "so long as a union acts in its self-interest and does not combine with non-labor groups." *Id. at 232*.

In [Allen Bradley Co. v. Local 3, IBEW](#), *325 U.S. 797, 809 (1945)*, the Court held unlawful an agreement between a union and local manufacturers and contractors to prohibit [**19] the purchase of products not manufactured locally.

In [United Mine Workers v. Pennington](#), *381 U.S. 657, 664, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)* the Court observed that a union could lawfully attempt to unilaterally impose the same wage rate upon all employers because the Sherman Act did not intend to restrict attempts to eliminate wage competition. The Court concluded, however, that the exemption does not apply where unions agree with non-labor entities to eliminate competitors from the market. *Id. at 665-666*.

In [Connell Constr. Co. v. Plumbers & Steamfitters Local 100](#), *421 U.S. 616, 625, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975)*, the [*936] Court concluded that the statutory labor exemption does not apply where a union imposed an agreement requiring a general contractor to subcontract only with companies that had signed agreements with the union. The Court noted, however, that the *nonstatutory* exemption reflected a labor policy favoring labor organization "to eliminate competition over wages and working [**20] conditions." *Id. at 622*. The court added that it had acknowledged "that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions." *Id.*

Based upon my review of the applicable Supreme Court cases, I conclude that the appropriate standard for analyzing the statutory exemption is that set out in [Hutcheson](#), *312 U.S. at 232*. As noted above, under that test, the statutory exemption to antitrust scrutiny applies "so long as a union acts in its self-interest and does not combine with non-labor groups." Plaintiffs correctly observe that this is a two-part test, and that the exemption applies only where both parts are satisfied. See [H.A. Artists & Assoc. v. Actors' Equity Ass'n](#), *451 U.S. 704, 715, 68 L. Ed. 2d 558, 101 S. Ct. 2102 (1981)*. The record submitted in support of and opposition to the parties' cross-motions for summary judgment leaves no doubt that the OJTP has been established and maintained to further the union's legitimate self [**21] interest. From that record, it is clear that the union members were losing work to non-union workers in the electrical field during the early 1980s, and that the OJTP was designed to allow union workers to obtain more work by enabling union contractors to compete with non-union contractors more effectively. It is

likewise clear that this attempt to strengthen the position of organized workers is consistent with the public policy reflected in the statutory exemption.

That the second part of the *Hutcheson* test is satisfied here is perhaps less obvious. A thorough review of the record, however, establishes that, in carrying out the OJTP, the union does not "combine" with non-labor groups, the members of Oregon NECA, in the manner proscribed in *Hutcheson*. The parties vigorously dispute the proper characterization of the OJTP. It can fairly be described, however, not as a wage subsidy, but as a negotiated wage concession which Local 48 and the members of Oregon NECA agree will be available in particular instances. Under this program, union workers contribute 3.5% of their wages to a fund that can then be used to reduce the amount that union contractors must pay in wages to union [**22] workers on specific projects. Under the OJTP, unions are not "combining" with non-labor groups in ways Courts have condemned as outside the statutory labor exemption: They are not agreeing with union contractors to limit who can bid on given projects, or on any other terms or conditions applicable to the provision of services. Instead, stated simply, the union workers in question have agreed to work for less than the hourly rates negotiated in the collective bargaining agreement. Any collective bargaining agreement between Local 48 and union contractors generally lowering wages paid to union workers would clearly allow union contractors to compete more effectively with non-union contractors. Any such agreement clearly would not, simply because it was the product of an agreement, be considered a "combination" outside the scope of the statutory exemption. The fact that the OJTP allows union contractors to incur lower labor costs on *particular* targeted jobs does not alter the analysis or remove that activity from the statutory labor exemption.

Though the OJTP is clearly the primary issue in this action, as noted above, plaintiffs also cite "threats" to general contractors who engage [**23] nonunion subcontractors, agreements with owners and developers to use only union labor on projects, and agreements with Taft-Hartley Trusts to invest funds in projects on the condition that nonunion contractors be excluded. In opposing defendants' motion for summary judgment on the basis of the labor exemption, plaintiffs assert that legitimate union activity does not include "acts of secondary pressure and/or threats, even if undertaken to achieve a legitimate end." Plaintiffs have not produced sufficient evidence to support their position, and defendants are entitled to summary [*937] judgment on these assertions as well. A trier of fact could not reasonably conclude that the employer defendants participated in the activities alleged. Under the Norris-LaGuardia Act and Section 20 of the Clayton Act, unions are allowed to engage in peaceful secondary activity without violating antitrust laws. Plaintiffs have not shown evidence that defendants engaged in secondary activity that was not protected or entered into unlawful combinations with plaintiffs' competitors.

2. Non-statutory exemption

In addition to the statutory exemption enacted by Congress, [HN10](#)[[↑]] courts have recognized a non-statutory [**24] labor exemption to antitrust laws that might otherwise proscribe certain labor activities. In [*Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622, 95 S. Ct. 1830, 44 L. Ed. 2d 418 \(1975\)](#), the court noted that this exemption

has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.

In [*Continental Maritime of San Francisco v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1393 \(9th Cir. 1987\)](#), the Ninth Circuit noted that neither this circuit nor the Supreme Court has "enunciated a general rule" for determining if a particular activity is covered by the non-statutory exemption. The *Continental* court noted that the non-statutory exemption is "based on the recognition that national labor policy should sometimes override antitrust [**25] policy," and cited with approval the analytical standards applied to that exemption in [*Mackey v. National Football League*, 543 F.2d 606, 612 \(8th Cir. 1976\)](#), cert. dismissed, 434 U.S. 801 (1977). *Id.* The *Mackey* court concluded that [HN11](#)[[↑]] parties to an employment agreement that restrains trade are exempt from antitrust liability only if: (1) the restraint on trade primarily affects only the parties; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the agreement results from bona fide arm's-length bargaining. [*Mackey*, 543 F.2d at 614](#) (citations omitted).

As discussed above, I conclude that defendants are entitled to summary judgment on the basis of the statutory exemption because the union has acted in its legitimate self interest, and because it has not "combined" with union contractors in the manner in which that term is applied to these claims. Even if the statutory exemption did not apply, defendants would be entitled to summary judgment because their activities at issue here satisfy the *Mackey* test. The first part of the test is satisfied because the **[**26]** activities at issue do not restrain trade: the OJTP is available on a nondiscriminatory basis to any contractor who signs a labor agreement with Local 48. There is no evidence that the union contractors who take advantage of the program either share bidding information, or fail to otherwise vigorously compete with each other for the projects. The record also establishes that nonunion contractors are allowed to compete on, and frequently secure, targeted projects.³ It likewise supports the conclusion that the wage reduction granted union contractors on targeted projects is often insufficient to account for the failure of nonunion contractors to secure contracts on certain of the projects on which they bid.⁴ Rather than restrain trade, by making union labor more competitive, it appears that the OJTP encourages more vigorous competition between union and nonunion contractors.

[27]** The second prong of the non-statutory exemption test is satisfied because wages are a mandatory subject of bargaining. See, e.g., *United Mine Workers v. Pennington*, 381 U.S. 657, 664, 14 L. Ed. 2d 626, **I^{*}938I** 85 S. Ct. 1585 (1965) (Wages are at the heart of issues about which employers and unions must bargain).

Finally, though I conclude that the OJTP is not the result of a "combination" within the meaning of the statutory labor exemption, the record supports only the conclusion that it is the result of collective bargaining between Local 48 and the union contractors. Based on the voluminous record submitted, a reasonable trier of fact could only conclude that the program was negotiated by the union and union contractors as an alternative to an across-the-board reduction of wages. The agreement authorizing the program, which allows union contractors to pay lower wage rates than otherwise specified in the collective bargaining agreement on a job-by-job basis, was signed by bargaining parties in April 1986.⁵

[28]** Application of the non-statutory exemption here is consistent with the underlying rationale for that exemption. Courts have recognized that organization of labor will inevitably have some effect on price competition, but that the goals of federal labor law could not be achieved if merely affecting business competition were a basis for invoking antitrust laws. The job targeting program at issue here indisputably affects competition between union and nonunion contractors. That is not a sufficient basis for applying antitrust laws to the program, however, and defendants' motion for summary judgment on the basis of the non-statutory exemption should be granted.

B. Antitrust Claims

My conclusion that defendants are entitled to summary judgment based on the labor exemption from antitrust liability makes it unnecessary to address defendants' contention that the antitrust claims must fail on other grounds. However, to have a complete record as to the issues in dispute, I will briefly analyze the merits of plaintiffs' antitrust claims.

1. Claim 1: Sherman Act Section 1 Claim

³ From the record submitted, it appears that between 1986 and January 1993, union contractors have obtained contracts on 3911 of 7213 projects on which job-targeting funds have been available.

⁴ Plaintiffs New Tech and Phoenix have produced bid files or bid quotes for 86 of the 282 jobs they assert they have lost because of the OJTP. It appears that the job targeting wage concession was a determining factor in awarding 12 of these 86 contracts.

⁵ Plaintiffs contend that the OJTP was not established through collective bargaining. Though I find that the record does not support that contention, a contrary conclusion should not alter the disposition of defendants' motion for summary judgment based on the non-statutory exemption. The Ninth Circuit has applied the non-statutory exemption to agreements between unions and employers that are not the result of collective bargaining. See *Richards v. Nielsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987).

HN12 [+] Section 1 of the Sherman Act, 15 U.S.C. § 1 prohibits "every contract, combination [**29] in the form of trade or otherwise, or conspiracy in restraint of trade. . ." Plaintiffs allege that defendants have violated this section by pricing their services at predatory levels. They allege that defendant union contractors' low bids are explicable only as "an intention to create entry barriers and to discipline or eliminate competition from non-union firms and thereby enhance the long-term ability of members of Oregon NECA to raise prices above competitive levels."

Courts have long recognized that, because restraint is "the very essence of contract," Section 1 would, if read literally, render the entire body of private contract law illegal. See National Soc'y of Professional Eng'r v. United States, 435 U.S. 679, 687-88, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978), citing Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918). Therefore, **HN13** [+] in evaluating restraints imposed by contracts or agreements, two complimentary categories of antitrust analysis have been developed. Id. at 692. The first category includes agreements [**30] "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.'" Id. The second category covers 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." Id. Under this second prong of analysis, commonly referred to as the "rule of reason," "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., Inc. v. GTE Sylvania, I*9391 Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977).

As noted in the two Findings and Recommendations filed earlier in this action, this case must be analyzed under the rule of reason. This rule requires that a claimant alleging a violation of Section 1 of the Sherman Act initially establish: (1) an agreement among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain [**31] competition; and (3) which actually injures competition. Les Shockley Racing v. National Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir. 1989). This requirement of an injury to competition is consistent with the frequent observation that antitrust laws were enacted "for the protection of competition, not competitors. . ." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977), citing Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962).

This is a highly unusual antitrust case. Predatory pricing, a generally ill-defined term, has been described as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986). Allegations of predatory pricing are often supported by analysis of a producer's average [**32] total and variable costs. See, e.g., 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, 74 L. Ed. 2d 61, 103 S. Ct. 57, 103 S. Ct. 58 (1982) (Predatory pricing occurs when a competitor sets low prices in order to drive out competition so that it can later charge monopoly prices and reap monopoly profits.).

This traditional pricing analysis serves poorly in the present action. Normally, one engaging in predatory pricing sells products at an artificially low level, sacrificing short-term profits for the long-term gains that might accrue if competitors are driven from, and then kept out of, the market. Here, we must begin an analysis of pricing by asking whose prices are relevant. The job targeting fund used to help union contractors obtain particular projects is funded by individual union members, who contribute 3.5% of their wages to the fund. What is the "cost" of labor to the laborers selling their services? As long as union workers charge more than minimum wage, which is the legal minimum at which labor [**33] can be sold, it is difficult to argue that laborers are selling their services below any generally recognized economic measure of costs. Union contractors taking advantage of the wage concessions on targeted projects do not, unless they choose to reduce the price of their services and materials in other ways, sacrifice any profit by reducing their bids to reflect lower labor costs. In that these competitors give up nothing in order to submit lower prices reflecting lower labor costs on targeted prices, it is hardly fair to speak of union contractors as pricing their services in a predatory manner. The union members themselves give up nothing more than the 3.5% of their wages that they have contributed on other work in order to fund the wage reduction on targeted jobs. An agreement under which union members negotiated an across-the-board wage decrease of 3.5% with union contractors clearly would offend no antitrust statutes. That the 3.5% reduction is accumulated and

targeted to particular projects likewise does not appear to run afoul of antitrust provisions as a predatory pricing scheme.

Plaintiffs' peculiar predatory pricing allegations reflect the unusual nature of this action. [**34] Plaintiffs allege that the bids of Oregon NECA members

are not merely low enough to meet non-union competition, but are at levels that, absent the subsidy, forego short run profit maximization, would frequently be below the total cost and, in selective cases, below the variable cost of the bidding members of Oregon NECA. At such levels, such bids are explicable only by an intention to create entry barriers and to discipline or eliminate competition from non-union firms and thereby enhance the long-term ability of members of Oregon NECA to raise prices above competitive levels. Such subsidized bid prices are well below those necessary for members of Oregon NECA to sell their services, are frequently well [*940] below cost, and are predatory. An agreement among competitors to charge predatory prices for the purpose of excluding lower cost and more efficient competitors from the market is a violation of [antitrust laws]. . . .

I find it significant that plaintiffs assert that the bids must be analyzed "absent the subsidy." It appears that, in fact, any analysis of the bids submitted by union contractors without taking into account the wage concession available on targeted jobs would [**35] be meaningless. Any analysis of what costs would be if they were in fact different appears to be hopelessly abstract: if the bidders' costs were different, it is fair to assume only that their bids would also be different. Labor costs the union contractors whatever per-hour rate union employers are required to pay for labor on a given project. If these employers pay \$ 15 per hour instead of \$ 20, pretending that the labor actually costs \$ 20 appears to be engaging in an insupportable fiction.

From this discussion, it is obvious that I seriously doubt whether traditional antitrust pricing analysis applies at all in this action. However, I will attempt to examine this action under traditional predatory pricing analysis. In doing so, I am guided by the cases cited above, and by the Supreme Court's recent decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993). Though the Brook Court considered a predatory pricing claim under Section 2 of the Sherman Act and price discrimination under the Robinson-Patman Act, several of its observations apply equally to the Section 1 claim at issue here. [**36] First, the Brook Court observed that only sales below cost should suffice to establish predatory pricing. *Id. at 2588*. The Court based this conclusion on its observation that

As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.

Id.

The Brook Court also noted that a competitor may be liable based upon low prices only if there is "a demonstration that the competitor has a reasonable prospect . . . of recouping its investment in below-cost prices. . . ." *Id.* The Court added that

If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed. In certain circumstances -- for example, where the market is highly diffuse and competitive, or where new entry is easy . . . summary disposition of the case is appropriate.

Id. at 2589.

[**37] Finally, as to analyzing the possibility that a predatory pricing scheme might succeed, the Court observed that those selling at predatory prices may recover their losses only where below-cost pricing can drive [competitors] from the market, or . . . cause them to raise their prices to supracompetitive levels within a disciplined oligopoly The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb.

Id.

Based on the guidance of *Brook Group* and the cases cited above, I conclude that a reasonable trier of fact could not find in plaintiffs' favor on the predatory pricing claim based on the record submitted. First, plaintiffs have not produced evidence from which a trier of fact could conclude that defendants are selling their services, identified either as the labor of union electricians, or the projects completed by the union contractors, below any reasonable measure of costs.

Further, defendants have submitted evidence establishing that the market for commercial/industrial contracting services is both "diffuse and competitive." The record demonstrates that more than 300 electrical contractors, **[**38]** less than one-third of which have signed agreements including job targeting **[*941]** provisions, now bid regularly on commercial industrial projects in the Portland area.

The record further establishes that non-union contractors frequently are awarded contracts on targeted jobs, and that union contractors compete vigorously among themselves as well for targeted jobs. Given the wide range of bids received on some projects, it is apparent that both union and non-union contractors have significantly different (or at least calculate differently) costs other than labor. In addition, the record supports only the conclusion that barriers to entry in the relevant market are low.

Finally, defendants are entitled to summary judgment on the [Section 1](#) claim because plaintiffs have not produced evidence from which a trier of fact could conclude that not just competitors, but competition, is harmed by the practices of which they complain. See, e.g., [Les Shockley Racing, 884 F.2d at 507](#).

2. Claim 2: Sherman [Section 2](#) Claim

[Section 2](#) of the Sherman Act, [15 U.S.C. § 2](#), proscribes monopolization, attempted monopolization, and conspiracies **[**39]** to monopolize. Plaintiffs allege that defendants violated this Section by conspiring to monopolize the market for commercial/industrial electrical construction business in the Portland metropolitan area.

Defendants contend that they are entitled to summary judgment on this claim because plaintiffs' claim is based upon a theory of "shared monopoly" rejected by the Ninth Circuit, and because they cannot establish that defendants had a "specific intent to monopolize" the relevant market. I agree.

(a) "Shared Monopoly" Issue

In [Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477, 490 \(9th Cir. 1988\)](#), cert. denied, 488 U.S. 1019, 102 L. Ed. 2d 806, 109 S. Ct. 817 (1989), the Ninth Circuit expressed serious reservations concerning the viability of a "shared monopoly" claim asserted under [Section 2](#) of the Sherman Act. The *Harkins* court noted that Professors Areeda and Turner "admit that 'no case has held the [§ 2](#) monopolization provision applicable to shared monopoly,'" *id.* (citation omitted), and that "one court directly addressing the issue stated bluntly, 'an oligopoly, **[**40]** or a shared monopoly, does not in itself violate [§ 2](#) of the Sherman Act.'" *Id.*, citing [Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc., 535 F. Supp. 225, 228-29 \(S.D.N.Y. 1982\)](#). The *Harkins* court concluded that, though it was not required to decide whether a shared monopoly might ever violate [Section 2](#), in the case before it, "involving a small market with numerous sellers, no claim is stated under [section 2](#)." *Harkins, 850 F.2d at 490*.

Under the guidance of *Harkins*, I conclude that plaintiffs have not shown evidence from which a trier of fact could find for them on the [Section 2](#) claim. In *Harkins*, the court characterized nine distributors as "numerous sellers," and a market consisting of Phoenix, Arizona, and its suburbs as small. Here, the record submitted shows that there are nearly 100 union contractors in the Portland metropolitan area. In the present action, with many more alleged participants in an alleged monopoly, the reasoning of *Harkins* requires the conclusion that plaintiffs' [Section 2](#) claim must fail.

Plaintiffs contend that *Harkins* is inapposite because, while that [**41] action concerned a "shared monopoly," the present action concerns "a conspiracy to monopolize case with an identified potential monopolist -- ONECA." They also assert that, if [Section 2](#) requires that a single defendant possess the requisite market power, ONECA qualifies as the monopolist.

These arguments fail for two reasons. First, as noted above, [HN14](#) [↑] [Section 2](#) proscribes monopolization, attempted monopolization, and conspiracies to monopolize. If a monopolization does not offend that section because it is shared, liability cannot logically be premised on an attempt to create such a monopoly. Perhaps it is useful to think about the issue like this: Suppose Congress enacted a law making it illegal to import or to conspire to import ponies. If that law were interpreted as allowing the importation of horses, it could hardly be interpreted as proscribing conspiracies to import them.

Second, plaintiffs' contention that Oregon NECA satisfies any requirement of a single [*942] monopolist under [Section 2](#) also fails. Oregon NECA is merely an association of contractors.⁶ As a multi-employer bargaining agent, it negotiates collective bargaining agreements with the electrical union, and provides management [**42] and administrative services related to those agreements. It does not bid on, or perform, electrical contracting work. It does not distribute projects among its members, or share bidding information among its members. Nothing in the complaint or the record submitted suggests that Oregon NECA can in any way be considered a "competitor." There is likewise no suggestion that any one or small group of the contractors who belong to Oregon NECA have or could obtain monopoly power. As mentioned previously, nothing in the record suggests that the members of Oregon NECA do not compete vigorously among themselves.

(b) *Specific Intent to Monopolize*

My conclusion that defendants' motion for summary judgment on the [Section 2](#) claim should be granted for other reasons makes it [**43] unnecessary to reach the question whether summary judgment is appropriate on the grounds that plaintiffs have not shown evidence from which a trier of fact could conclude that defendants specifically intended their elimination. I will nevertheless briefly address the issue.

Though [*Eichman v. Fotomat Corp., 880 F.2d 149, 162 \(9th Cir. 1989\)*](#) raises the issue whether all defendants must have a specific intent to monopolize in order to incur liability under [Section 2](#), Ninth Circuit decisions have frequently cited the specific intent requirement. See, e.g., [*Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 926 \(9th Cir. 1980\)*](#), cert. denied, 450 U.S. 921, 67 L. Ed. 2d 348, 101 S. Ct. 1369 (1981); [*Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168, 1174 \(9th Cir. 1988\)*](#).

Having thoroughly reviewed the record, I conclude that plaintiff has not shown evidence allowing the conclusion that defendants specifically intended to monopolize the relevant market. At the outset, I note that it is union members who contribute the funds [**44] needed to fund the OJTP, and a union, Local 48, that has negotiated the agreements making those funds available to Oregon NECA members. Unions have a legitimate, statutorily permissible objective, the organization of the work force: organization of the entire work force in any particular area by legitimate means would offend no law or federally-recognized public policy.

The record does show that some non-union contractors have joined Oregon NECA.⁷ The record likewise shows that the leadership of Local 48 has promoted the OJTP as a means of organizing non-union contractors. The record also supports the conclusion that the OJTP has allowed members of Oregon NECA to compete more effectively with non-union contractors.⁸ This evidence is not, however, sufficient to establish defendants' specific intent to

⁶ Plaintiffs' reliance on [*Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 \(1945\)*](#) is misplaced. The Associated Press, unlike Oregon NECA, actually sold a product.

⁷ Tigard Electric, formerly the lead plaintiff in this action, has subsequently joined Oregon NECA and has signed a bargaining agreement with Local 48.

monopolize the market. The record submitted would not support the conclusion that non-union contractors have been forced out of business by the OJTP: Plaintiffs have identified no non-union contractors who have been forced out of work by the program. So long as their actions are otherwise lawful, a union is permitted to attempt to organize all workers in a given area of employment. **[**45]** That is a long-recognized right reflected in the statutes cited in the discussion of the statutory labor exemption. As to the union contractors, even the elimination of a number of nonunion contractors does not result in monopolization. The union contractors continue to compete among themselves, including any formerly non-union contractors who choose to join Oregon NECA. The record would not support the conclusion that, through the use of the OJTP **[*943]** and other practices complained of here, any particular Oregon NECA member intends to monopolize the relevant market. In the absence of such evidence, I conclude that plaintiffs cannot show a specific intent to monopolize within the meaning of [Section 2](#).

[46] C. National NECA's Motion for Summary Judgment on Other Grounds**

National NECA contends that, even if it were not entitled to summary judgment on the grounds discussed above, it is entitled to summary judgment on other grounds. It contends that plaintiffs have not produced evidence from which a trier of fact could conclude that it acted as National NECA's agent with respect to the OJTP, or that National NECA played an "active role" in the alleged predatory pricing and monopolization conspiracy. Because I have concluded that National NECA is entitled to summary judgment for the reasons discussed above, I need not reach this issue. In order to make this record complete, however, I note my conclusion that National NECA is not entitled to summary judgment on these alternative grounds. The record submitted demonstrates that material issues of fact remain concerning questions of agency and the extent to which National NECA might otherwise share responsibility for the policies at issue.

III. Plaintiff ABC's Motion for Summary Judgment on Claim 2

Obviously, from my recommendation that defendants' motion for summary judgment on this claim be granted, I have concluded that plaintiffs **[**47]** are not entitled to summary judgment on this claim.

CONCLUSION

I recommend DENYING plaintiff ABC's motion for summary judgment on the second claim (#169).

I recommend GRANTING plaintiff ABC's motion for summary judgment on defendant National NECA's counterclaims (#174).

I recommend GRANTING defendant National NECA's motion for summary judgment on plaintiffs' claims (#177).

I recommend GRANTING defendant Oregon NECA's and defendant IBEW 48's motion for summary judgment on plaintiffs' claims (#182).

DATED this 24th day of February, 1994.

John Jelderks

United States Magistrate Judge

End of Document

⁸ The record also supports the conclusion that some non-union contractors, including plaintiffs Phoenix Electric and New Tech Electric, are financially robust and in no danger of imminent demise.



Sessions Tank Liners v. Joor Mfg.

United States Court of Appeals for the Ninth Circuit

January 8, 1993, Argued, Submitted, Pasadena, California ; February 25, 1994, Filed

No. 92-55085

Reporter

17 F.3d 295 *; 1994 U.S. App. LEXIS 3281 **; 1994-1 Trade Cas. (CCH) P70,520; 94 Cal. Daily Op. Service 1402; 94 Daily Journal DAR 2492

SESSIONS TANK LINERS, INC., Plaintiff-Appellee, v. JOOR MANUFACTURING, INC., Defendant-Appellant.

Subsequent History: Certiorari Denied October 3, 1994, Reported at: [1994 U.S. LEXIS 5494](#).

Prior History: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. CV-84-6363-MRP. Mariana R. Pfaelzer, District Judge, Presiding.

Core Terms

tank, immunity, lining, government action, district court, anticompetitive, subcommittee, petitioning, antitrust, shielded, revision, anti trust law, injuries, antitrust liability, Sherman Act, damages, prospective economic advantage, deconstruction, campaign, private party, flowing, permits, storage, courts, proposed revision, public official, misrepresentations, decisions, leaking, ban

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN1](#) [down arrow] Exemptions & Immunities, Parker State Action Doctrine

States cannot be held liable under the Sherman Act for anticompetitive restraints imposed as an act of government.

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

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 > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

[**HN2**](#) [] Exemptions & Immunities, Noerr-Pennington Doctrine

The federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government.

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN3**](#) [] Exemptions & Immunities, Noerr-Pennington Doctrine

Insofar as the Sherman Act (Act) sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as the court has already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena.

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

[**HN4**](#) [] Exemptions & Immunities, Noerr-Pennington Doctrine

Immunity attaches only when the anticompetitive conduct at issue constitutes a valid effort to petition the government. The validity of such efforts, and thus the applicability of Noerr immunity, varies with the context and nature of the activity.

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

[**HN5**](#) [] Exemptions & Immunities, Noerr-Pennington Doctrine

Because the injuries plaintiff complains of are the result of governmental action, defendant is shielded by petitioning immunity from liability under the antitrust laws.

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

Torts > ... > Elements > Causation > Intervening Causation

[**HN6**](#) [] Exemptions & Immunities, Noerr-Pennington Doctrine

The court cannot accept an interpretation of the Noerr doctrine that grants immunity only when the defendant's efforts to persuade government officials to impose anticompetitive restraints were not the cause of the governmental restraints actually imposed. So interpreted, the immunity shields nothing that would otherwise cause liability.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN7 [down] **Intentional Interference, Elements**

To prevail on a claim of intentional interference with prospective economic advantage the plaintiff must demonstrate (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN8 [down] **Commercial Interference, Prospective Advantage**

The very existence of a tort action for the seeking of valid governmental action exerts an undesirable chilling effect on the access of others to government, regardless of the motives of the particular party before the court.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN9 [down] **Commercial Interference, Prospective Advantage**

A person's expectancy in the outcome of a government licensing proceeding is not protected against outside interference.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN10 [down] **Intentional Interference, Elements**

California courts would not permit recovery in this case for tortious interference with prospective economic advantage, where the damages all flow from governmental decisions of disinterested public officials.

Counsel: Jerome I. Braun, Farella, Braun & Martel, San Francisco, California, and David E. Lundin, Rancho Santa Fe, California, for the defendant-appellant.

Maxwell M. Blecher, Blecher, Collins & Wienstein, Los Angeles, California, for the plaintiff-appellee.

Andrew D. Hutton, Michael J. Shockro, Latham & Watkins, Los Angeles, California, and Raymond A. Tabar, John G. Nelson, Thomson & Nelson, Whittier, California, for the amicus.

Judges: Before: William C. Canby, Jr., and William A. Norris, Circuit Judges, and Jack E. Tanner *, District Judge. Opinion by Judge Canby; Dissent by District Judge Tanner

Opinion by: CANBY

Opinion

*The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

[*296] OPINION

CANBY, Circuit Judge

Appellant Joor Manufacturing, Inc. ("Joor"), challenges the district court's decision holding Joor liable for anticompetitive conduct in violation of federal antitrust laws and for the California tort of intentional interference with prospective economic advantage. **[**2]** Through deliberate misrepresentation, Joor caused a prominent standard-setting organization to amend its influential model fire code to the disadvantage of Joor's competitor, appellee Sessions Tank Liners, Inc. ("Sessions").

Because Sessions has failed to prove that its injuries result from anything other than governmental action, we reverse the district court's judgment on the antitrust claims. We also conclude that Joor is shielded from liability on the California commercial tort claim. We therefore reverse the district court's judgment on that claim as well.

BACKGROUND

The parties in this case are commercial competitors. Joor is in the business of manufacturing steel tanks designed for the underground storage of hazardous fluids. Sessions repairs leaking storage tanks in place by cutting them open, lining their interiors with a protective coating of epoxy, and resealing them.

The cost of lining a tank is about the same as the cost of a new tank. Tank lining is cheaper than tank replacement, however, because lining does not entail the additional costs of removing and discarding the leaking tank and installing a new one. Tank lining, moreover, does not require the lengthy interruption **[**3]** of business that tank replacement often involves.

In most of the localities in which Sessions did business prior to bringing this suit, tank lining required a permit. Authority to issue a tank lining permit usually rested with the local fire marshal or fire chief. Before the events that precipitated this law suit, fire authorities granted tank lining permits to Sessions without reluctance, and Sessions's business grew continually.

The Western Fire Chiefs Association (WFCA) is a private, nonprofit organization whose voting membership comprises fire chiefs and other governmental employees. The WFCA periodically promulgates a revised Uniform Fire Code (UFC), a model safety code prescribing safety standards and procedures. Many local governments formally adopt each successive UFC revision as municipal law. In some cities and towns where the UFC has not been formally enacted into law, local officials enforce the UFC by refusing to issue permits for structures or activities that are not in conformance with the code.

During the time of Joor's involvement with the WFCA, revision of the UFC was a three-phase process. In the first phase, designated **[*297]** subcommittees of the standing UFC Committee **[**4]** inquired into various fire safety issues and drafted proposed revisions in accordance with their findings. After the proposed revisions were published in two trade journals, the UFC Committee convened to review each proposal and to vote on recommending its adoption or rejection by the WFCA. The meeting was open to subcommittee members and members of the public, who could register objections to the suggested revisions. The UFC Committee focused its review on revisions that were the subject of an objection. Proposals that were not the subject of an objection were recommended for approval.

In the final phase of the UFC revision process, the UFC Committee published in trade journals the proposed code changes and accompanying UFC Committee recommendations. At its annual meeting, the full body of the WFCA voted on the proposed revisions. Members of the public could attend this meeting and express support for or opposition to any proposal under consideration. The WFCA usually adopted proposed revisions to which no objections were made. If a majority of the WFCA approved a proposed revision, the revision was incorporated into the UFC.

Unlike the UFC Committee and the WFCA, whose memberships [**5] were limited to public officials, UFC subcommittees included industry representatives and members of the public. The conduct at issue in this case arises from appellant Joor's involvement - through its president, Howard Robbins - with the UFC subcommittee charged with revising UFC Article 79, the section of the code that prescribes guidelines for the handling and storage of flammable liquids. Robbins volunteered to work on the subcommittee and took part in revising the provisions relating to underground storage tanks. Robbins was assigned the task of reviewing the parts of Article 79 that dealt with depth and location specifications for underground storage tanks. At the time he became involved with the subcommittee, Article 79 did not address tank lining or require that leaking tanks be removed.

Alarmed at the news of Robbins's participation in the code revision process, representatives from Sessions provided the subcommittee with materials about the tank lining process and were granted an opportunity to make a presentation on the subject, but the presentation was scheduled for the subcommittee's final meeting. Prior to the meeting, Robbins circulated among subcommittee members a [**6] letter in which he raised concerns about the safety of tank lining and stated that the WFCA might incur liability for sanctioning the process because it would void a tank's Underwriters Laboratories (UL) certification.

After the Sessions representatives made their presentation and left the meeting, Robbins rallied the subcommittee to amend Article 79 to include a provision requiring that leaking storage tanks be removed from the ground. Robbins re-asserted that the lining process was unsafe and would void the UL label, subjecting the WFCA to liability. In spite of their awareness of Robbins's economic interest in a tank lining ban, the subcommittee unanimously approved Robbins's suggestion, incorporating the amendment in UFC § 79.601(d). In effect, the amendment was tantamount to a ban on tank lining.

With little or no discussion of the leaking tank removal provision, the UFC Committee approved the revised version of Article 79. The full body of the WFCA gave the revised article final approval.

Before the WFCA officially adopted the tank removal provision, Robbins sent letters to public entities, fire officials, standard-setting organizations and customer groups informing them of the [**7] proposed amendment. Fire officials in many localities began denying Sessions's requests for permits and Sessions's business declined sharply. In the years following, Sessions's business continued to suffer.

Sessions filed a complaint in district court alleging that Joor had violated federal antitrust laws and California unfair competition laws. Ruling that Joor was shielded by Noerr-Pennington immunity from antitrust liability, the district court granted partial summary judgment in favor of Joor. On interlocutory review, this court substantially [*298] upheld the district court's decision. *Sessions Tank Liners v. Joor Mfg., 827 F.2d 458 (9th Cir. 1987)*. The Supreme Court, however, vacated our decision and remanded it for further consideration in light of the then-recent decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)*. Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 487 U.S. 1213, 101 L. Ed. 2d 899, 108 S. Ct. 2862 (1988). We remanded the case to the district court. *Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 852 F.2d 484 (9th Cir. 1988)*.

After a bench trial the [**8] district court ruled that Noerr immunity does not protect Joor from antitrust liability. The district court focused its analysis on whether Joor's machinations in the Article 79 subcommittee constituted a "valid effort to influence government action." *Sessions, 786 F. Supp. 1518 at 1525*. Engaging in the "intensely factual inquiry" mandated by the Supreme Court's opinion in *Allied Tube*, the district court found that Robbins had knowingly made false statements to the subcommittee. It also found that Robbins had taken advantage of his affiliation with the subcommittee to promote the tank lining ban and prevent the proponents of tank lining from effectively presenting their side of the issue to the subcommittee. Concluding that Joor's conduct could not be deemed a valid effort to petition lawmakers, the district court ruled that Joor was not shielded by Noerr immunity. *Id. at 1526-27*.

The court found Joor liable for a violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*, and for the California tort of intentional interference with prospective advantage. *Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 786 F. Supp. 1518 (C.D. Cal. 1991)*. [**9] It is the district court's judgment against Joor that we review here.

ISSUES ON APPEAL

In this case we are called upon to decide whether a private party can be held liable, under federal antitrust laws and the California common law, for anticompetitive restraints resulting from valid governmental action.

DISCUSSION

I. The Antitrust Claim

Joor contends that the district court erred in ruling that Joor is not shielded by *Noerr-Pennington* immunity from liability on the antitrust claim.

Antitrust petitioning immunity has its roots in the Supreme Court's decision in [*Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1942\)*](#). In *Parker*, the Court ruled that [HN1](#) states cannot be held liable under the Sherman Act for anticompetitive restraints imposed "as an act of government." [*Id. at 352*](#). The *Parker* holding was based on the Court's conclusion that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." [*Id. at 351*](#). In the absence of some stronger indication [\[**10\]](#) that Congress intended the Sherman Act to apply to states as well as to private parties, the Court was unwilling to subject states to antitrust liability. *Id.*

In [*Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)*](#), the Court recognized a corollary to the *Parker* state action immunity doctrine: [HN2](#) "The federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government." [*City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S. Ct. 1344, 1354-55, 113 L. Ed. 2d 382*](#). The defendants in *Noerr* were a consortium of railroad executives that had conducted a successful publicity campaign designed to arouse public disfavor of the freight trucking industry in order to impair the truckers' ability to compete with the railroads. The campaign succeeded on two levels: it led to the retention, passage and enforcement of state laws limiting freight trucking, and it damaged the truckers' relationships with their customers. [*Noerr, 365 U.S. at 129-32.*](#)

Harkening to the same principles underlying the *Parker* doctrine, the *Noerr* [\[**11\]](#) Court ruled that the railroads could not be held [\[*299\]](#) liable under the antitrust laws for effects of their campaign. [*Id. at 141-43; see also Omni, 111 S. Ct. at 1354-55*](#) (discussing *Noerr*); 1 Phillip Areeda & Donald F. Turner, *Antitrust Law* Par. 204b (1978).

[HN3](#) Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena.

[*Noerr, 365 U.S. at 140-41.*](#) To impose antitrust liability on private parties for urging government action, the Court noted, would present other difficulties. It would be detrimental to democratic government because it would make citizens reluctant to inform lawmakers of their desires for laws that restrain trade, and it might offend the *First Amendment* right to petition the government for a redress of grievances. [*Id. at 137-38.*](#) [\[**12\]](#)

The *Noerr* Court also rejected the proposition that petitioning immunity was limited to injuries flowing directly from governmental action. It held that the railroads were also shielded from liability for the harm the truckers suffered in their relationships with their customers. In the Court's view, that injury was "incidental" to the defendants' campaign

to influence legislation. To impose liability for such incidental effects would "be tantamount to outlawing" the petitioning activity itself. [*Id.* at 143-44](#).¹

The Court further defined the *Noerr* immunity doctrine [**13] in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, the case on which the district court relied in holding Joor liable for violating the Sherman Act. The *Allied* court recognized that, if carried to its extreme, antitrust petitioning immunity could be used to shield defendants from liability for all manner of anticompetitive conduct as long as the injury claimed could be characterized as incidental to an effort to influence governmental action. The Court addressed this problem by ruling that [HN4](#)[↑] immunity attaches only when the anticompetitive conduct at issue constitutes a *valid* effort to petition the government. [486 U.S. at 499-500](#). "The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity." [*Id.* at 499](#).

In applying *Allied* to Joor's conduct, the district court overlooked a key distinction between *Allied* and this case. The plaintiff in *Allied* was awarded damages only on the theory that the stigma of banning the plaintiff's product from a uniform code caused independent marketplace harm to the plaintiff in jurisdictions that permitted [**14] the use of the plaintiff's products. [*Id.* at 498 n.2](#). In contrast, Sessions has never proved that it sustained injuries from anything other than the actions of municipal authorities. [Sessions, 786 F. Supp. at 1532](#). Sessions has not shown that any potential tank lining customer in jurisdictions that were not enforcing the WFCA tank removal provision decided not to engage Sessions's services because of the WFCA's adoption of section 79.601(d). Nor has Sessions adduced any evidence that Joor's actions caused independent marketplace harm in jurisdictions that continued to permit tank lining. Unlike the plaintiff in *Allied*, Sessions was not awarded damages on the theory that Joor's "marketing the stigma" of section 79.601(d) caused Sessions any loss of business independent of the losses resulting from the permit denials. *Id.* The injuries for which Sessions seeks recovery flowed directly from government action. This fact takes the case entirely out of the realm of *Allied*.

[HN5](#)[↑] Because the injuries Sessions complains of are the result of governmental action, Joor is shielded by petitioning immunity from liability under the [**15] antitrust laws. Our [*300] conclusion is grounded in the justification for antitrust petitioning immunity first enunciated in *Noerr* and consistently reaffirmed in later Supreme Court opinions. See, e.g., [Omni, 111 S. Ct. at 1354-55](#); [California Motor Transport, 404 U.S. at 509-10](#); [Pennington, 381 U.S. at 669-671](#). The antitrust laws promote competition by prohibiting private actors from combining or conspiring to restrain trade. [15 U.S.C. §§ 1 & 2](#); [Parker, 317 U.S. at 350-51](#); [Noerr, 365 U.S. at 136-37](#). Unlike private actors acting in combination, disinterested governmental decision-makers who take measures to inhibit competition are accountable politically and procedurally to those affected by the anticompetitive measures. [Parker, 317 U.S. at 352](#); Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, [80 Cal. L.R. 1177, 1240-43 \(1992\)](#). The policies underlying the Sherman Act do not obtain in this context.²

[**16] To rule otherwise and hold Joor liable for injuries flowing from governmental decision-makers' imposition of an anticompetitive restraint, we would have to find that the restraint was imposed *because of* Joor's petitioning efforts. Proof of causation would entail deconstructing the decision-making process to ascertain what factors prompted the various governmental bodies to erect the anticompetitive barriers at issue. This inquiry runs afoul of the principles guiding the *Parker* and *Noerr* decisions. See [Omni, 111 S. Ct. at 1352, 1355](#) (rejecting suggestion that there is a conspiracy exception to petitioning immunity in cases where "government officials conspire with a private party to employ government action as a means of stifling competition" because such an exception would be "impracticable or beyond the purpose of the antitrust laws"); [Noerr, 365 U.S. at 145](#).

¹ In later cases, the Court recognized that *Noerr* immunity applies to attempts to influence administrative, executive and judicial action. [Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 \(1973\)](#); [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 \(1965\)](#).

² Sessions concedes as much in its brief when it states, "The *Noerr* doctrine and its progeny rest on the premise that the Sherman Act regulates business activity, but not political activity. Pure political activity is beyond the reach of the Sherman Act." Appellee's Brief at 3.

The district court's holding illustrates the problems that arise when private parties are held liable under the antitrust laws for injuries flowing from governmental action. In the district court's view, the fact that Sessions's injuries flowed from local [**17] officials' refusal to grant tank lining permits did not relieve Joor of antitrust liability. Joor's actions would be shielded by *Noerr* immunity, the court reasoned, only if the permit denials could be characterized as "an 'intervening cause' breaking the link between a private party's pursuit of an anticompetitive objective and a plaintiff's injury." [Sessions, 786 F. Supp. at 1533](#). The government action would be recognized as an intervening cause, the district court stated, only if invoking petitioning immunity was necessary (1) to prevent courts from second-guessing the decisions of better-informed government officials, (2) to avoid deconstructing the governmental decision-making process to determine whether a particular decision was an independent governmental action and not the result of a party's improper influence, or (3) to protect a citizen's [First Amendment](#) right to petition the government and to ensure that the government is not deprived of useful information. [Id. at 1534](#). The district court concluded that none of these policy considerations applies to the present case. *Id.* And yet, the district court necessarily [**18] deconstructed the decision-making process in finding that Joor's misrepresentations regarding the safety of tank lining were the cause of the local officials' decisions to deny Sessions's requests for permits.

In addition to its dependence on deconstruction, the "intervening cause" analysis presents other difficulties. [HN6](#) [↑] We cannot accept an interpretation of the *Noerr* doctrine that grants immunity only when the defendant's efforts to persuade government officials to impose anticompetitive restraints were not the cause of the governmental restraints actually imposed. So interpreted, the immunity shields nothing that would otherwise cause liability. Joor would be protected from antitrust liability only if the court found that the permit denials were motivated by factors wholly unrelated to Robbins' activities in the Article 79 subcommittee and his subsequent campaign to notify public officials of the tank lining ban. See *id.*

[*301] This approach cannot be reconciled with the principles underlying the antitrust petitioning immunity doctrine. "Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental [**19] action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." [Allied, 486 U.S. at 499](#) (quoting [Noerr, 365 U.S. at 136](#)); accord [Lawline v. American Bar Ass'n, 956 F.2d 1378, 1383 \(7th Cir. 1992\)](#) (holding that defendant bar associations that had urged state supreme court to adopt bar disciplinary rules were immune from liability under Sherman Act for anticompetitive injuries resulting from court's adoption of rules); [Juster Assoc. v. City of Rutland, 901 F.2d 266, 271 \(2d Cir. 1990\)](#) (holding that developer and city were immune from antitrust liability because restraint complained of was the consequence of governmental action). Immunity from liability for restraints imposed by the government attaches regardless of the "validity" of the efforts of those urging the action.³ See [Omni, 499 U.S. 365, 111 S. Ct. at 1354-56, 113 L. Ed. 2d 382](#) (rejecting suggestion that immunity from anticompetitive injuries flowing from government action does not attach when action is the result of conspiracy between defendants and governmental officials); [Noerr, 365 U.S. at 145](#) [**20] (applying petitioning immunity to private party that had "deliberately deceived the public and public officials" in lobbying campaign aimed at effecting enactment of anticompetitive legislation).

Because the only anticompetitive injuries that Sessions complains of are the direct result of governmental action, we conclude that Joor is shielded from liability for these injuries by petitioning immunity.⁴

[**21] II. The State Law Claim

³ We re-emphasize that the liability that *Allied* attached to "invalid" efforts to petition the government was liability for damages flowing from the non-governmental, independent market-place harm that the defendants' activities caused.

⁴ Joor raises other points of error concerning the district court's decision holding Joor liable to Sessions under the Sherman Act. Because we determine that Joor is immune from the antitrust claims, we do not reach these arguments.

Joor asserts that the district court erred in ruling that Sessions was entitled to judgment on its claim that Joor had committed the common-law tort of intentional interference with prospective economic advantage.⁵ According to Joor, any conduct shielded by the doctrine of petitioning immunity in the federal antitrust context is perforce shielded in the state common-law context.

[**22] We need not decide whether antitrust petitioning immunity and immunity under state tort law are perfectly coextensive. See *Blank v. Kirwan*, 39 Cal. 3d 311, 703 P.2d 58, 216 Cal. Rptr. 718 (Cal. 1985) (citing separate grounds for barring recovery on antitrust claims and tortious interference claims); *Willis v. Santa Ana Community Hospital*, 58 Cal. 2d 806, 809, 376 P.2d 568, 570, 26 Cal. Rptr. 640, 642 (Cal. 1962) (holding that state antitrust statutes do not supersede all common-law commercial torts). We are convinced that, in the circumstances of this case, the California Supreme Court would hold Joor immune from damages for interference with prospective economic advantage.

The California Supreme Court has carefully considered the relationship of antitrust petitioning immunity to the tort of interference with prospective economic advantage. In *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 791 P.2d 587, 270 Cal. Rptr. 1 (Cal. 1990) ("PG&E"), the Court dealt with a claim that the defendant [**23] had induced a governmental agency to initiate litigation seeking to avoid a contract to supply hydroelectric power to the plaintiff PG&E. The Court held that "to permit [this] cause of action to be stated when the only interference [*302] alleged is that defendant induced the bringing of potentially meritorious litigation would be an unwarranted extension of the scope of these torts and a pernicious barrier to free access to the courts." *Id.* 791 P.2d at 588. The Court approvingly recited the evolution of the *Noerr* immunity, and stated that "this doctrine relies on the constitutional right to petition for redress of grievances to establish that there is no antitrust liability for petitioning any branch of government, even if the motive is anticompetitive." *Id.* at 595.

It is true that this latter statement in *PG&E* is expressly rested on the *First Amendment*, and Joor's entitlement under that Amendment is limited in the present case. Joor made deliberate misrepresentations in securing the amendment to the UFC; he falsely represented that the lining process would void a tank's UL certification, and he made unfounded assertions [**24] regarding the safety of tank lining and its effect on a tank's structural integrity. Those statements, of themselves, have no real claim to *First Amendment* protection. See *Clipper Express v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1261-62 (9th Cir. 1982), cert. denied, 483 U.S. 1227 (1983); see also *California Motor Trans.*, 404 U.S. at 512-13 (recognizing that, in various fora, sanctions are imposed for deliberate misrepresentations).

PG&E recognizes, however, that [HN8](#)↑ the very existence of a tort action for the seeking of valid governmental action exerts an undesirable chilling effect on the access of others to government, regardless of the motives of the particular party before the court. *PG&E*, 791 P.2d at 597. Moreover, "the torts of inducing breach of contract and interference with prospective advantage have been criticized as protecting the secure enjoyment of contractual and economic relations at the expense of our interest in a freely competitive economy." *Id.* For this reason, the California Supreme Court has [**25] limited the types of prospective advantage that it will protect: [HN9](#)↑ "a person's expectancy in the outcome of a government licensing proceeding is not protected against outside interference." *Id.* at 598 (citing *Blank v. Kirwan*, 39 Cal. 3d at 330, 703 P.2d at 70, 216 Cal. Rptr. at 730).

The only tort involving inducement of litigation that the California Court was willing to recognize in *PG&E* was the tort of malicious prosecution, with its dual protective requirements of a lack of probable cause and a lack of success in the litigation. *Id.* at 598. If any analogy at all is to be made between the tort of malicious prosecution and that of

⁵ [HN7](#)↑ To prevail on a claim of intentional interference with prospective economic advantage the plaintiff must demonstrate: "(1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant." *Blank v. Kirwan*, 39 Cal. 3d 311, 703 P.2d 58, 70, 216 Cal. Rptr. 718 (Cal. 1985).

interference with prospective economic advantage, the fact that Joor succeeded in influencing the disputed licensing decisions would preclude recovery.

Finally, we believe that the California courts, if presented with the policy considerations against deconstruction of public decisionmaking that we discussed in Part I, would find them as compelling in the tort law context as they are in the antitrust context. To impose tort liability for damages resulting from valid governmental decisions [**26] by public officials requires an examination of the motives of those officials that judges, federal or state, are reluctant to undertake. In the present case, for example, the district court found that the fire officials "relied on [Joor's] misrepresentation in denying permits to Sessions to engage in tank lining." *Sessions*, 786 F. Supp. at 1535. The same policy considerations that led the federal courts to conclude that the antitrust laws are not intended to precipitate such deconstruction of public decisionmaking would, we are convinced, lead the California courts to conclude that the state tort law of interference with prospective economic advantage is also not intended to permit such deconstruction.

We conclude, therefore, that the [HN10](#) California courts would not permit recovery in this case for tortious interference with prospective economic advantage, where the damages all flow from governmental decisions of disinterested public officials. We accordingly reverse the judgment of the district court awarding such damages.

[*303] CONCLUSION

The judgment of the district court awarding damages to Sessions under federal and state law is
REVERSED.

Dissent by: TANNER, Senior District Judge dissenting. [**27]

Dissent

I believe the district court properly applied the facts of this case to the law as set forth in [*Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 100 L. Ed. 2d 497, 108 S. Ct. 1931 \(1988\)](#), and has correctly concluded that Joor was not shielded by *Noerr* immunity. I dissent.

End of Document



New Orleans Pelicans Baseball, Inc. v. National Ass'n of Professional Baseball Leagues, Inc.

United States District Court for the Eastern District of Louisiana

February 26, 1994, Decided ; March 1, 1994, Filed; March 2, 1994, Entered

CIVIL ACTION NO. 93-253 SECTION "F"

Reporter

1994 U.S. Dist. LEXIS 21468 *; 1994 WL 631144

NEW ORLEANS PELICANS BASEBALL, INC. VERSUS THE NATIONAL ASSOCIATION OF PROFESSIONAL BASEBALL LEAGUES, INC., ET AL

Disposition: [*1] Motion for summary judgment DENIED in part and GRANTED in part.

Core Terms

territory, League, relocation, baseball, defendants', rights, exemption, team, parties, summary judgment, antitrust claim, damages, arbitrary and capricious, specific performance, indispensable, plaintiff's claim, anti trust law, asserts, notice, antitrust, reasons, summary judgment motion, higher classification, regulation, genuine, playing, protest

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 > Legal Entitlement

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

HN1 [down arrow] Entitlement as Matter of Law, Genuine Disputes

Fed. R. Civ. P. 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record, taken as a whole could not lead a rational trier of fact to find for the non-moving party. A genuine issue of fact exists only if the evidence is such that a reasonable jury could return a verdict for the non-moving party.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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

HN2 Entitlement as Matter of Law, Appropriateness

The mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. Therefore, if the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. Summary judgment is proper if the party opposing the motion fails to establish an essential element of his case. In evaluating the summary judgment motion, the court must read the facts in the light most favorable to the non-moving party.

Business & Corporate Law > Unincorporated Associations

HN3 Business & Corporate Law, Unincorporated Associations

Under Louisiana law, courts will generally not interfere with the internal judgments of a private association, except in cases in which the action complained of is arbitrary, capricious or unjustly discriminatory. Courts will also act to insure that voluntary associations do not exercise their power to make and enforce rules in an unlawful arbitrary or malicious manner. Voluntary associations must comply with their own rules.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

Civil Procedure > Parties > General Overview

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN4 Compulsory Joinder, Indispensable Parties

Courts consider four criteria when determining whether a party is indispensable under *Fed. R. Civ. P. 19*: (1) to what extent a judgment rendered in the party's absence might be prejudicial to it; (2) the extent to which, through protective provisions, shaping of relief, or other measures, the prejudice might be lessened or avoided; (3) whether a judgment rendered in the party's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Where parties ought to be joined under *Rule 19(a)*, that rule expressly contemplates that the district court will order the adverse parties to join them. *Rule 19* does not mandate dismissal even if the court were to conclude that parties are indispensable. Rather, the court would order joinder if it is feasible.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

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

HN5 [+] **Sports, Baseball**

The [commerce clause](#) forbids inconsistent state antitrust regulation of professional league sports. As the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the [Commerce Clause](#) precludes the application of state [antitrust law](#).

Counsel: For NEW ORLEANS PELICANS BASEBALL, INC., plaintiff: Warren Horn, Heller, Draper, Hayden & Horn, LLC, New Orleans, LA.

For NEW ORLEANS PELICANS BASEBALL, INC., plaintiff: Robert A. Kutcher, Chopin, Wager, Cole, Richard, Reboul & Kutcher, LLP, Metairie, LA.

For NEW ORLEANS PELICANS BASEBALL, INC., plaintiff: David Lawrence Bateman, David L. Bateman, PLC, Baton Rouge, LA.

For NATIONAL ASSOCIATION OF PROFESSIONAL BASEBALL LEAGUES, INC., THE, defendant: Ronald Lee Riggle, Koch and Rouse, L.L.C., New Orleans, LA.

For MAJOR LEAGUE BASEBALL, defendant: Mishthi Grace Ratnesar, Campbell, McCranie, Sistrunk, Anzelmo & Hardy, Metairie, LA.

For MAJOR LEAGUE BASEBALL, defendant: Howard Marks, Sedgwick, Detent, Moran & Arnold, Chicago, IL.

For MAJOR LEAGUE BASEBALL, defendant: Harvey C. Koch, Gary J. Rouse, Koch and Rouse, L.L.C., New Orleans, LA.

For PROFESSIONAL BASEBALL EXECUTIVE COUNCIL, movant: Mishthi Grace Ratnesar, Campbell, McCranie, Sistrunk, Anzelmo & Hardy, Metairie, LA.

For PROFESSIONAL BASEBALL EXECUTIVE COUNCIL, movant: George E. Yund, Douglas E. Hart, Frost & Jacobs, Cincinnati, [*2] OH.

For PROFESSIONAL BASEBALL EXECUTIVE COUNCIL, movant: Howard Marks, Sedgwick, Detent, Moran & Arnold, Chicago, IL.

For PROFESSIONAL BASEBALL EXECUTIVE COUNCIL, movant: Harvey C. Koch, Gary J. Rouse, Ronald Lee Riggle, Koch and Rouse, L.L.C., New Orleans, LA.

For NEW ORLEANS ZEPHYRS BASEBALL CLUB, L.L.C., movant: Albert Kirk Gaspercz, Adams & Reese, New Orleans, LA.

For PROFESSIONAL BASEBALL EXECUTIVE COUNCIL, third-party plaintiff: Mishthi Grace Ratnesar, Campbell, McCranie, Sistrunk, Anzelmo & Hardy, Metairie, LA.

For PROFESSIONAL BASEBALL EXECUTIVE COUNCIL, third-party plaintiff: George E. Yund, Douglas E. Hart, Frost & Jacobs, Cincinnati, OH.

For PROFESSIONAL BASEBALL EXECUTIVE COUNCIL, third-party plaintiff: Howard Marks, Sedgwick, Detent, Moran & Arnold, Chicago, IL.

For PROFESSIONAL BASEBALL EXECUTIVE COUNCIL, third-party plaintiff: Harvey C. Koch, Gary J. Rouse, Ronald Lee Riggle, Koch and Rouse, L.L.C., New Orleans, LA.

For THOMAS M BENSON, JR, third-party defendant: Warren Horn, Heller, Draper, Hayden & Horn, LLC, New Orleans, LA.

For THOMAS M BENSON, JR, third-party defendant: Robert A. Kutcher, Chopin, Wager, Cole, Richard, [*3] Reboul & Kutcher, LLP, Metairie, LA.

For THOMAS M BENSON, JR, third-party defendant: David Lawrence Bateman, David L. Bateman, PLC, Baton Rouge, LA.

Judges: MARTIN L. C. FELDMAN, UNITED STATES DISTRICT JUDGE.

Opinion by: MARTIN L. C. FELDMAN

Opinion

ORDER AND REASONS

Defendants move the Court to grant summary judgment in their favor on all counts of the complaint and to dismiss the complaint with prejudice. For the reasons that follow, the Court DENIES defendants' motion except as to plaintiff's state and federal antitrust claims, which the Court GRANTS.

Background

This case involves the unsuccessful attempt of plaintiff to purchase and relocate a AA Southern League baseball club to New Orleans. The National League added two expansion teams for 1993, the Colorado Rockies, and the Florida Marlins. Likewise, the AAA International League added two clubs, in Ottawa, Canada and Charlotte, North Carolina. These changes displaced minor league clubs previously operating in those cities. Consequently, the AAA Denver Zephyrs and the AA Charlotte Knights needed to find new homes. In search of a new home, the Zephyrs explored the possibility of relocating to New Orleans. The plaintiff claims, [*4] however, that the Zephyrs abandoned this idea due to lack of financing.

This litigation arises from the attempts by the New Orleans Pelicans, Inc. to purchase the Charlotte Knights from Charlotte Baseball Inc. and relocate the team to the New Orleans area. The plaintiff and Charlotte Baseball were brought together by the President of the Southern League, Jimmy Bragan. Negotiations followed that included telephone calls and correspondence directed to the plaintiff in Louisiana, as well as negotiations with the plaintiff's lawyers in San Antonio, Texas. In August 1992, the plaintiff signed a letter of intent to purchase the Charlotte Knights of the Southern League, and conditioned the purchase on the ability of the Pelicans to move the club to the New Orleans territory. Plaintiff contends that at all times the move was a condition of the purchase and that the defendants knew it.

On September 1, 1992 the Pelicans submitted an "Application for Control Interest Transfer" to Mike Moore, President of the National Association, together with a \$ 5,000 application fee. Although approval of this application only transferred ownership, the application states and the plaintiff makes clear that [*5] the relocation would be to the New Orleans area. More importantly, Jimmy Bragan had already notified the National Association in early October 1992 that the Southern League claimed the New Orleans territory for the Knights. Finally, the Purchase Agreement upon which the Application was based expressly stated that the purchase was conditioned on getting approval to relocate the club to New Orleans.

On November 2, 1992, President Moore gave written approval of the Control Interest Transfer. Three days later, on November 5, he issued a conditional written approval of the relocation of the Charlotte club to New Orleans "subject to the possibility of (1) a protest by another League, or [and here is the spark that fueled the dispute] (2) the submission of notice by a club of a League of higher classification of its protection of, or request to relocate to, territory that would include any portion of your proposed relocation territory." This letter required that such a notice be in writing and received by the close of business on November 20, 1992. That date is interesting because a good deal of activity was taking place regarding the Zephyrs at the same time.

On November 18, 1992, the [*6] Zephyrs, who play in the American Association, submitted a written request for the New Orleans territory; President Moore notified plaintiff of this change of events the following day.

On November 20, 1992, the American Association are said to have voted, in a conference call, 7 to 1 in favor of the Zephyrs' relocation to New Orleans. The result of this vote was, defendants claim, communicated orally to Mr. Moore by a representative of the American Association, Branch Rickey, that same day. Plaintiff disputes whether this vote was taken in accordance with the American Association's by-laws, and whether the result of the vote was communicated orally to Mr. Moore before the November 20, 1992 deadline.

On November 23, 1992, Mr. Moore announced three requirements that the Zephyrs had to meet by December 1, 1992 in order to receive consideration of their desire to try to relocate to the New Orleans territory. Specifically, he required permission of the American Association for relocation and approval of the proposed playing facility; a copy of a lease on a facility in which the franchise would play; and approval of the major league team affiliate of the relocation and proposed playing [*7] facility.

On December 6, despite the Zephyrs' failure to comply with the December 1, 1992 deadline, Moore granted Denver's request to relocate, and thus, thwarted the application of the plaintiff. Then Moore denied an appeal by the Southern League and the PBEC refused to review the Moore decision or the entire history of the transaction.¹

The Pelicans never purchased the Charlotte club. The plaintiff, of course, blames this on the defendants. The Charlotte club has since been sold to another and is playing temporarily in Nashville, Tennessee. The Zephyrs did relocate to New Orleans and played their 1993 home games at UNO.

Before addressing the merits of defendants' motion, it is perhaps useful to briefly [*8] describe what has already happened in this case. Plaintiff originally named as defendants Mike Moore, the President of the NAPBL, the NAPBL, the Southern League and the PBEC. In the complaint, plaintiff asserted five relief counts and sought a declaratory judgment or specific performance declaring that the Pelicans were entitled to the New Orleans territory for the purpose of operating a minor league baseball club. Subsequently, plaintiff filed a First Amended and Supplemental Complaint, adding Charlotte Baseball, Inc., the owner of the Charlotte Knights AA club, as a defendant and adding a sixth count for specific performance of the purchase contract between plaintiff and Charlotte Baseball, Inc. In earlier motion practice, the Court dismissed Mike Moore individually, the Southern League and Charlotte Baseball, Inc. from the case and also dismissed claims of *ultra vires* actions by the NAPBL. Following the rulings on the motion to dismiss, plaintiff filed a Second Amended and Supplemental Complaint, adding a seventh count alleging that the Pelicans had suffered pecuniary damages from the alleged conduct of defendants. Finally, plaintiff filed a third Amended and Supplemental Complaint, [*9] adding an eighth count of state and federal antitrust violations. Consequently, before the Court now are only the NAPBL and PBEC as defendants, and only portions of counts one through four, and counts seven and eight remains as viable claims.

I. Summary Judgment

HN1[ [Federal Rule of Civil Procedure 56](#)] instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record, taken as a whole could not lead a rational trier of fact to find for the non-moving party. See [Matsushita Elec. Indus. Co. v. Zenith Radio](#), 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

HN2[ The mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See *id.* Therefore, "if the evidence is merely colorable, or is not significantly probative," summary [*10] judgment is

¹ The PBEC considered the matter at a meeting in Dallas on January 11, 1993. It decided that a denied relocation request by the President of the NAPBL was an unreviewable final decision. It further decided that it did not have jurisdiction to hear a protest by the Pelicans of the approval of the Zephyrs.

appropriate. [*Id. at 249-50*](#) (citations omitted). Summary judgment is proper if the party opposing the motion fails to establish an essential element of his case. See [*Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)*](#). In evaluating the summary judgment motion, the court must read the facts in the light most favorable to the non-moving party. [*Anderson, 477 U.S. at 255*](#).

II. Arbitrary and Capricious Conduct

This Court stated the following in its Order and Reasons, dated April 30, 1992, denying defendants' motion to dismiss:

To be entitled to relief, the plaintiff must prove: (1) that the New Orleans territory was open at the time the Pelicans claimed it, but was thereafter protected and the Pelicans were entitled to protection by the defendants after it was granted to them; (2) that the defendants violated their own rules and expanded their rules to benefit the Zephyrs; (3) that the defendants' actions were intentional, arbitrary and capricious; (4) that the New Orleans territory was never properly claimed by the Zephyrs and was properly awarded to the Pelicans; (5) that the [*11] New Orleans territory was never properly claimed by the League to which the Zephyrs belong; and (6) that after the Zephyrs claimed the territory, the defendants acted improperly because they did not enforce their own rules, requirements and deadlines.

Defendants claim that the plaintiff's suit must fail because the Pelicans never had territorial rights protected by the PBA or the NAA and the defendants properly awarded those rights to the Zephyrs. In support of this argument, the defendants maintain that the November 2, 1992 letter merely approved the Pelicans' Application for Control Interest Transfer, the ownership rights, but did not approve the team's relocation to New Orleans. They further argue that the November 5, 1992 letter properly set forth the requirements of Rule 34(E) and that those requirements were satisfied when the Zephyrs submitted, on November 18, 1992, a written application for the New Orleans territory, which the League approved on November 20, 1992. Their reading of the November 5th letter presumes a clarity that is mystified by its text.

Plaintiff asserts that material facts are in dispute as to whether defendants acted arbitrarily and capriciously by allowing [*12] the Zephyrs to relocate to the New Orleans area. Specifically, plaintiff claims first, that there are material questions of fact regarding the effect of the November 2, 1992 letter. The Pelicans claim that, in addition to approving the control interest transfer, that letter granted them territorial rights in the New Orleans territory. Again, the rhetoric of this case departs from textual content. Second, plaintiff asserts that material questions of fact abound regarding whether Moore exceeded the scope of his authority under the rules of baseball in his November 5th letter and whether the conditions of that letter were properly satisfied. For the most part, plaintiff seems to have the more persuasive argument in this narrow motion setting.²

A. Analysis

HN3 [↑] Under Louisiana law, courts will generally not interfere with the internal judgments of a private association, except in cases in which [*13] the action complained of is arbitrary, capricious or unjustly discriminatory. [*Sanders v. Louisiana High School Athletic Ass'n, 242 So. 2d 19, 25 \(La. App. 3 Cir. 1970\)*](#). See also [*Crane v. Indiana High School Athletic Assoc., 975 F.2d 1315, 1320 \(7th Cir. 1992\)*](#) ("courts will also act to insure that voluntary associations do not exercise their power to make and enforce rules in an unlawful arbitrary or malicious manner?.voluntary associations must comply with their own rules."). That test drives this analysis, and it will be a central feature of pre-jury submission motion practice at the close of some or all of the evidence.

The question before the Court, therefore, is whether there is a genuine issue of a material fact that the defendants acted arbitrarily and capriciously in this case. A genuine issue of material facts exists where the evidence is such that a reasonable jury could find that the defendants acted arbitrarily and capriciously. Reviewing the evidence in a light most favorable to the plaintiff, the Court finds that the defendants are not entitled to summary relief.

² Most of the arguments presented here are not new to what has been shared with the Court in earlier motion practice.

Two fact issues trump summary judgment. First, the meaning of the letter [*14] of November 2, 1992. That letter explicitly approved the Application for Control Interest Transfer; however, the letter may also have awarded the plaintiff territorial rights in the New Orleans territory. The text itself is inconclusive. The letter of November 2, 1992 states little more than "your Application for Control Interest Transfer of the Charlotte Knights is substantially complete." What one draws from this somewhat elusive comment depends upon proof not in this record.

Next, the Court finds that the controversial letter of November 5, 1992 and the circumstances that followed present the strongest reasons for denying summary judgment. In fact, the success or failure of plaintiff's case will ride on the letter of November 5, 1992. It provides in part:

...I hereby approve the proposed relocation subject to the possibility of (1) a protest by another League, or (2) the submission of notice by a club of a league of higher classification of its protection of, or request to relocate to, territory that would include any portion of your proposed relocation territory. To be effective, any such protest or notice must be in writing and received by the National Association office [*15] before 5:00 p.m. on November 20, 1992.

At first blush, it seems that President Moore's second condition departs from the textual grant of Rule 34, which controls the relocation of teams. Rule 34 says:

...The Commissioner and the President of the Minor League Association shall have fifteen (15) days from the date of approval of the proposed expansion or relocation to grant permission for the occupation of the territory, and during that fifteen (15) day period a *League of higher classification* that applies for the rights to the same territory shall be given preference. (emphasis added)

President Moore's letter states, however, that a club of a higher classification may also express an interest in an area; in contrast, Rule 34 states only that a league of a higher classification may express such an interest. This distinction takes on significant meaning given what ensued after the fifteen day deadline was triggered. It is this tension that animates the fight.

It is undisputed that the Zephyrs expressed interest in the New Orleans area in writing on November 18, 1992. It is further undisputed that the American Association, in a 7 to 1 vote, approved the Zephyrs' [*16] request on November 20, 1992.

The defendants' first and basic problem with these events is that the Zephyrs are most assuredly a club, not a league. Moore has admitted that his authority comes from the rules of baseball and that he cannot legislate. Thus, a material question of fact remains regarding whether the conditions set forth in the letter of November 5, 1992 were within Moore's authority as President of the National Association.

Defendants argue that all this is irrelevant because the American Association approved the Zephyrs' move on November 20, 1992, and orally notified President Moore of their vote later that day. Plaintiffs correctly point out that the record is far from clear as to whether President Moore received notice of the vote on November 20. Moreover, President Moore's letter expressly required that any notice had to be in writing. Instead, it was given orally. Accordingly, even if the notice was given on November 20, 1992, it was arguably not given in accordance with the guidelines set forth by President Moore himself. These unresolved fact issues could give content to the arbitrary and capricious characterization of unwelcomed conduct and must be resolved at [*17] trial.

Consequently, the Court DENIES defendants' motion for summary judgment on plaintiff's claims relating to the arbitrary and capricious conduct of defendants.

III. Remedies

1. Specific Performance

Defendants maintain that, even if arbitrary and capricious conduct is proved, plaintiff has no right to specific performance. The defendants claim that no territorial rights can accrue until and unless the relocation has the approval of the League, the President of the NAPBL, and consideration by the Commissioner. Defendants claim

that the only specific performance that could be awarded would be to order the Commissioner's Office to consider whether to disapprove the Pelicans' relocation request.

Plaintiff maintains that it is entitled to specific performance of its rights to the New Orleans territory. The right to the New Orleans territory, plaintiff claims, would return plaintiff to the status quo as it was prior to the arbitrary and capricious acts complained of, thereby enabling it to attempt to bring a professional baseball team to New Orleans. Moreover, if the Pelicans were entitled to the territory, plaintiff says, the team is entitled to be compensated for the value [*18] of the territory as a result of the actions of the National Association that awarded the territory to the Zephyrs.³

A. Analysis

If plaintiff proves that the arbitrary and capricious decisions of defendants caused it to lose its rights to the New Orleans territory, plaintiff will be entitled to specific performance, in the form of being granted rights to the New Orleans territory. That is the only way to return plaintiff to the status quo prior to the arbitrary and capricious acts complained of, unless compensation is a provable alternative.

Ultimately, the Court agrees with plaintiff that it would be inappropriate for the Court to attempt to speculate on what might happen if plaintiff wins. Accordingly, the Court rejects defendants' argument that plaintiff is not entitled to specific performance.

2. *Baseball Rules Benefit Only Leagues and Clubs*

Defendants argue that the rules [*19] of baseball exist for the benefit of the Leagues and the Clubs that are subject to the NAA and PBA. Defendants argument focuses on the fact that, because the Pelicans do not own a club within a NAPBL member league, they are not capable of relocating to New Orleans.

Plaintiff asserts that this argument incorrectly assumes that the Pelicans never had rights to the New Orleans territory. They claim that defendants' argument puts the cart before the horse. These arguments echo those to which the Court has already spoken.

A. Analysis

The Court still agrees with plaintiff. Defendants' argument overlooks plaintiff's theory in this case. Plaintiff's case turns on whether the Pelicans were awarded rights to the New Orleans territory; if a jury finds that they were awarded those rights, then plaintiff is entitled to relief in some form, regardless of the present ownership status of the AA team. Whether the Pelicans own a team today is irrelevant to whether defendants deprived that team of their rights to the New Orleans territory.

3. *Indispensable Parties*

Defendants continue to insist that the Court should not entertain any relief altering the territorial rights in New Orleans because [*20] indispensable parties to such a determination, namely the Zephyrs and the American Association, the current owners of the New Orleans territory, are absent. In response, plaintiff asserts that no indispensable third parties preclude the continued litigation of this case. Plaintiff argues that neither the Zephyrs nor the American Association are indispensable. Plaintiff plans to enforce its right to monetary relief against the named defendants; consequently, there is no need for the Zephyrs or the American Association to be parties to this litigation. If the Court should hold that these parties are indispensable, plaintiff claims that joinder of those parties, not dismissal of plaintiff's claim, is the proper remedy.

A. Analysis

HN4 Courts consider four criteria when determining whether a party is indispensable under [Rule 19](#): (1) to what extent a judgment rendered in the party's absence might be prejudicial to it; (2) the extent to which, through

³ This is a component of plaintiff's claim that, it would seem, will be the most challenging in terms of adequate proof.

protective provisions, shaping of relief, or other measures, the prejudice might be lessened or avoided; (3) whether a judgment rendered in the party's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if [*21] the action is dismissed for nonjoinder. *Macklin v. Butler*, 553 F.2d 525, 531 (7th Cir. 1977). "Where parties ought to be joined under Rule 19(a)," as plaintiff asserts, "that rule expressly contemplates that the district court will order the adverse parties to join them." *Id. at 530*. And so, contrary to defendants' assertions, Rule 19 does not mandate dismissal even if this Court were to conclude that parties are indispensable. Rather, the Court would order joinder if it is feasible. *Teamsters Local Union No. 116 v. Fargo-Moorhead Auto Dealers Assoc.*, 620 F.2d 204 (8th Cir. 1980).

Defendants fail to apply these factors. If, as the defendants claim, they will bump the plaintiff and still grant the New Orleans territory to the Zephyrs, then neither the Zephyrs nor the American Association will be affected by any judgment.

Accordingly, the Court finds that none of the parties named by defendants are Rule 19 indispensable parties.

4. Damages

Defendants' final argument about damages focuses on the ability of the Pelicans to prove any recoverable damages. But the strength of this view cannot overcome the speculation with which it [*22] is asserted. Defendants argue first that plaintiff is not entitled to any compensation because the Zephyrs expressed interest in the New Orleans territory before the waiting period set forth in the November 5th letter lapsed. Moreover, even if plaintiff has incurred definable damages, defendants maintain that plaintiff has yet to provide any evidence of damage. Defendants draw attention to what plaintiff asked its expert witness to assess: the value of the New Orleans territory in the context of a draft, the value of the club the Pelicans wanted to purchase, and the value of the cash flow lost by not owning the club. Defendant asserts that the value of the New Orleans territory in the context of a draft is not a proper element of damages because the draft rules are inapplicable to an unoccupied, unprotected territory. The Court has previously discussed the uncertainty of this position. Defendants further maintain that plaintiff's own financial projections indicate that a substantial loss during 1993 was anticipated. Accordingly, the defendants claim that the Pelicans lost nothing by not playing in this uncontested market.

The Pelicans claim to have proof of recoverable damages. The Pelicans [*23] first note that defendants argument again assumes that the Pelicans never had an interest in the New Orleans territory. The Pelicans admit that their entire case anchors to a finding that the team was awarded the New Orleans territory, was owed protection by the National Association of that territory, and that the team was replaced in violation of the rules because only a league could claim the territory.

A. Analysis

The Court finds that the plaintiff has offered enough evidence for motion purposes concerning damages to avoid summary judgment at this Juncture. Defendants' argument incorrectly overlooks plaintiff's theory, that defendants at first awarded plaintiff territorial rights to the New Orleans area. If plaintiff can prove that they were, in fact, awarded the territory, and were owed protection by the National Association of that territory, then the plaintiff's would be entitled to compensation, if the evidence is more than speculative. That is the disputed fact that makes summary relief an unreasonable expectation.

Accordingly, the Court DENIES defendants' motion to the extent that it claims plaintiff cannot prove recoverable damages.

IV. Dismissal of PBEC

PBEC [*24] claims that it should be dismissed as a defendant because it has not taken any improper action against plaintiff. Plaintiff claims that the PBEC acted improperly by not overruling the decision of Mike Moore concerning the relocation of Charlotte club to New Orleans. The PBEC argues that, because Rule 35(B) clearly makes a disapproval of a relocation request by the President of the NAPBL a final decision, there is no right to review that decision by the Commissioner or PBEC. This, too, has been rejected before.

The PBEC additionally maintains that the Pelicans have no claim for PBEC's refusal to hear the merits of the Pelicans' protest of the Zephyrs' relocation to New Orleans. The PBEC's decision not to hold a hearing rests, PBEC claims, on the ground that the Pelicans were not a club or a league and therefore had no standing under the rules of baseball to protest the decision. This argument found no agreement before, and it does not get any now. It is a rehash.

A. Analysis

The Court remains persuaded by plaintiff's argument that the PBEC should not be dismissed from this action. The PBEC had the authority under the rules of baseball to review for an abuse of discretion President [*25] Moore's decision to award the New Orleans territory to the Zephyrs. Accordingly, the Court DENIES PBEC's motion to be dismissed as a defendant.

V. Antitrust Claim

Defendants at last present something new. They argue that summary judgment is appropriate on plaintiff's state and federal antitrust claims. Defendants refer correctly to a healthy and impressive history of precedent that supports the theme that the business of baseball is exempt from the antitrust law. Defendants note that the Pelicans' reliance on the *Piazza* case, which held that the baseball exemption is limited to the player reserve system, *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993), is misplaced. Specifically, they assert that *Piazza* is out of step with years of federal jurisprudence and is nothing more than a wrongly decided case. For example, defendant says that the court in *Piazza* misread Supreme Court authority, ignored a large body of case law and disregarded substantial legislative construction. Although *Piazza* presents an impressive dissent from precedent, this Court associates itself with the weight of authority.

As to the application of Louisiana [*26] antitrust law to this case, defendants maintain first, that application of state antitrust law would effectively nullify the federal antitrust exemption accorded baseball, *Flood v. Kuhn*, 316 F. Supp. 271, 279 (S.D.N.Y. 1970), aff'd, 443 F.2d 264 (2d Cir. 1971), aff'd, 407 U.S. 258, 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972); and second, that application of the myriad of state antitrust laws to professional sports leagues would burden interstate commerce far more than any local law enforcement interest could justify. *Flood v. Kuhn*, 443 F.2d 264, 268 (2d Cir. 1971), aff'd, 407 U.S. 258, 284, 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972).

If this Court finds that the federal exemption does apply in this case, plaintiff enterprisingly argues that state antitrust law should nevertheless apply because of the reason behind the federal exemption. Invoking *Federal Baseball Club of Baltimore v. National League*, 259 U.S. 200, 208, 66 L. Ed. 898, 42 S. Ct. 465 (1922), plaintiff concludes that the original federal antitrust exemption arose from the view that baseball was a purely state affair lacking the [*27] elements of interstate commerce. Plaintiff says that if the reason for the exemption is that baseball is wholly state-connected, then baseball surely cannot argue that it is exempt from state regulation because of the federal exemption.

A. Analysis

1. Federal Antitrust Claim

The Court stated the following in its Order and Reasons, dated April 30, 1993:

The defendants are in the business of baseball. Their business is a legally sanctioned monopoly.(FN6) One of the central features of that monopoly is the power to decide who can play where.

In footnote 6 the Court wrote:

The Supreme Court has repeatedly endorsed the antitrust exemption for the business of baseball. See *Flood v. Kuhn*, 407 U.S. 258, 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972); *Toolson v. New York Yankees*, 346 U.S. 356, 98 L. Ed. 64, 74 S. Ct. 78 (1953); *Federal Baseball Club of Baltimore v. National League*, 259 U.S. 200, 66 L. Ed. 898, 42 S. Ct. 465 (1922).

Even with the assistance of *Piazza*, the Court is not convinced that the baseball exemption to the antitrust laws does not apply in this case. *Piazza*, of course, is not binding [*28] on this Court; and, while the Court does find its

reasoning impressive, it does not feel that *Piazza* warrants ignoring the strong precedent to the contrary. In fact, at least one circuit court has addressed and rejected the same argument that the court in *Piazza* accepted--that the two references in the *Flood* case to the reserve system limited the baseball exemption to that aspect of baseball alone. [Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 540-41](#) (7th Cir.), cert. denied, 439 U.S. 876, 58 L. Ed. 2d 190, 99 S. Ct. 214 (1978). This Court cannot accept the cramped view of *Flood* that *Piazza* takes.⁴

[*29] Accordingly, the Court GRANTS defendants' motion for summary judgment on plaintiff's federal antitrust claim.

2. State Antitrust Claim

The Court also GRANTS defendants' motion for summary judgment on plaintiff's state antitrust claim. Plaintiff's argument ignores the fact that the Supreme Court in *Flood* implicitly, if not explicitly, affirmed the district court's dismissal of plaintiff's state antitrust claim on the ground that application of state antitrust regulation would conflict with federal policy and would inhibit the national uniformity that is required in any regulation of baseball and its reserve system. [Flood, 407 U.S. at 284](#). In addition, the Court also finds that [HNS](#) [the [commerce clause](#) forbids inconsistent state antitrust regulation of professional league sports. See e.g. [id. at 284](#) ("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](#)").]

Conclusion

For the foregoing reasons, the Court DENIES the motion for summary judgment on all grounds except plaintiff's state and federal antitrust claims. [*30] The Court GRANTS defendants' motion for summary judgment on plaintiff's state and federal antitrust claims and dismisses those claims.

New Orleans, Louisiana, February 26, 1994.

MARTIN L. C. FELDMAN

UNITED STATES DISTRICT JUDGE

End of Document

⁴ In *Federal Baseball*, in 1922, Justice Holmes declared baseball, not just the reserve clause, free of the reach of the antitrust laws. The reserve clause was merely the incident-driven catalyst for the Court's inquiry. Right or wrong, out of step with commercial reality or not, *Federal Baseball* continues to bind us, as *Flood v. Kuhn* instructs.

Centennial Sch. Dist. v. Independence Blue Cross

United States District Court for the Eastern District of Pennsylvania

February 28, 1994, Decided ; February 28, 1994, Filed

CIVIL ACTION NO. 93-3456

Reporter

1994 U.S. Dist. LEXIS 2098 *; 1994-1 Trade Cas. (CCH) P70,526

CENTENNIAL SCHOOL DISTRICT v. INDEPENDENCE BLUE CROSS; MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA, t/a PENNSYLVANIA BLUE SHIELD; KEYSTONE HEALTH PLANS, INC.; and KEYSTONE HEALTH PLAN EAST, INC., t/a KEYSTONE HEALTH PLAN v. CENTENNIAL SCHOOL DISTRICT, BRADLEY S. KIRSCH, ROBERT J. FLUEHR, and EXECUCOMP INSURANCE SERVICES, INC.

Core Terms

Shield, Sherman Act, alleges, insurance business, monopoly power, insurer, healthcare plan, antitrust, percent, monopolization, seventy-five, employees, restraint of trade, McCarran-Ferguson Act, tie, motion to dismiss, cause of action, relevant market, integral part, service plan, policyholder, Defendants', monopoly, argues, plans

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

HN1 Motions to Dismiss, Failure to State Claim

In determining a motion to dismiss, all assertions in the complaint are assumed to be true; all reasonable inferences are drawn from the complaint in favor of the plaintiff; and the complaint only may be dismissed if the plaintiff has alleged no set of facts under which they could state a claim.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN2 Scope, Exemptions

The McCarran-Ferguson Act, [15 U.S.C.S. §§ 1011-1015](#), insulates the business of insurance from federal antitrust liability in certain circumstances. The Supreme Court has reiterated that the McCarran-Ferguson Act precludes application of federal antitrust laws if the challenged conduct fulfills all of the following three elements: that the conduct (1) is the "business of insurance," (2) is subject to sufficient state regulation, and (3) does not constitute coercion, intimidation, or a boycott.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN3 Scope, Exemptions

See [15 U.S.C.S. § 1012](#).

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN4 Scope, Exemptions

See [15 U.S.C.S. § 1013](#).

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN5 Scope, Exemptions

The status of defendants as insurers does not control whether they are engaged in the "business of insurance." Instead, the "business of insurance" should be read to single out one activity from others, not to distinguish one entity from another. The United States Supreme Court has established a three-part test to evaluate the activity: 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. All three parts of the test must be met in the affirmative for the activity to constitute the "business of insurance."

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN6 Scope, Exemptions

Risk spreading among insurance companies does not constitute the "business of insurance."

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN7 Scope, Exemptions

Courts have carefully defined the "business of insurance" requirement to effect the limited congressional purposes behind the act, and for the same reasons consistently use a fact-based conduct analysis to determine whether that requirement is met in a particular case.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN8 [blue download icon] **Regulated Practices, Private Actions**

The United States Supreme Court has mandated in antitrust cases a concededly rigorous standard; because the proof is largely in the hands of the alleged coconspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

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

Antitrust & Trade Law > Sherman Act > Claims

HN9 [blue download icon] **Actual Monopolization, Claims**

To state a claim for monopolization under [§ 2](#) of the Sherman Act, plaintiff must allege: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

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

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

HN10 [blue download icon] **Attempts to Monopolize, Elements**

To state a claim for attempted monopolization, under § 2 of the Sherman Act, the plaintiff must allege (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

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

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

HN11 [blue download icon] **Actual Monopolization, Claims**

[15 U.S.C.S. § 2.](#)

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

HN12 [blue download icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

A leveraging case requires allegations of more than a "competitive advantage" in the secondary market.

Civil Procedure > ... > Pleadings > Complaints > General Overview

[HN13](#) [down] Pleadings, Complaints

It is axiomatic that alternate forms of pleading may be pursued. [*Fed. R. Civ. P. 8\(e\)\(2\)*](#).

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

[HN14](#) [down] Sherman Act, Scope

See [15 U.S.C.S. § 1](#).

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

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

[HN15](#) [down] Sherman Act, Scope

To state a claim for tying, plaintiff must allege (1) a tie (conditioning the sale of one product on the purchase of another), (2) that the seller has economic power as to the tying product to restrain competition in the tied product market, and an effect on interstate commerce.

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

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

[HN16](#) [down] Regulated Practices, Price Fixing & Restraints of Trade

See 73 Pa. Cons. Stat. Ann. § 201-9.2 (1992).

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

[HN17](#) [down] Private Actions, Purchasers

In an action brought under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, common law elements of fraud require that a purchase must have been made in reliance upon a misrepresentation or other alleged deceptive practice.

Torts > ... > Contracts > Intentional Interference > Elements

[HN18](#) [down] Intentional Interference, Elements

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the third person's failure to perform the contract.

Torts > ... > Contracts > Intentional Interference > Elements

HN19 [] **Intentional Interference, Elements**

Therefore, in order to allege a claim, of tortious interference with a contract, a plaintiff must show (1) that the acts complained of were willful and intentional; (2) that they were calculated to cause damage to the plaintiff and its business; (3) that the acts were done with the unlawful purpose of causing damage and loss to the plaintiff without right or justifiable cause on the part of the defendant; and (4) that actual damage and loss resulted.

Torts > ... > Contracts > Intentional Interference > Defenses

HN20 [] **Intentional Interference, Defenses**

One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other.

Counsel: [*1] For CENTENNIAL SCHOOL DISTRICT, individually and on behalf of all others similarly situated, PLAINTIFF: WAYNE M. THOMAS, JOSEPH C. KOHN, KOHN, SAVETT, KLEIN & GRAF, P.C., PHILADELPHIA, PA. ALLAN D. GOULDING, JR., CURTIN & HEEFNER, MORRISVILLE, PA.

For INDEPENDENCE BLUE CROSS, MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA t/a PENNSYLVANIA BLUE SHIELD, KEYSTONE HEALTH PLANS, INC., KEYSTONE HEALTH PLAN, EAST, INC. t/a KEYSTONE HEALTH PLAN, DEFENDANTS: MARC J. SONNENFELD, MORGAN, LEWIS & BOCKIUS, PHILA, PA. MICHAEL F. CLAYTON, MORGAN, LEWIS & BOCKIUS, WASHINGTON, DC.

For INDEPENDENCE BLUE CROSS, MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA t/a PENNSYLVANIA BLUE SHIELD, KEYSTONE HEALTH PLANS, INC., KEYSTONE HEALTH PLAN, EAST, INC. t/a KEYSTONE HEALTH PLAN, COUNTER-CLAIMANTS: MARC J. SONNENFELD, MORGAN, LEWIS & BOCKIUS, PHILA, PA. MICHAEL F. CLAYTON, MORGAN, LEWIS & BOCKIUS, WASHINGTON, DC.

For CENTENNIAL SCHOOL DISTRICT, COUNTER-DEFENDANT: JOSEPH C. KOHN, KOHN, SAVETT, KLEIN & GRAF, P.C., PHILADELPHIA, PA. PHILLIP B. SILVERMAN, HARRIS & SILVERMAN, PHILA, PA. For BRADLEY S. KIRSCH, COUNTER-DEFENDANT: DENNIS J. O'LEARY, WHITE AND WILLIAMS, PHILA, PA. ALLAN D. GOULDING, JR., CURTIN & HEEFNER, [*2] MORRISVILLE, PA. PHILLIP B. SILVERMAN, HARRIS & SILVERMAN, PHILA, PA. For ROBERT J. FLUEHR, EXECUCOMP INSURANCE SERVICES, INC., COUNTER-DEFENDANTS: JAMES M. PRAHLER, MARGOLIS, EDELSTEIN & SCHERLIS, PHILADELPHIA, PA.

Judges: Padova, J.

Opinion by: PADOVA

Opinion

MEMORANDUM

Padova, J.

I. Introduction

Plaintiff, Centennial School District ("Centennial"),¹ has filed suit alleging a misuse of monopoly power in violation of § 2 of the Sherman Act (Count I); restraint of trade in violation of § 1 of the Sherman Act (Count II); attempted monopolization in violation of § 2 of the Sherman Act (Count III); illegal tying in violation of § 1 of the Sherman Act (Count IV); common law restraint of trade (Count V); deceptive trade practices in violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (Count VI); and tortious interference with contractual and business relationships (Count VII). The defendants are Independence Blue Cross ("Blue Cross"), Medical Service Association of Pennsylvania, t/a Pennsylvania Blue Shield ("Blue Shield"), Keystone Health Plans, Inc., and Keystone Health Plan East, Inc., t/a Keystone Health Plan ("Keystone"). Defendants have filed a motion to dismiss the [*3] complaint. For the following reasons, the motion will be granted in part and denied in part.

The complaint alleges the following facts, which must be accepted as true in the context of a motion to dismiss. Centennial provides two types of health care plans to its employees: (1) fee for service plans, which provide access to physicians and partially or completely reimburse the employee, and (2) prepaid plans, known as health maintenance organizations (HMOs), which provide a broader range of care by a pool of doctors. Complaint at PP 16-20. Federal law mandates that Centennial offer its employees both a Preferred Provider Plan or Preferred Provider Organization ("PPO plan") and a pure HMO plan. *Id.* at P 31.² In addition, plaintiff's labor agreements with employees require it to offer fee for service plans. *Id.* at P 35. Blue Cross and Blue Shield [*4] sell plans to employers, have a monopoly power in the "fee for service health care plan market in Southeastern Pennsylvania," and "dominate the overall market for health care plans in Southeastern Pennsylvania, which market includes both fee for service and HMO plans," with a dangerous probability of monopolization of the overall market. *Id.* at PP 21-24. Defendant Keystone is a for-profit subsidiary owned jointly by Blue Cross and Blue Shield. *Id.* at P 25.

[*5] In February of 1993, defendants threatened to terminate Centennial's fee for service plan unless seventy-five percent of Centennial's employees enrolled in Blue Cross/Blue Shield. Defendants permit enrollment in the Keystone HMO to count toward this minimum participation rate. Centennial prefers another HMO, which it alleges is less costly. *Id.* at P 33.

II. Standard of Review

HN1 [↑] In determining a motion to dismiss, all assertions in the complaint are assumed to be true; all reasonable inferences are drawn from the complaint in favor of the plaintiff; and the complaint only may be dismissed if the plaintiff has alleged no set of facts under which they could state a claim. See, e.g., *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1410 (3d Cir.), cert. denied, 115 L. Ed. 2d 1007, 111 S. Ct. 2839 (1991). Defendants have moved for dismissal on two grounds: first, that their activities are exempt from antitrust liability under the McCarran-Ferguson Act and second, that even if not exempt, plaintiff has failed to state a claim upon which relief can be granted. I will first address the applicability of the McCarran-Ferguson Act and [*6] then turn to the individual claims.

III. McCarran-Ferguson Act

¹ The Complaint is styled as a class action, and a motion for class certification is pending. For purposes of this motion, however, Centennial is the only plaintiff.

² The complaint alleges that PPOs provide more limited access to health care than fee for service plans. Complaint at P 19. However, in the brief opposing the motion to dismiss, plaintiff states that the complaint incorrectly described PPOs and that the correct term for the plan described in the complaint would be the Individual Practice Association ("IPA") form of an HMO. Pltf's Opp. Mot. Dis. at 4 n.3. Although this terminology problem is not material to the resolution of the motion, plaintiff presumably will seek to amend the complaint to resolve the issue.

HN2[] The McCarran-Ferguson Act, [15 U.S.C.A. §§ 1011-1015 \(West 1993\)](#), insulates the business of insurance from federal antitrust liability in certain circumstances.³ The Supreme Court recently reiterated that the McCarran-Ferguson Act precludes application of federal antitrust laws if the challenged conduct fulfills all of the following three elements: that the conduct (1) is the "business of insurance," (2) is subject to sufficient state regulation, and (3) does not constitute coercion, intimidation, or a boycott. [Hartford Fire Insurance Co. v. California, 125 L. Ed. 2d 612, 113 S. Ct. 2891, 2900 \(1993\)](#).

[*7] The activity being challenged -- in this case, the minimum participation requirement -- must be evaluated under the McCarran-Ferguson Act. **HN5**[] The status of defendants as insurers does not control whether they are engaged in the "business of insurance." Instead, "the business of insurance" should be read to single out one activity from others, not to distinguish one entity from another." *Id. at 2901*. The Supreme Court has established a three-part test to evaluate the activity: "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." *Id.* (quoting [Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 3009, 73 L. Ed. 2d 647 \(1982\)](#) (emphasis in *Pireno*)). All three parts of the test must be met in the affirmative for the activity to constitute the "business of insurance."

Defendants argue first, that such agreements are a traditionally recognized way of spreading [*8] risk. Defendants argue that older and ill employees tend to opt for Blue Cross/Blue Shield coverage (a process known as "adverse selection"), and that without the participation requirement the companies would have an undesirable "risk pool" compared to the "risk pool" of employees in general. Defendants assert that preventing adverse selection reduces premiums and keeps the companies viable.

Second, defendants argue that the minimum participation requirement is solely an integral part of the policy relationship between the insurer and the insured. Third, they contend that the activity does not go beyond the insurance market. For support, defendants rely heavily upon [Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island, 883 F.2d 1101 \(1st Cir. 1989\)](#), cert. denied, 494 U.S. 1027, 108 L. Ed. 2d 610, 110 S. Ct. 1473 (1990). Defendants argue that the minimum participation requirement therefore constitutes the "business of insurance." However, defendants' position is incorrect.

³ **HN3**[] The Act provides in relevant sections 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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

[15 U.S.C.A. § 1012 \(West 1976\)](#). **HN4**[]

- (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

- (b) 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.

[15 U.S.C.A. § 1013 \(West 1976\)](#).

In *Ocean State*, the Court of Appeals affirmed the District Court's grant of a JNOV following a jury verdict for plaintiff. Among other things, the court [*9] determined that the plaintiff "failed to show that Blue Cross' actions were anything other than legitimate acts of competition." *Id.* at 1105. In contrast, here I must accept as true the allegations of plaintiff's complaint, which clearly state that Blue Cross is acting to destroy competition. Plaintiff has alleged that defendants are not engaged in risk-spreading activities, but instead pursue a monopolization strategy. See, e.g., [*State of Maryland v. Blue Cross and Blue Shield, 620 F. Supp. 907 \(D. Md. 1985\)*](#) (holding that whether horizontal market allocation was "the business of insurance" could not be determined on a motion for summary judgment). Furthermore, at this point in the proceedings, it is not clear that the practice is an integral part of the relationship between the policy-holder and the insurer. See [*SEC v. National Securities, Inc., 393 U.S. 453, 460, 89 S. Ct. 564, 568-69, 21 L. Ed. 2d 668 \(1969\)*](#) ("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' [*10] insurance' . . . Whatever the exact scope of the statutory term, it is clear where the focus was -- it was on the relationship between the insurance company and the policyholder."). See also [*Anglin v. Blue Shield of Virginia, 693 F.2d 315 \(4th Cir. 1982\)*](#) (holding that refusal to offer a specific type of policy was between the policy holder and insurer and constituted the "business of insurance"); [*American Standard Life & Accident Ins. v. U.R.L., Inc., 701 F. Supp. 527 \(M.D. Pa. 1988\)*](#) (holding that HN6[↑]] risk spreading among insurance companies does not constitute the "business of insurance."). Instead, the minimum participation requirement may only be an integral part of the relationship between defendants and the policyholder's employer, and that it may not be integral to an individual's policy that seventy-five percent of other policy holders subscribe with the same insurance provider. Of course, discovery may show that the requirement is an integral part of the insurance relationship because it permits the insurer to offer specific terms to the policyholder (for example, by keeping costs down). Nevertheless, at this stage [*11] of the proceedings that determination cannot be made. See, e.g., [*Reazin v. Blue Cross & Blue Shield of Kansas, 663 F. Supp. 1360, 1402 \(D. Kan. 1987\)*](#) HN7[↑]] ("Courts have carefully defined the 'business of insurance' requirement to effect the limited congressional purposes behind the act, and for the same reasons consistently use a fact-based conduct analysis to determine whether that requirement is met in a particular case"), aff'd, [*899 F.2d 951*](#) (10th Cir.), cert. denied, [*497 U.S. 1005, 111 L. Ed. 2d 752, 110 S. Ct. 3241 \(1990\)*](#).

Additionally, the parties dispute issues regarding the characterization of the seventy-five percent minimum participation agreement and whether it is a risk-spreading device. For example, defendants argue in their brief in support of the Motion to Dismiss that "as a condition of underwriting group health insurance, some minimum participation requirement becomes an obvious necessity." Memorandum at 9 (emphasis in original). Even if this is true, I cannot determine, in the context of a motion to dismiss, that the 75% level (contrasted with 25% or 50%, for example) is a necessary element of doing [*12] business instead of a pretextual anticompetitive device, as plaintiff alleges. Plaintiff also questions the necessity of the participation requirement, because defendants did not enforce it until 1992.⁴ Because I cannot determine now that the challenged activity constitutes the "business of insurance," I need not determine whether there is sufficient state regulation or whether the challenged activity constitutes a boycott or other coercion. At this stage of the proceedings, the McCarran-Ferguson Act therefore affords no shield to defendants, and I turn to the individual antitrust claims.

IV. Failure to State Antitrust Claims

Defendants argue that even if the McCarran-Ferguson Act does not immunize their conduct, plaintiff has failed to state a claim for a violation of federal **antitrust law**. In this context, I note that HN8[↑]] the Supreme Court [*13] has mandated in antitrust cases a "concededly rigorous standard" and that because "the proof is largely in the hands of the alleged coconspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." [*Hospital Bldg Co. v. Trustees of Rex Hosp., 425 U.S. 738, 96 S. Ct. 1848, 1853, 48 L. Ed. 2d 338 \(1976\)*](#). With this guidance, I will examine the federal antitrust claims.

⁴The parties dispute when the minimum participation requirement was adopted by the defendants, but there does not seem to be any dispute that it was not enforced until 1992.

A. Count I and Count III: Claims Under [Section 2](#) of the Sherman Act

Defendants contend that these counts fail to state a claim under [section 2](#) of the Sherman Act.⁵ [HN9](#)[↑] To state a claim for monopolization under [section 2](#) of the Sherman Act, plaintiff must allege: "(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." *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 197 (3d Cir. 1992) (quoting [United States v. Grinnell Corp.](#), 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)), [*14] cert. denied, S. Ct. (1993). [HN10](#)[↑] To state a claim for attempted monopolization, the plaintiff must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." [Spectrum Sports, Inc. v. McQuillan](#), 122 L. Ed. 2d 247, 113 S. Ct. 884, 890-91 (1993). Defendants contend that plaintiff has not met either standard.

Defendants assert that plaintiff has failed adequately to allege possession of monopoly power in the relevant market. Count I alleges a violation based on "misuse of monopoly power." Defendants argue that the complaint asserts that defendants have [*15] a monopoly in the "market for fee for service health care plans," but that it alleges anticompetitive conduct in the "the health maintenance organization market and the overall health care plan market." Defendants urge that misuse of monopoly power is simply another term for monopoly leveraging, a theory doomed to fail in this case. However, Defendants' argument depends upon a misconstruction of *Fineman*. In that case, the plaintiff had failed to prove that the defendant was able to use power in one market to obtain a monopoly or a dangerous probability of monopoly in another market. *Fineman*, 980 F.2d at 203.

Plaintiff's complaint characterizes Count I as a "misuse of monopoly power." As plaintiff apparently concedes, this is essentially a claim of leveraging; that is, alleging that the monopoly power in one market (the fee for service market) is being used to destroy competition in a second market (the overall market for health care plans). [HN12](#)[↑] A leveraging case requires allegations of more than a "competitive advantage" in the secondary market. *Id.* at 204. Plaintiff argues that the complaint alleges that the fee [*16] for service monopolist is refusing to deal with employers unless the employers terminate some dealings with HMOs. See [Reazin v. Blue Cross and Blue Shield of Kansas](#), 899 F.2d 951 (10th Cir.) (defendants changed the allowable payments to hospitals to attempt to destroy a competitor), cert denied, 497 U.S. 1005, 111 L. Ed. 2d 752, 110 S. Ct. 3241 (1990). Plaintiff also argues that it is premature in any event to define the market at this point in the litigation.

Plaintiff's complaint does allege a monopoly in fee for service plans and a dangerous probability of obtaining monopoly power in the overall market for health care plans in Southeastern Pennsylvania, although it is not a model of clarity in this regard. Complaint at PP 4, 5, 40. Furthermore, plaintiff has alleged specific acts which it contends creates the probability of success by defendants in the secondary market: the enforcement of the minimum participation requirement. Defendants' contention that separate markets for fee for service and HMO plans would preclude, as a matter of law, an overall health care plan market also fails; it is generally accepted that submarkets may exist. See, e.g., [*17] *Fineman*, 980 F.2d at 199. Count I will not be dismissed.

Count III alleges attempted monopolization in violation of [section 2](#). Defendants raise similar arguments regarding the inconsistency of allegations in Count III as with Count I. Defendant complains that plaintiff inconsistently alleges the relevant markets in different counts of the complaint. In other words, defendants argue that plaintiff has not identified one relevant market, but instead several mutually exclusive ones. However, [HN13](#)[↑] it is axiomatic that alternate forms of pleading may be pursued. See [Fed. R. Civ. P. 8\(e\)\(2\)](#).⁶ Plaintiff has alleged a relevant market in

⁵ [HN11](#)[↑] [Section 2](#) of the Sherman Act provides in relevant part that "every person that 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 . . . shall be deemed guilty of a felony." [15 U.S.C.A. §2](#).

⁶ For the same reason, plaintiff's allegations that Blue Cross and Blue Shield wield monopolistic power and yet that they have combined to violate [section 1](#) of the Sherman Act both may proceed at this stage.

Count III of the complaint (the market for health care plans in Southeastern Pennsylvania), and also alleged a specific intent to monopolize and a dangerous probability of success. Therefore, Count III may proceed as well.

[*18] B. Count II: [Section 1](#) of the Sherman Act

Defendants argue for the dismissal of Count II of the complaint, which is predicated upon [Section 1](#) of the Sherman Act.⁷ This Count alleges that Blue Cross and Blue Shield have conspired to refuse to sell to plaintiff. Complaint P 44. According to defendants, "because the alleged Blue Cross/Blue Shield joint activity does not bring together disparate economic interests that would otherwise be in competition with one another," Defendants' Memorandum at 26, no [Section 1](#) claim has been stated. In support of this statement, defendants rely upon [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984), in which the Supreme Court held that a parent and its wholly-owned subsidiary cannot conspire for purposes of the Sherman Act. Defendants draw from the opinion that the underlying purpose of the Sherman Act is to promote independent economic interests.

[*19] However, Plaintiff responds persuasively that *Copperweld* and its progeny are inapplicable and that defendants have cited no cases applying the standard of "independent sources of economic power." Plaintiff has alleged in this count that Blue Cross and Blue Shield are separate companies and that therefore they can conspire or combine in violation of [Section 1](#). As plaintiff has noted, until 1 July 1991, Blue Cross and Blue Shield operated competing HMOs, and that joint ventures (i.e., Keystone) between competitors or potential competitors may violate the Sherman Act. See, e.g., [Citizen Publishing Co. v. United States](#), 394 U.S. 131, 22 L. Ed. 2d 148, 89 S. Ct. 927 (1969). Count II may proceed.

C. Count IV: Tying Under [Section 1](#)

HN15 To state a claim for tying, plaintiff must allege (1) a tie (conditioning the sale of one product on the purchase of another), (2) that the seller has economic power as to the tying product to restrain competition in the tied product market, and an effect on interstate commerce. [Bogosian v. Gulf Oil Corp.](#), 561 F.2d 434, 449 (3d Cir. 1977), cert. denied, 434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978). Defendants assert [*20] the plaintiff has not adequately alleged the existence of a tie, and therefore seek dismissal of this count. Defendants contend that plaintiff has not and cannot allege that defendants conditioned the sale of their fee for service plan on the purchase of the HMO plan. If the seventy-five percent requirement is met through the purchase of fee for service products, say defendants, then the HMO need never be purchased at all.

Plaintiff argues that defendants have tried to force it to give up the HMO it wants in order to meet the seventy-five percent participation requirement. It argues that coercion to buy the tied product is sufficient; however, in this case no tie has been demonstrated.

Here, the first element of tying has not been met. Defendants have not conditioned the sale of Blue Cross/Blue Shield on the purchase of the Keystone HMO. The minimum purchase requirement may be satisfied in any way: by the purchase of Blue Cross/Blue Shield policies alone, by the purchase of Keystone HMO alone, or by any combination of the two. Plaintiff concedes that if defendants imposed the seventy-five percent requirement only as to Blue Cross/Blue Shield, there would be no tie. Plff. Opp. at [*21] 47 n.25. It is true that coercion may constitute illegal tying, see [Jefferson Parish Hosp. Dist. No. 2 v. Hyde](#), 466 U.S. 2, 9, 104 S. Ct. 1551, 1556, 80 L. Ed. 2d 2 (1984). However, the situation here is distinguishable because the minimum participation agreement does not require purchase of the HMO. If defendants would not commit a tie by requiring seventy-five percent of plaintiff's employees to purchase Blue Cross/Blue Shield, then permitting the purchase of the HMO to count toward that minimum cannot constitute a tie. The other twenty-five percent is still "open" and any HMO could be offered to those employees. There is no package deal required here. Count IV therefore will be dismissed.

⁷ **HN14** [Section 1](#) of the Sherman Act provides, in pertinent part, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . ." [15 U.S.C.A. § 1](#).

V. Pendent State Law Claims

In addition to the federal antitrust claims, plaintiff has asserted several state law causes of action as well. Defendants seek dismissal of those claims, and I address them now.

A. Count V: Restraint of Trade

Defendants have proffered no separate argument against the restraint of trade count, but instead argue that the common-law restraint of trade claim fails for the same reasons that the Sherman Act claim fails. Because I [*22] have held that plaintiff has stated a cause of action under the Sherman Act, the claim for restraint of trade may proceed.

B. Count VI: Unfair Trade Practices and Consumer Protection Law

Plaintiff alleges a cause of action under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL), which provides:

[HN16](#)[Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action, to recover actual damages or one hundred dollars (\$ 100), whichever is greater.

73 Pa. Cons. Stat. Ann. § 201-9.2 (1992).

Plaintiff argues that it has stated a claim because it alleges that Blue Cross misrepresented the purpose of the seventy-five percent minimum participation requirement. However, even if that is so, it is clear that plaintiff did not purchase based on the alleged misrepresentation. Plaintiff apparently wants no part of the minimum participation requirement, regardless of its represented purpose. Without [*23] any allegation that the plaintiff purchased in reliance upon misrepresentations, there can be no cause of action under the UTPCPL. See, e.g., [Prime Meats, Inc. v. Yochim](#), 422 Pa. Super. 460, 619 A.2d 769, 774 (Pa. Super. Ct. 1993) (holding in [HN17](#)[] an action brought under the UTPCPL that "common law elements of fraud require that a purchase must have been made in reliance upon a misrepresentation or other alleged deceptive practice."). Count VI therefore will be dismissed.

C. Count VII: Tortious Interference with Contractual Business Relationships

Tortious interference with contractual business relations is governed in Pennsylvania by the [Restatement \(Second\) of Torts § 766](#) (1979):

[HN18](#)[One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the third person's failure to perform the contract.

[Adler, Barish, Daniels, Levin and Creskoff v. Epstein](#), 482 Pa. 416, 393 A.2d 1175 (Pa. 1978), cert. [*24] dismissed, 442 U.S. 907, 99 S. Ct. 2817 (1979), quoted in [U.S. Healthcare v. Blue Cross of Greater Philadelphia](#), 898 F.2d 914, 925 (3d Cir. 1990).

[HN19](#)[Therefore, in order to allege such a claim, a plaintiff must show "(1) that the acts complained of were willful and intentional; (2) that they were calculated to cause damage to the plaintiff and its business; (3) that the acts were done with the unlawful purpose of causing damage and loss to the plaintiff without right or justifiable cause on the part of the defendant; and (4) that actual damage and loss resulted." [Advanced Power Systems v. Hi-Tech Systems](#), 801 F. Supp. 1450, 1458 (E.D. Pa. 1992) (quoting [Boyce v. Smith-Edwards-Dunlap Co.](#), 398 Pa. Super. 345, 580 A.2d 1382, 1390 (Pa. Super. Ct. 1990)).

Plaintiff alleges that it has contractual relations with HMOs other than Keystone, and that defendants have interfered with those relationships. Complaint at P 71. Defendants maintain that they are privileged under Pennsylvania law because competition cannot give rise to a tortious interference claim. *Restatement (Second) of Torts § 768*,⁸ *Franklin Music v. American Broadcasting Companies*, 616 F.2d 528 (3d Cir. 1979), *Gilbert v. Otterson*, 379 Pa. Super. 481, 550 A.2d 550, 554 (Pa. Super. Ct. 1988). However, whether or not defendants have employed wrongful means is precisely the issue in this suit. Because I have found that plaintiff has sufficiently stated a cause of action predicated upon the allegedly unlawful actions of defendant, this count may proceed as well.

[*26] An appropriate order follows.

ORDER

AND NOW, this 28th day of February, 1994, upon consideration of Defendants' motion to dismiss (Document No. 5), the responses thereto, and arguments of counsel in connection therewith,

It is hereby ORDERED that the Motion is GRANTED IN PART AND DENIED IN PART. Counts IV and VI of Plaintiff's complaint are hereby DISMISSED. In all other respects, the Motion is DENIED.

BY THE COURT:

JOHN R. PADOVA, J.

End of Document

⁸ [Section 768](#) provides that:

HN20 [One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor . . . does not interfere improperly with the other's relation if]

- (a) the relation concerns a matter involved in the competition between the actor and the other and
- (b) the actor does not employ wrongful means and
- (c) his action does not create or continue an unlawful restraint of trade and
- (d) his purpose is at least in part to advance his interest in competing with the other.

[Restatement \(Second\) of Torts § 768](#).



Massachusetts Sch. of Law v. ABA

United States District Court for the Eastern District of Pennsylvania

March 11, 1994, Decided ; March 11, 1994, Filed, Entered

CIVIL ACTION No. 93-6206

Reporter

846 F. Supp. 374 *; 1994 U.S. Dist. LEXIS 2924 **; 1994-1 Trade Cas. (CCH) P70,538

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC. v. AMERICAN BAR ASSOCIATION, et al.

Subsequent History: [\[**1\]](#) Motion for Reconsideration Granted May 31, 1994, Reported at: [1994 U.S. Dist. LEXIS 7219.](#)

Core Terms

individual defendant, accreditation, contacts, personal jurisdiction, law school, co-conspirator, conspiracy, cause of action, defendants', exercise of personal jurisdiction, lack of personal jurisdiction, conspired, sufficient contact, forum state, organizational

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN1 In Rem & Personal Jurisdiction, In Personam Actions

Before a federal court can exercise personal jurisdiction over any individual defendants, there must be a constitutionally acceptable relationship between that defendant and the forum. Once a defendant challenges the exercise of personal jurisdiction, the plaintiff has the burden of proving with reasonable particularity that sufficient contacts to support jurisdiction exist between the defendant and the forum state. The plaintiff must establish a basis for either specific jurisdiction or general jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Long Arm Jurisdiction

HN2 In Rem & Personal Jurisdiction, In Personam Actions

[Fed. R. Civ. P. 4](#) allows a federal district court to exercise personal jurisdiction over out-of-state defendants to the extent allowed by the law of the state where the court is located.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Long Arm Jurisdiction

HN3 [down] In Rem & Personal Jurisdiction, In Personam Actions

Pennsylvania has two statutes that confer jurisdiction over persons. [42 Pa. Cons. Stat. §§ 5301, 5322](#). General jurisdiction over an individual defendant is based on the individual's presence or domicile in Pennsylvania when served or on the individual's consent to jurisdiction. [42 Pa. Cons. Stat. § 5301\(a\)\(1\)](#) (1993). Specific jurisdiction over a person is based on the cause of action arising from the person's activities and contacts in Pennsylvania. [42 Pa. Cons. Stat. § 5322\(a\)](#) (1993).

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN4 [down] In Rem & Personal Jurisdiction, Constitutional Limits

Pennsylvania provides for jurisdiction to the fullest extent allowed by the United States Constitution and to be based on the most minimum contact with Pennsylvania allowed by the United States Constitution. [42 Pa. Cons. Stat. § 5322\(b\)](#). With regard to specific jurisdiction, due process is satisfied when a cause of action is related to or arises out of the defendant's purposeful contacts with the forum state so that the defendant could reasonably expect to be haled into court in that forum. It is not enough to warrant the exercise of personal jurisdiction that a defendant is being sued in a forum where he or she had some contact. Rather, a court must examine the relationship among the defendant, the forum, and the litigation.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN5 [down] In Rem & Personal Jurisdiction, In Personam Actions

Co-conspirator jurisdiction is not a separate basis of jurisdiction apart from general or specific jurisdiction. Rather, it is based on the contacts-with-the-forum analysis. The difference is that a court looks not only at the defendant's forum contacts, but at those of the defendant's resident co-conspirators. The court imputes the contacts of the resident co-conspirator over whom it has jurisdiction to the foreign co-conspirator to see if there are sufficient contacts to exercise jurisdiction over the latter.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN6 [down] In Rem & Personal Jurisdiction, In Personam Actions

Merely belonging to a civil conspiracy does not make a member subject to the jurisdiction of every other member's forum. Rather, there must also be substantial acts in furtherance of the conspiracy within the forum, of which the out-of-state co-conspirator was or should have been aware.

Antitrust & Trade Law > Clayton Act > Jurisdiction

[HN7](#) [down arrow] Clayton Act, Jurisdiction

The Clayton Act authorizes that an antitrust suit against a corporation can be brought in the judicial district where it is an inhabitant and also in any district where the corporation is found or transacts business. [15 U.S.C.S. § 22](#). This provision for nationwide service of process means that a federal district court's jurisdiction is coextensive with the boundaries of the United States. This Clayton Act provision applies only to corporate, not individual, antitrust defendants.

Counsel: FOR MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC., PLAINTIFF: HAROLD E. KOHN, KOHN, SAVETT, KLEIN & GRAF, P.C., PHILADELPHIA, PA. JOANNE ZACK, KOHN, NAST & GRAF, P.C., PHILADELPHIA, PA. LAWRENCE R. VELVEL, ANDOVER, MA. MICHAEL L. COYNE, ANDOVER, MA. CONSTANCE L. RUDNICK, ANDOVER, MA. PETER M. MALAGUTI, ANDOVER, MA. JOSEPH E. DEVLIN, ANDOVER, MA.

FOR AMERICAN BAR ASSOCIATION, DEFENDANT: L. SUZANNE FORBIS, PEPPER, HAMILTON & SCHEETZ, PHILA, PA. BARBARA W. MATHER, PEPPER, HAMILTON & SCHEETZ, PHILA, PA. H. BLAIR WHITE, SIDLEY AND AUSTIN, CHICAGO, IL. DAVID T. PRITIKIN, SIDLEY AND AUSTIN, CHICAGO, IL. WILLIAM H. BAUMGARTNER, SIDLEY AND AUSTIN, CHICAGO, IL. FOR LAW SCHOOL ADMISSION SERVICES, INC., LAW SCHOOL ADMISSION COUNCIL, DEFENDANTS: JOSEPH B. G. FAY, JAY H. CALVERT, JR., MORGAN, LEWIS & BOCKIUS, PHILA, PA. MICHAEL F. CLAYTON, MORGAN, LEWIS & BOCKIUS, WASHINGTON, DC. SCOTT A. STEMPER, MORGAN, LEWIS AND BOCKIUS, WASHINGTON, DC. H. BLAIR WHITE, SIDLEY AND AUSTIN, CHICAGO, IL. DAVID T. PRITIKIN, SIDLEY AND AUSTIN, CHICAGO, IL. WILLIAM H. BAUMGARTNER, SIDLEY AND AUSTIN, CHICAGO, IL. FOR THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC., CARL C. MONK, DEFENDANTS: JACQUELINE R. DEPEW, ROBERT [\[**2\]](#) A. BURGOYNE, DAVID M. FOSTER, SALLY P. PAXTON, FULBRIGHT & JAWORSKI L.L.P., WASHINGTON, DC.

Judges: Ditter, Jr.

Opinion by: J. WILLIAM DITTER, JR.

Opinion

[*376] MEMORANDUM AND ORDER

Ditter, J.

Before me is a case involving law school accreditation and alleged violations of federal [antitrust law](#) by four organizational defendants and 22 individual defendants. Plaintiff avers in its complaint that the American Bar Association ("ABA") monopolizes the accreditation process. Defendants, plaintiff asserts, have conspired to fix the salaries of law school faculties and administrators; restrict their output; raise law school tuitions; and foreclose from legal education people in lower socio-economic classes. Twenty-one ¹ of the individual defendants have filed a motion to dismiss the claims against them for lack of personal jurisdiction and improper venue. I will grant their motion.

¹ The 22nd individual defendant, Carl C. Monk, has filed (with the American Association of Law Schools) a separate motion to dismiss for failure to state a claim against either Monk or AALS and for lack of personal jurisdiction and improper venue as to Monk. That motion will be addressed in another opinion.

[**3] I. FACTS

For the purposes of the present jurisdictional motion the following allegations contained in the complaint will be accepted as true. Plaintiff, Massachusetts School of Law at Andover, Inc. ("MSL") is a non-profit corporation that operates a law school in Andover, Massachusetts. The law school opened its doors in 1988.

MSL asserts it endeavors to provide high quality, low-cost legal education to people who might otherwise be shut out of more traditional law schools. The law school prides itself on having a unique admissions procedure that encourages applicants from mid-life and from lower economic classes and on having a tuition that is currently \$ 9,000 per year. MSL says it achieves its goals by policies and practices that it admits are in direct conflict with certain ABA accreditation criteria. MSL asserts that the ABA requires law schools to utilize the LSAT in admissions decisions, which MSL does not do. The ABA does not count adjunct faculty in computing required student-faculty ratios; MSL makes extensive use of adjunct professors, which keeps salary costs down, but does not allow MSL to reach the ABA-required ratio. The ABA criteria require a law school's library to [**4] have a certain number of hardbound volumes; MSL relies heavily on an electronic library.

MSL sought accreditation from the ABA. Such accreditation is crucial, MSL contends, because the vast majority of jurisdictions (41 states plus the District of Columbia) require that a prospective bar applicant be a graduate of an ABA-accredited law school before he or she can sit for that state's bar examination.² In 1993 the ABA denied MSL's application for accreditation.

MSL maintains that the ABA's accreditation criteria are anticompetitive and that the ABA has abused its monopoly power over accreditation. MSL asserts that defendants' actions have caused it to suffer competitive injury and loss of prestige. It avers that it has difficulty competing for students as a result of the ABA's denying [**5] accreditation, and it has suffered economic damage through decreased enrollments. In two counts, MSL claims that defendants have combined and conspired to organize and enforce a group boycott in restraint of trade, a violation of the Sherman Act, Section 1, and that defendants have conspired to monopolize the provision of law school training, the accreditation of law schools, and the licensing of lawyers, in violation of the Sherman Act, Section 2. 15 U.S.C. §§ 1, 2.

A variety of motions have been filed in this case. Here I will only address the motion of 21 individual defendants to dismiss the claims against them for lack of personal jurisdiction and improper venue.³ These defendants are, [**377] or have been, members of various ABA committees and organizations that participate in the accreditation process. James White, for example, is the ABA's consultant on legal education and is the chief administrative officer of the council of the ABA section of legal education and admissions to the Bar. The council promotes the ABA's accreditation standards and determines whether individual law schools comply. Other individual defendants are or were on the council, [**6] the ABA's accreditation committee, or the site review team that visited MSL as part of its accreditation application process.

II. PERSONAL JURISDICTION

HN1 Before this court can exercise personal jurisdiction over any of these individual defendants, there must be a constitutionally acceptable relationship between that defendant and the forum. Once a defendant challenges the exercise of personal jurisdiction, the plaintiff has the burden of proving with reasonable particularity that sufficient contacts to support jurisdiction exist between the defendant and the forum state. The plaintiff must establish [**7] a basis for either specific jurisdiction or general jurisdiction.

² Massachusetts is not one of those states. MSL was accredited by the Massachusetts Board of Regents in 1990, and so its graduates can sit for the Massachusetts bar examination and, if successful, practice law in that jurisdiction.

³ The 21 individual defendants who filed this motion are: James P. White, Nina Appel, Jose R. Garcia-Pedrosa, Laura N. Gasaway, Frederick M. Hart, Rudolph C. Hasl, R.W. Nahstoll, Henry Ramsey, Jr., Norman Redlich, John E. Ryan, Gordon D. Schaber, Pauline Schneider, Steven R. Smith, Claude R. Sowle, Robert A. Stein, Rennard Strickland, Roy T. Stuckey, Leigh H. Taylor, Frank K. Walwer, Sharp Whitmore, and Peter A. Winograd.

A. Personal Jurisdiction Based on Individual Defendants' Contacts With Pennsylvania

[HN2](#) [↑] [Federal Rule of Civil Procedure 4](#) allows a federal district court to exercise personal jurisdiction over out-of-state defendants to the extent allowed by the law of the state where the court is located. [HN3](#) [↑] Pennsylvania has two statutes that confer jurisdiction over persons. [42 Pa. Cons. Stat. Ann. §§ 5301, 5322](#). General jurisdiction over an individual defendant is based on the individual's presence or domicile in Pennsylvania when served or on the individual's consent to jurisdiction. [42 Pa. Cons. Stat. Ann. § 5301 \(a\)\(1\)](#) (Purdon 1993). Specific jurisdiction over a person is based on the cause of action arising from the person's activities and contacts in Pennsylvania. [42 Pa. Cons. Stat. Ann. § 5322\(a\)](#) (Purdon 1993).

Each of the individual defendants has stated in an affidavit that he or she was served outside of Pennsylvania, is not a resident⁴ of Pennsylvania, and has not consented to the exercise of personal jurisdiction by courts in Pennsylvania. (Def. Mot., exh. A-U). Plaintiff has not offered evidence to the contrary. Therefore, [**8] I find that there is no basis for the exercise of general personal jurisdiction over the 21 individual defendants.

Moreover, I find that plaintiff has not shown that I may exercise specific personal jurisdiction over these defendants. The exercise of personal jurisdiction over a defendant must be consistent with due process. [HN4](#) [↑] Pennsylvania provides for jurisdiction to the fullest extent allowed by the United States Constitution and to be based on the most minimum contact with Pennsylvania allowed by the United States Constitution. [42 Pa. Cons. Stat. Ann. § 5322\(b\)](#). With regard to specific jurisdiction, due process is satisfied when a cause of action is related to or arises out of the defendant's purposeful contacts with the forum state so that the defendant could reasonably expect to be haled into court in that forum. See [Provident Nat'l Bank v. California Fed. Sav. and Loan, 819 F.2d 434, 437](#) [**9] (citing [World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 \(1980\)](#)).

It is not enough to warrant the exercise of personal jurisdiction that a defendant is being sued in a forum where he or she had some contact. Rather, a court must examine the relationship among the defendant, the forum, and the litigation. [Regency Oldsmobile, Inc. v. General Motors Corp., 685 F. Supp. 91, 94 \(D.N.J. 1988\)](#). A case from the Eighth Circuit is particularly instructive. In *Health Care Equalization Committee*, plaintiff, a chiropractic society, alleged antitrust violations by (among other defendants) the American College of Radiology. [Health Care Equal. Comm. v. Iowa Medical Soc'y, 851 F.2d 1020, 1022 \(8th Cir. 1988\)](#). Plaintiff's allegations against the ACR focused on [*378] the ACR's adoption of a code of ethics that prohibited professional association with chiropractors. [Id. at 1030](#). The district court granted the ACR's motion to dismiss for lack of personal jurisdiction. [Id. at 1022](#). [**10] In affirming the dismissal, the Eighth Circuit examined the relationship between the ACR's contacts with the forum state and the alleged cause of action against ACR. [Id. at 1030](#). The ACR's contacts with the forum were limited to the less than one percent of ACR members who lived there and the mailings sent to those members. [Id.](#) In holding that there were insufficient contacts with the forum to warrant jurisdiction over the ACR, the Eighth Circuit said that the plaintiff had drawn no direct connection between the ACR's adoption of its code of ethics and its limited contact with the forum. [Id.](#)

In another case, a private educational institution alleged that two professional organizations and 25 individual defendants had conspired to limit the number of practicing orthodontists in violation of the antitrust laws. [United States Dental Inst. v. American Ass'n of Orthodontists, 396 F. Supp. 565, 569 \(N.D. Ill. 1975\)](#). The complaint averred that the individual defendants furthered the conspiracy by adopting certain guidelines and acting to prevent the plaintiff from gaining state approval. [Id. at 571](#). [**11] Nine of the individual defendants moved to dismiss for lack of personal jurisdiction. [Id. at 569](#). The district court found that three of the individual defendants had been at a meeting in the forum state at which the allegedly exclusionary guidelines were adopted and had been on the council that voted to approve the guidelines. [Id. at 571](#). The court found that the plaintiff's cause of action, which arose from the exclusionary guidelines, was directly traceable to the meeting in the state at which they were adopted. [Id.](#) Therefore, the court held, the activities of the three voting defendants supported the exercise of personal jurisdiction. [Id.](#)

⁴ For the purpose of considering general personal jurisdiction I will consider "residence" the equivalent of "domicile."

Here, the cause of action arises from the ABA's denial of accreditation to MSL. The ABA criteria in question were applied by an accreditation team that inspected MSL's campus and facilities in Massachusetts. The MSL faculty and students who suffer from the school's loss of prestige are in Massachusetts. The economic harms are felt by MSL in Massachusetts. The decreased enrollment is experienced in MSL's classrooms in Massachusetts.

MSL has the burden of establishing that its **[**12]** cause of action arose from the individual defendants' contacts with Pennsylvania. Provident Nat'l Bank, 819 F.2d at 437. MSL has not done so. It has not alleged with "reasonable particularity" the individual defendants' contacts with Pennsylvania, much less any contacts with Pennsylvania that injured MSL. Both the complaint and plaintiff's memorandum in opposition to the individual defendants' motion assert that the four organizational defendants have contacts with Pennsylvania.⁵ With regard to the individual defendants, however, plaintiff does not allege with particularity any contacts they have with Pennsylvania that gave rise to MSL's claims.⁶ Each individual defendant has stated in an affidavit that he or she did not take any action concerning MSL while in Pennsylvania and did not discuss MSL accreditation during any telephone conversation or correspondence with a person in Pennsylvania. (Def. Mot., exh. A-U). MSL has not countered these affidavits with any evidence to the contrary. Instead, plaintiff merely states that the individual defendants "must have" engaged in accreditation activities in Pennsylvania, "must have" inspected law schools in **[**13]** Pennsylvania, and "must have" received reports written in Pennsylvania. Even if MSL were able to support its allegations of what the individual defendants "must have" done in Pennsylvania, it still cannot do what the plaintiff in *United States Dental Institute* was able to do: directly connect the **[*379]** cause of action to the individual defendants' activities in the forum state. [396 F. Supp. at 571](#).

MSL has not alleged, much less established, *any* contacts the 21 individual defendants had with Pennsylvania. More importantly, even if MSL were able to **[**14]** support its supposition that the individual defendants "must have" engaged in accreditation activities in Pennsylvania regarding Pennsylvania schools, MSL has not suggested how these activities had anything to do with MSL's failure to obtain accreditation in Massachusetts. There are not a limited number of accreditations to go around, so that bestowal of accreditation on a Pennsylvania law school lowers MSL's prospect of being accredited. All this leads to my conclusion that the individual defendants do not have sufficient contacts with Pennsylvania to permit the exercise of specific personal jurisdiction over them.

B. Personal Jurisdiction Based on Co-Conspirators' Contacts With Pennsylvania

In addition to arguing that the individual defendants must have had sufficient contacts with Pennsylvania on other accreditation matters to warrant jurisdiction arising out of MSL's accreditation, plaintiff urges me to exercise personal jurisdiction over the 21 individual defendants based on the contacts of their alleged co-conspirators. MSL's theory of co-conspirator jurisdiction is that because the court has personal jurisdiction over four organizational defendants, and because all of the defendants **[**15]** are alleged to have conspired with each other, the court has personal jurisdiction over all of the defendants.⁷ I conclude the co-conspirator jurisdictional theory is not applicable

⁵ For example, the ABA is a partner in ALI/ABA, a provider of continuing legal education located in Philadelphia. The Law School Admission Services, Inc. and Law School Admission Council are located in Newtown, Pennsylvania. The American Association of Law Schools has member law schools in Pennsylvania.

⁶ The complaint alleges that James White "transacts business in the Eastern District of Pennsylvania" but is no more specific than that.

⁷ I have serious reservations about whether the individual defendants, alleged to be on various ABA committees or carrying out the ABA's work in accrediting law schools, can conspire with the ABA. Section one of the Sherman Act applies only to concerted action, proof of which requires evidence of a relationship between at least two legally distinct persons or entities. [Oksanen v. Page Memorial Hosp.](#), 945 F.2d 696, 702 (4th Cir. 1991), cert. denied, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992). It seems doubtful that the individual defendants are acting as distinct entities apart from the ABA during an accreditation review. See *id.* (medical staff indistinct from hospital during peer review process). This opinion does not address that issue; I merely note that plaintiff's complaint, which alleged *all* defendants conspired with each other, may thus allege concerted activity which is legally impossible.

in this case because plaintiff has not alleged substantial acts (or any acts at all, for that matter) in Pennsylvania in furtherance of the conspiracy.

[**16] [HN5](#) Co-conspirator jurisdiction is not a separate basis of jurisdiction apart from general or specific jurisdiction. Rather, it is based on the same contacts-with-the-forum analysis just discussed. The difference is that a court looks not only at the defendant's forum contacts, but at those of the defendant's "resident" co-conspirators. The court imputes the contacts of the "resident" co-conspirator over whom it has jurisdiction to the "foreign" co-conspirator to see if there are sufficient contacts to exercise jurisdiction over the latter. See *Ethanol Partners v. Wiener, Zuckerbrot, Weiss & Brecher*, 635 F. Supp. 15, 18 (E.D. Pa. 1985); *In re Arthur Treacher's Franchisee Litig.*, 92 F.R.D. 398, 411 (E.D. Pa. 1981).

The four organizational defendants in this case do not dispute that there is personal jurisdiction over them in this forum.⁸ Plaintiff's alleging that the individual defendants conspired with the organizational defendants is not enough to permit an exercise of jurisdiction over the 21 individuals who contest it. [HN6](#) Merely belonging to a civil conspiracy does not make a member subject to the jurisdiction of every other [**17] member's forum. *In re Arthur Treacher's*, 92 F.R.D. at 411. Rather, there must also be substantial acts in [*380] furtherance of the conspiracy within the forum, of which the out-of-state co-conspirator was or should have been aware. *Id.*

[**18] MSL has not alleged in its complaint substantial acts in Pennsylvania by anyone that furthered the conspiracy and certainly nothing of which the out-of-state individual defendants would have been a part. MSL has said in its memorandum, for example, that James White communicates with all ABA-accredited law schools, including those in Pennsylvania; selects site inspection team members that visit schools in Pennsylvania; and meets with LSAC/LSAS officials. MSL has not said how these acts furthered the conspiracy that injured MSL. MSL has also stated in its memorandum (not its complaint) that phone calls, letters, reports and meetings "must have been" held in Pennsylvania. Again, plaintiff has not shown how these acts, even if proved to be more than conjecture, are substantial acts that furthered the conspiracy which injured MSL.

To be sure, MSL has alleged that the effects of the conspiracy were felt nationwide and therefore by law schools in Pennsylvania, but this is not the same as alleging that substantial acts to further the conspiracy took place in Pennsylvania. Therefore, I find that the individual defendants are not subject to the exercise of personal jurisdiction in Pennsylvania [**19] on the basis of co-conspirator jurisdiction.

III. CONCLUSION

For the reasons stated above, I hold that there is no basis to support the exercise of general personal jurisdiction over 21 of the individual defendants. Similarly, I hold that those individual defendants do not have sufficient contacts with the forum -- either through their own acts or through co-conspirators' contacts -- giving rise to MSL's cause of action that would support the exercise of specific personal jurisdiction. Having decided the individual defendants' motion on the basis of personal jurisdiction, I make no decision on their venue arguments. Plaintiff's claims against the individual defendants must be dismissed for lack of personal jurisdiction. An appropriate order follows.

ORDER

And now, this 11th day of March, 1994, the motion of defendants James P. White, Nina Appel, Jose R. Garcia-Pedrosa, Laura N. Gasaway, Frederick M. Hart, Rudolph C. Hasl, R.W. Nahstoll, Henry Ramsey, Jr., Norman Redlich, John E. Ryan, Gordon D. Schaber, Pauline Schneider, Steven R. Smith, Claude R. Sowle, Robert A. Stein,

⁸ [HN7](#) The Clayton Act authorizes that an antitrust suit against a corporation can be brought in the judicial district where it is an inhabitant and also in any district where the corporation is found or transacts business. [15 U.S.C. § 22](#). This provision for nationwide service of process means that a federal district court's jurisdiction is coextensive with the boundaries of the United States. *American Trade Partners v. A-1 Int'l Importing Enter., Inc.*, 755 F. Supp. 1292, 1302 (E.D. Pa. 1990). This Clayton Act provision applies only to corporate, not individual, antitrust defendants. *Delong Equip. Co. v. Washington Mills Abrasive*, 840 F.2d 843, 848 (11th Cir. 1988).

846 F. Supp. 374, *380 1994 U.S. Dist. LEXIS 2924, **19

Rennard Strickland, Roy T. Stuckey, Leigh H. Taylor, Frank K. Walwer, Sharp Whitmore, and Peter A. Winograd [****20**] to dismiss the claims against them for lack of personal jurisdiction is hereby GRANTED.

BY THE COURT:

J. William Ditter, Jr.

J.

End of Document



Sebastian Int'l, Inc. v. Longs Drug Stores Corp.

United States District Court for the Central District of California

March 11, 1994, Decided ; March 11, 1994, Filed

No. CV 93-2891 WDK

Reporter

1994 U.S. Dist. LEXIS 6632 *; 30 U.S.P.Q.2D (BNA) 1785 **

SEBASTIAN INTERNATIONAL INC., Plaintiff, v. LONGS DRUG STORES, CORP., Defendant.

Core Terms

products, collective mark, trademark, infringement, salons, misrepresentations, consumers, service mark, membership, marks, sells, drug store, retailers, likelihood of confusion, first sale doctrine, genuine, courts, merits, hair, preliminary injunction, unfair competition, affiliated, displaying, enjoined, resale, resell, seller, consumer confusion, likely to cause, unauthorized

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Trademark Law > Special Marks > Collective Marks

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

HN1 [] **Special Marks, Collective Marks**

A plaintiff seeking a preliminary injunction must show (1) the probable success on the merits and the possibility of irreparable injury or (2) serious questions on the merits and a balance of hardship tipping sharply in its favor. These are not two distinct tests but the opposite ends of a single continuum in which a required showing of harm varies inversely with a required showing of meritoriousness.

Business & Corporate Compliance > ... > Trademark Law > Special Marks > Collective Marks

Trademark Law > Trademark Cancellation & Establishment > Registration Procedures > General Overview

HN2 [] **Special Marks, Collective Marks**

It appears that a collective mark need not be owned solely by a collective; rather, a corporation can own a collective mark. The Lanham Act (Act) defines a collective mark as a trademark used by members of a collective. [15 U.S.C.S.](#)

§ 1127. The Act directly addresses who may use but not who may own a collective mark. Furthermore, the Trademark Manual of Examining Procedure, a manual used by an examining board to determine whether a mark is valid, states that a collective membership mark can be owned by someone other than a collective organization whose members use a mark, and an owner itself might not be a collective organization.

Business & Corporate Compliance > ... > Trademark Law > Special Marks > Collective Marks

Trademark Law > Trademark Cancellation & Establishment > Registration Procedures > General Overview

HN3 [down] **Special Marks, Collective Marks**

See [15 U.S.C.S. § 1054.](#)

Trademark Law > ... > Registration Procedures > Federal Registration > Federal Registration as Evidence

Trademark Law > Trademark Cancellation & Establishment > Registration Procedures > General Overview

Trademark Law > Special Marks > Service Marks > Registration of Service Marks

HN4 [down] **Federal Registration, Federal Registration as Evidence**

Registration is prima facie evidence of the validity of a mark. [15 U.S.C.S. § 1115 \(a\).](#)

Business & Corporate Compliance > ... > Trademark Law > Special Marks > Collective Marks

Trademark Law > Trademark Cancellation & Establishment > Priority > General Overview

Trademark Law > Special Marks > General Overview

Trademark Law > Special Marks > Service Marks > General Overview

HN5 [down] **Special Marks, Collective Marks**

Dual use of a mark is permitted: a collective mark can be used both as a trademark or service mark by a collective as well as a collective service mark or membership mark by members of a collective. The key inquiry in determining whether a mark is being used as a collective mark or a traditional mark is who is using it. Moreover, although perhaps collective service marks and membership marks typically appear on placards and the like, case law indicates that they can also appear on products themselves. Thus, it appears that the location of a mark does not determine its characterization as a collective mark; rather, a message conveyed to consumers by a mark is dispositive.

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

1994 U.S. Dist. LEXIS 6632, *6632L³⁰ U.S.P.Q.2D (BNA) 1785, **1785

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 > Causes of Action Involving Trademarks > Infringement Actions > General Overview

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN6 **Federal Unfair Competition Law, Trade Dress Protection**

A defendant is liable for unfair competition if it uses in commerce a misleading representation that is likely to cause confusion or to deceive as to affiliation, connection, or association. [15 U.S.C.S. § 1125\(a\)](#). Similarly, a defendant is liable for trademark infringement, which is one type of unfair competition, if it uses a registered mark that is likely to cause confusion, mistake, or deception. [15 U.S.C.S. § 1114\(1\)](#).

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > Conveyances > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

HN7 **Infringement Actions, Determinations**

The general rule is that the unauthorized sale of goods bearing their true trademarks does not, by itself, constitute infringement. This is predicated on the notion that neither misrepresentations of fact nor consumer confusion ordinarily exist when a genuine mark bearing a true mark is sold.

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

Trademark Law > Likelihood of Confusion > General Overview

Business & Corporate Compliance > ... > Remedies > Buyer's Damages & Remedies > General Overview

Trademark Law > Conveyances > General Overview

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

HN8 **Contracts, Sales of Goods**

The first sale doctrine provides that trademark law generally does not apply to the sale of genuine goods bearing a true mark even though such sale is without a mark owner's consent. Once a trademark owner sells his product, a buyer ordinarily may resell a product under an original mark without incurring any trademark liability. The reason is that trademark law is designed to prevent sellers from confusing or deceiving consumers about the origin or make of a product, which confusion ordinarily does not exist when a genuine article bearing a true mark is sold. However, when additional factors are present indicating the likelihood of confusion or deception, infringement will be found.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

HN9[**Infringement Actions, Determinations**

Courts have found infringement where a trademark owner dictates that sellers provide certain ancillary functions and where it is not obvious to a consumer that these functions have not been performed. For example, where quality control is critical and any defect or potential defect due to a reseller's failure to adhere to quality control standards is not readily observable, a trademarked product sold by an unauthorized seller is not considered a "genuine" product and therefore is likely to cause confusion or deception.

Trademark Law > ... > Infringement Actions > Defenses > First Use

Trademark Law > Conveyances > General Overview

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > Likelihood of Confusion > General Overview

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN10[**Defenses, First Use**

The first sale doctrine is not to be applied by rote to resales of genuine products. Rather, its application is predicated on the absence of misrepresentations and likelihood of confusion. Thus, where evidence of those exist, courts refuse to apply the first sale doctrine and will find infringement even for the resale of genuine products bearing their true marks. Significantly, however, although the primary purpose of the trademark law is to protect consumers from confusion and deception, this end must be accomplished consistent with free market objectives.

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

Trademark Law > Likelihood of Confusion > General Overview

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > General Overview

Trademark Law > Conveyances > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

Trademark Law > ... > Infringement Actions > Defenses > First Use

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN11[Contracts, Sales of Goods

Trademark cases seem to look only to whether there is a likelihood of consumer confusion not to who is responsible for that confusion. For example, courts that apply the first sale doctrine and find no infringement base their holdings entirely on the fact that the resale of goods bearing true traditional trademarks does not create misrepresentations or likelihood of confusion. Notably, none of these courts mentions the fact that even had there been any misrepresentations or likelihood of confusion, no infringement would be found because a trademark owner was somehow responsible by virtue of its labeling the products. These courts focus solely on the absence of misrepresentations and likelihood of confusion. In addition, other courts have refused to apply the first sale doctrine and instead have enjoined the resale of genuine goods even where a trademark owner has arguably "mislabelled" products.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > ... > Licenses > Licensable Subject Matter > Tying Arrangements

HN12[Infringement Actions, Determinations

Refusing to apply the first sale doctrine and finding infringement is entirely in line with antitrust law. Courts have held that a manufacturer may, consistent with federal antitrust laws, impose restraints on and refuse to deal with a retailer solely because a retailer's image is not consistent with a product's prestige, image and quality. Thus, protecting one's image and ensuring that only appropriate retailers sell one's product are deemed to be valid business justifications in the antitrust arena.

Judges: [*1] Keller

Opinion by: WILLIAM D. KELLER

Opinion

[1786] ORDER RE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

Before the Court is plaintiff Sebastian International Inc.'s ("Sebastian") Motion for Preliminary Injunction against Defendant Longs Drug Stores Corporation ("Longs"). The underlying lawsuit involves Sebastian's claims of unfair competition and trademark infringement arising from Longs' sale of genuine Sebastian products bearing their original marks. After oral argument and considerable further analysis, this Court reverses its tentative ruling and GRANTS Sebastian's motion for preliminary injunction.

II. FACTUAL BACKGROUND

Sebastian manufactures and distributes hair care products, including shampoos, conditioners, permanents, and colors. It sells its products only to professional salons and distributors that agree to sell only to professional salons. (Motion p.1)

In the past, "diverters" have sold Sebastian products to unauthorized retailers including drug stores and other non-salon retail outlets. Some of these unauthorized resellers presumably sell the products in higher volume and at lower prices than the authorized salons. In order to combat such diversion, in 1992 Sebastian [*2] formed "The Sebastian Collective Membership Program" ("Collective"). Sebastian authorizes only [*1787] members of the Collective to sell its products and limits membership to professional salons and distributors that agree to resell only to members or member salons' clientele. Sebastian conducts product seminars and educational classes for and distributes product training and educational materials to members of its collective. (Motion p.1)

In April 1992, Sebastian filed to register the "Sebastian Collective Salon Member" as a collective membership and service mark. These marks are displayed on Sebastian's products. (Motion p. 1). The collective membership mark has been registered, and the service mark has been accepted for allowance by the Trademark Office.

Defendant Longs operates a chain of general merchandise and drug stores. It is neither a salon, an authorized distributor, nor a member of the Collective, nor does it employ licensed cosmetologists. Since at least 1987, Longs has sold unadulterated Sebastian products bearing their original marks. There is some evidence that Longs displays Sebastian products in a disheveled manner and sells defective products. One Sebastian representative [*3] visited a Longs location and observed that many of the products had fallen down in the shelf and observed that one of the hair spray bottles was missing a nozzle. (Driscoll Decl. Exh. 2, 9)

Significantly, Sebastian conducted a consumer survey of respondents who had recently shopped in drug stores for hair care products. After being shown a placard depicting the collective mark, respondents were asked if they believed the store displaying the sign would need authorization to do so. Fifty six percent answered in the affirmative. (Cogan Exh. 2, p. 10) Then, after being shown a product and specifically directed to the collective mark, respondents were asked if they would believe the store would have to get authorization or permission to carry it. Thirty eight percent answered in the affirmative. (Cogan Exh. 2, p. 11) When then asked if they believed the store is affiliated with or associated with the Sebastian Collective program, 14 percent answered in the affirmative. (Cogan Exh. 2, p. 11-12).

Sebastian moves to enjoin Longs from selling Sebastian products bearing the collective marks. Sebastian argues that (1) it is likely to succeed on the merits because (a) its mark is a valid collective [*4] mark, (b) Longs' sale of these goods creates misrepresentations of affiliation and is likely to cause confusion, as evidenced by the consumer survey results, and (c) the first sale doctrine does not apply; (2) Longs' sales create irreparable harm to Sebastian's reputation; and (3) the balance of hardship weighs in Sebastian's favor.

III. DISCUSSION

A. *The Preliminary Injunction Standard*

HN1 A plaintiff seeking a preliminary injunction must show (1) the probable success on the merits and the possibility of irreparable injury or (2) serious questions on the merits and a balance of hardship tipping sharply in its favor. *Miss World (UK), Ltd. v. Mrs. America Pageants, Inc., 856 F.2d 1445, 1448 (9th Cir. 1988)*. These are not two distinct tests but "the opposite ends of a single continuum in which the required showing of harm varies inversely with the required showing of meritoriousness." *Id.*

B. *Likelihood of Success on the Merits of Unfair Competition and Trademark Infringement Claims*

1. *Validity of the Collective Mark*

Longs argues that Sebastian's marks are invalid as collective marks because (1) collective marks must be owned by a [*5] collective entity not a corporation, (2) marks used by a collective on its own goods are not collective marks, (3) Sebastian's collective service mark does not cover members' provision of consultation services at issue here.

In this Court's view, Longs' arguments are unavailing. [HN2](#) First, it appears that a collective mark need not be owned solely by the collective; rather, a corporation can own a collective mark. The Lanham Act defines a collective mark as a trademark used by members of a collective. [15 U.S.C. § 1127](#). [HN3](#) In addition, [§ 1054](#) provides for the registration of collective marks "in the same manner . . . as are trademarks, by persons . . . exercising control over the use of the marks . . . except when used so as to represent falsely that the owner or a user thereof makes or sells the goods or performs the services" [15 U.S.C. § 1054](#). Thus, it appears that the Lanham Act directly addresses who may use but not who may own a collective mark.

Furthermore, the Trademark Manual of Examining Procedure ("TMEP"), a manual used by the examining board to determine whether a mark is valid, states that a collective membership [\[*6\]](#) mark can be owned by "someone other than the collective organization whose members use the mark, and the owner itself might not be a collective organization. An example is a business corporation which forms a club for persons meeting certain qualifications and which, in forming the club, arranges to retain control of the group and of the mark used by the members of the [\[*1788\]](#) group. The corporation which has retained control over use of the mark is the owner of the mark, and is entitled to register the mark." TMEP § 1304.05. (citing [In re Stencil Aero Engineering Corp., 170 U.S.P.Q. 292 \(TTAB 1971\)](#) (Aircraft ejection manufacturer can own a collective membership mark that it created for its club of successful users because the statutory definition requires only that mark be *used* by members; there is no limitation that only a collective can own mark)).

Moreover, the U.S. Trademark Office granted Sebastian as a corporation both Registrations and Notices of Allowances for the collective membership and service marks, respectively. (Kuchinski Decl. P 4, 5). [HN4](#) Registration is *prima facie* evidence of the validity of a mark. [15 U.S.C. § 1115](#) [\[*7\]](#) [\(a\)](#).¹

[\[*8\]](#) Second, as discussed in this Court's earlier order, dual use of a mark is permitted: a collective mark can be used both as a trademark or service mark by the collective as well as a collective service mark or membership mark by members of the collective.² McCarthy at § 19.34[1][b], TMEP § 1303.01. The key inquiry in determining whether a mark is being used as a collective mark or a traditional mark is who is using it. Here, the members of the collective "use" the mark by displaying and selling products that bear the mark identifying the seller both as a member of the collective and, correspondingly, as a salon professional who has received training and education in

¹ Longs argues that Sebastian cannot own a collective mark and cites [F.R. LePage Bakery v. Roush Bakery Products Co., 851 F.2d 351, 353 \(Fed. Cir. 1988\)](#), withdrawn, vacated and remanded, [863 F.2d 43 \(Fed. Cir. 1988\)](#), vacated and modified, [13 USPQ2d 1045 \(TTAB 1989\)](#) in that regard. In that case, the Federal Circuit held that where a corporation is making and selling its wares under a trademark, it is not entitled to own a collective mark registration. Accord TMEP § 1302 ("a collective mark must be *owned* by a collective entity even though the mark is *used* by the members of the collective."); § 1303.01 ("a collective mark must be owned by a collective entity.")

In this court's view, *Le Page* is distinguishable. *Le Page* involved the transfer of a collective mark to one of the members of the collective. Here, the Collective did not transfer ownership of the mark to one of the salon members. Rather, as in *In re Stencil*, Sebastian as a corporate entity created the collective and owns the mark. Sebastian is not a member of the Collective. Moreover, this Court can think of no logical reason (nor, apparently, did the U.S. Trademark Office in registering the collective marks) why corporate niceties should dictate the validity of a collective mark. Notably, in addressing the validity of collective marks, the Lanham Act and relevant case law seem to focus on how a mark is used rather than who owns it.

[HN5](#)

² Previously, some courts applied the anti-use-by-owner rule to collective marks. According to that rule, if the owner of a collective mark, rather than the members, used the mark to identify its own goods or services the mark was not a "collective" mark but a traditional trademark or service mark. McCarthy at § 19.34[1][b]. See, e.g., [Aloe Creme Laboratories, Inc. v. American Soc. for Aesthetic Plastic Surgery, Inc., 192 U.S.P.Q. 170, 173 \(TTAB 1976\)](#).

Significantly, however, in 1988, the Trademark Law Revision Act made clear that the anti-use-by-owner rule does not apply to collective marks; consequently, a collective mark owner can make dual use out of the marks. A collective mark can be used in such a way as to be both a collective mark as well as a traditional trademark or service mark. McCarthy at § 19.34[1][b], [2], TMEP § 1303.01.

the use of Sebastian products. The fact that Sebastian itself applies the marks to the products and arguably also "uses" the marks does not transmogrify the collective mark into a traditional trademark or service mark.

[*9] Moreover, although perhaps collective service marks and membership marks typically appear on placards and the like, the case law indicates that they can also appear on products themselves. See *Boise Cascade Corp. v. Mississippi Pine Mrs. Assn.*, 164 U.S.P.Q. 364, 367 (TTAB 1969) and *Saks & Co. v. Snack Food Ass'n*, 1989 TTAB LEXIS 37, 12 U.S.P.Q. 2d 1833, 1836 (TTAB 1989). Thus, it appears that the location of the mark does not determine its characterization as a collective mark; rather, the message conveyed to consumers by the mark is dispositive.

Third, Sebastian's service mark covers the services in question here. The mark covers the provision to hairdressers of "educational services" in the use of Sebastian products. (Kuchinsky Decl., Exh.3). In this Court's view, implicitly, a hairdresser who has received training and education in the use of Sebastian products would in turn necessarily bestow the benefits of this training on his or her customers. Thus, the service mark indicates that the member is trained and educated and therefore, by implication, will be able to instruct the customer as to the proper [*10] use of Sebastian products.

Accordingly, Sebastian has established a likelihood of success on the merits with regard to the validity of its collective marks.

B. Misrepresentation and Likelihood of Confusion

HN6 [↑] A defendant is liable for unfair competition if it uses in commerce a "misleading representation" that is "likely to cause confusion" [**1789] or to deceive as to affiliation, connection, or association. Lanham Act, [15 U.S.C. § 1125\(a\)](#). Similarly, a defendant is liable for trademark infringement, which is one type of unfair competition, if it uses a registered mark that is "likely to cause confusion," or mistake, or deception. Lanham Act, [15 U.S.C. § 1114\(1\)](#), *Shakey's Inc. v. Covalt*, 704 F.2d 426, 431 (9th Cir. 1993).

HN7 [↑] The general rule is that the unauthorized sale of goods bearing their true trademarks does not, by itself, constitute infringement. *Matrix Essentials, Inc. v. Emporium Drug Mart, Inc.*, 988 F.2d 587, 593 (5th Cir. 1993). This is predicated on the notion that neither misrepresentations of fact nor consumer confusion ordinarily exist when [*11] a genuine mark bearing a true mark is sold. *NEC Electronics v. CAL Circuit Abco*, 810 F.2d 1506, 1509 (9th Cir.), cert. denied, 484 U.S. 851, 98 L. Ed. 2d 108, 108 S. Ct. 152 (1987). **HN8** [↑] In particular, the first sale doctrine provides:

"Trademark law generally does not apply to the sale of genuine goods bearing a true mark even though such sale is without the mark owner's consent. Once a trademark owner sells his product, the buyer ordinarily may resell the product under the original mark without incurring any trademark liability. The reason is that trademark law is designed to prevent sellers from confusing or deceiving consumers about the origin or make of a product, which confusion ordinarily does not exist when a genuine article bearing a true mark is sold." *Id.* (Citations omitted.)

However, when additional factors are present indicating the likelihood of confusion or deception, infringement will be found. For example, courts have found infringement where a reseller makes an affirmative misrepresentation, such as places a plaintiff's trademark on an advertisement or on pamphlets, [*12] and there is a suggestion that the customer was confused or deceived into believing the seller is an "authorized" dealer or seller. 3A Callman Unfair Competition Trademarks and Monopolies, § 21.13, fn. 6, p. 123-133 (citing *Trail Chevrolet, Inc. v. General Motors Corp.*, 381 F.2d 353 (5th Cir. 1967). See also *Bandag, Inc. v. Al Bolser's Tire Stores*, 750 F.2d 903 (Fed. Cir. 1984) and *Stormor, A Div. of Fuqua Industries v. Johnson*, 587 F. Supp. 275 (W.D.Mich. 1984).

HN9 [↑] In addition, courts have found infringement where a trademark owner dictates that sellers provide certain ancillary functions and where it is not obvious to the consumer that these functions have not been performed. For example, where quality control is critical and any defect or potential defect due to a reseller's failure to adhere to quality control standards is not readily observable, a trademarked product sold by an unauthorized seller is not

considered a "genuine" product and therefore is likely to cause confusion or deception. See, e.g., [Shell Oil Co. v. Commercial Petroleum, Inc.](#), [928 F.2d 104 \(4th Cir. 1991\)](#), [*13] [Adolph Coors Co. v. A. Genderson & Sons, Inc.](#), [486 F. Supp. 131 \(D.Colo. 1980\)](#).³

[*14] In short, the first sale doctrine is not to be applied by rote to resales of genuine products. Rather, its application is predicated on the absence of misrepresentations and likelihood of confusion. Thus, where evidence of those exist, courts refuse to apply the first sale doctrine and will find infringement even for the resale of genuine products bearing their true marks.

Significantly, however, although the primary purpose of the trademark law is to protect consumers from confusion and deception, this end must be accomplished consistent with free market objectives. [Intel Corp. v. Terabyte Intern., Inc.](#), [6 F.3d 614, 615 \(9th Cir. 1993\)](#).

Here, unlike *Matrix* and the other first sale doctrine cases, misrepresentations and likelihood of confusion are present. By selling products bearing the collective mark, Longs is arguably misrepresenting to consumers that it is affiliated with or authorized by Sebastian or the Collective. The survey results bear this out. In addition, apparently members of the Collective provide certain ancillary functions (namely, quality control, consultative services and charity contributions). The collective mark, more than [*15] a [**1790] traditional trademark, indicates a closer connection to Sebastian and in turn could signal to customers the existence of these functions. Thus, Longs, by selling Sebastian products bearing the collective mark, is arguably misrepresenting that it provides these functions.

Consumer confusion is also likely. The survey results indicate that a substantial number of consumers mistakenly perceived that a drug store selling goods bearing the collective mark must be authorized by or affiliated with Sebastian or the Collective. Evidence of actual consumer confusion, though not required, certainly tends to establish the likelihood of confusion.

The fact that Sebastian, by virtue of its "mislabeling," is somehow responsible for any misrepresentations or confusion is not determinative. The trademark law is concerned primarily with protecting consumers from being confused. [HN11](#)[ The trademark cases seem to look only to whether there is a likelihood of consumer confusion not to who is responsible for that confusion. For example, courts that apply the first sale doctrine and find no infringement base their holdings entirely on the fact that the resale of goods bearing true traditional trademarks does [*16] not create misrepresentations or likelihood of confusion. Notably, none of these courts mentions the fact that even had there been any misrepresentations or likelihood of confusion, no infringement would be found because the trademark owner was somehow responsible by virtue of its labeling the products. These courts focus solely on the absence of misrepresentations and likelihood of confusion.

In addition, other courts have refused to apply the first sale doctrine and instead have enjoined the resale of genuine goods even where the trademark owner has arguably 'mislabeled' the products. See [Claire, Inc. v. Boston Discount Center of Berkeley](#), [608 F.2d 1114 \(6th Cir. 1979\)](#) (Manufacturer of hair coloring successfully sued retailers that sold professional use products to consumers for home use where professional products lacked warnings and instructions.) Thus, the trademark case law is entirely consistent with enjoining Longs resale.

³ By contrast, where any purported shortcomings would be obvious to the customers, customers are not likely to be confused and, consequently, infringement will not be found. In *Matrix*, for example, Matrix argued that its hair care products were not genuine unless they were sold with accompanying consultative services. The Court rejected this argument and held that no customer shopping in the drugstore would be confused or deceived as to whether they were getting a cosmetologist's consultation. [Matrix](#), [988 F.2d at 591](#). Nor, the Court held, would confusion exist as to sponsorship because the goods were manufactured and labelled by Matrix. [Id. at 592](#). See also [H.L. Hayden Co. of N.Y., Inc. v. Siemens Medical Systems, Inc.](#), [879 F.2d 1005 \(2d Cir. 1989\)](#) (Defendant's sale of plaintiff's dental equipment, sold through its catalog and without plaintiff's required installation, was nevertheless a "genuine" product, and customers would not likely be confused or deceived that the product did not include installation).

[HN10](#)[

Finally, finding infringement here is consistent with the free market principles. [HN12](#)¹ Refusing to apply the first sale doctrine and finding infringement here is entirely in line with antitrust law. Courts have held that a manufacturer [*17] may, consistent with federal antitrust laws, impose restraints on and refuse to deal with a retailer solely because the retailer's image is not consistent with the product's prestige, image and quality. [Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186 \(2nd Cir. 1992\)](#). Thus, protecting one's image and ensuring that only appropriate retailers sell one's product are deemed to be valid business justifications in the antitrust arena.

Here, Sebastian has attempted to do just that: to create a certain cachet and high end image of its products. Accordingly, Sebastian only sells to salons that are members of the Collective and expressly refuses to sell to drug stores and other lower end retailers that it thinks will taint the image of its products. In this regard, Sebastian places its collective mark on its products in part to combat diversion to unauthorized retailers like drug stores. In this Court's view, enjoining Longs' resale is entirely consistent with the principles of antitrust law as evidenced by [Trans Sport](#).

Accordingly, Sebastian has established that it is likely to succeed on the merits with regard to establishing a misrepresentation [*18] that is likely to cause consumer confusion.

C. Irreparable Harm/Balance of Hardships

Sebastian faces a real threat of irreparable harm and the balance of hardships tips sharply in its favor. As indicated in the survey, the collective mark arguably implies even more of a connection between the reseller and Sebastian than does a traditional trademark. Therefore, Sebastian's cachet is in even greater jeopardy. Longs is arguably perceived as a lesser, discount environment, particularly when contrasted to a tony salon setting.

In addition, there is evidence that Longs is selling defective products and exhibiting them in a disheveled manner. Moreover, as pointed out during oral argument, a number of survey respondents mistakenly believed that a drug store selling products bearing the Sebastian collective mark is probably selling second-band or damaged Sebastian products. This signals to consumers that Sebastian might have authorized the sale of inferior goods. In addition, at least one salon owner declared that he would consider terminating his membership in the Collective unless diversion to drug stores was stopped. Thus, Longs is in real jeopardy of losing members of the Collective, [*19] which, in turn, could threaten its ability to maintain the high end image of its products.⁴

[**1791] By contrast, Longs faces a relatively minor harm. Longs will lose the lost profits on future sales of Sebastian products. However, Longs sells numerous other brands of hair care products. Thus, its very existence as a retailer is not in jeopardy. In addition, [*20] Longs sells Sebastian only on a sporadic basis. Thus it does not have a reputation as a reliable source of Sebastian products to protect.

Accordingly, Sebastian faces the possibility of irreparable injury, and the balance of hardship tips sharply in its favor.

IV. CONCLUSION

For the foregoing reasons, Sebastian's motion for Preliminary Injunction is GRANTED. This Court Orders that, pending a trial on the merits and determination in this action,

(1) defendant and defendant's officers, directors, employees, agents, servants, successors, and assigns, as well as those persons in active concert or participation with them who receive notice of the Order, be enjoined from

⁴ Longs argues that Sebastian delayed in bringing this action, which in turn negates Sebastian's contentions of irreparable injury. Longs' argument is without merit. Admittedly, Sebastian has been on notice of Longs' sales since 1987 and only now seeks injunctive relief. However, Sebastian's Collective was not founded until June 1992. Sebastian did not attempt to utilize the trademark avenue until after it registered its collective mark, placed the mark on its goods, and in April 14, 1993, first learned that the defendant was selling Sebastian Product bearing the collective mark. Sebastian then filed suit on May 18, 1993. Sebastian did not, therefore, sleep on its rights.

infringing the collective marks of plaintiff, or from otherwise engaging in unfair competition with plaintiff, in any manner, including but not limited to:

(a) displaying, distributing and/or offering for sale to the public, and/or purchasing or otherwise acquiring for the purpose of displaying, distributing and/or offering for sale to the public, Sebastian hair care and beauty products that bear one or more of plaintiff's Collective Marks, namely, Sebastian Collective Salon Member and Sebastian Collective Salon Member [*21] & Design; and/or

(b) engaging in any conduct tending falsely to represent or likely to confuse, mislead or deceive purchasers, defendant's customers or members of the public into thinking that defendant is or is affiliated with plaintiff and/or the Collective, that defendant's services are offered by or are otherwise the same nature as those offered by plaintiff and/or the members of the Collective, and that defendant's offering of services, if any, has been sponsored, approved, or licensed by plaintiff or the Collective.

(2) Sebastian shall post a bond in the amount of \$ 250,000 for the payment of such costs and damages as may be incurred or suffered if Longs is found to have been wrongfully enjoined or restrained.

(3) This Order shall be stayed for 90 days. Unless the Court of Appeals orders otherwise, this injunction will take effect after 90 days from the date of this Order.

(4) During this 90-day stay, Longs may attempt to sell inventory it currently possesses of Sebastian hair care and beauty products that bear one or more of plaintiff's Collective Marks;

(5) Within 30 days of the last of these sales, Longs shall submit to the Court an accounting of any sales made and corresponding [*22] profits earned from these sales.

IT IS SO ORDERED.

William D. Keller, Judge

United States District Court

DATED: March 11, 1994

End of Document



Advanced Health-Care Servs. v. Giles Memorial Hosp.

United States District Court for the Western District of Virginia, Roanoke Division

March 15, 1994, Filed, Entered

Civil Action No. 88-0346-R

Reporter

846 F. Supp. 488 *; 1994 U.S. Dist. LEXIS 7482 **; 1994-1 Trade Cas. (CCH) P70,591

ADVANCED HEALTH-CARE SERVICES, Plaintiff, v. GILES MEMORIAL HOSPITAL & MEDSERV CORPORATION, Defendants.

Disposition: [**1] Granted.

Core Terms

patients, market share, monopolization, percent, monopoly power, summary judgment, competitor, alleges, antitrust, monopoly, steering, supplier, Sherman Act, probative evidence, defendants', predatory, leveraging, anticompetitive, concentration, exclusionary, conspiracy, competitive advantage, predatory conduct, calculated, rental

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

HN1[] Regulated Practices, Private Actions

The complex nature of antitrust litigation encourages summary disposition of such cases where permissible. The Fourth Circuit Court of Appeals has approved of the use of summary judgment in antitrust cases.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

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

HN2[] Summary Judgment, Evidentiary Considerations

In a case with much complicated and detailed evidence, once the moving party has met its burden under [Fed. R. Civ. P. 56\(c\)](#), the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts, but must come forward with sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.

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

[**HN3**](#) [down] **Sherman Act, Claims**

To prove an unreasonable restraint of trade in violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must show: (1) that the conspiracy produced adverse, anticompetitive effects within the relevant product and geographic market; (2) that the objects and conduct pursuant to the conspiracy were illegal; and (3) that the plaintiff was injured as a proximate result of the conspiracy.

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN4**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

To prevail on a monopolization claim under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), a plaintiff must show possession of monopoly power in a relevant market, willful acquisition or maintenance of that power in an exclusionary or predatory manner, and causal antitrust injury.

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN5**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

Numerous cases and commentators have suggested that absent extraordinary circumstances, a market share over 50 percent is required to show market power.

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

[**HN6**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

Another means of viewing monopoly power is through market share trends. If a defendant's market share is declining and/or other competitors' markets shares are rising, then the defendant can hardly possess monopoly power.

846 F. Supp. 488, *488L^A 1994 U.S. Dist. LEXIS 7482, **1

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

[**HN7**](#) [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

A firm, even one with monopoly power, is not guilty of predatory exclusionary conduct when it is simply exploiting the competitive advantages legitimately available to it.

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

[**HN8**](#) [+] **Private Actions, Remedies**

Antitrust injury arises only from harm to the competitive process itself and not from harm to a single competitor.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

[**HN9**](#) [+] **Actual Monopolization, Anticompetitive & Predatory Practices**

The monopoly leveraging theory does not follow from the text of the Sherman Act and destroys the distinction between concerted conduct that restrains trade in [15 U.S.C.S. § 1](#), and unilateral conduct that monopolizes or attempts to monopolize in [15 U.S.C.S. § 2](#). Further, when a monopolist has a lawful monopoly in one market and uses its power to gain a competitive advantage in a second market, the anticompetitive dangers that implicate the Sherman Act are not present.

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

[**HN10**](#) [+] **Sherman Act, Claims**

To prove attempted monopolization under [section 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), the plaintiff must prove a specific intent to monopolize a relevant market, predatory or anticompetitive acts, and a dangerous probability of successful monopolization. Attempted monopolization requires a specific intent to destroy competition or build monopoly. A desire to increase market share or even to drive a competitor out of business through vigorous

competition on the merits is not sufficient. The requisite intent to monopolize may be shown through direct evidence or through inference by showing predatory conduct.

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

HN11[] **Monopolies & Monopolization, Attempts to Monopolize**

Where evidence of intent to monopolize and predatory conduct is weak and entry barriers are low, an antitrust plaintiff must show a defendant's market share of above 50 percent to show a dangerous probability of success to support an attempted monopolization charge. Attempted monopolization claims involving between 30 percent and 50 percent shares should usually be rejected, except when conduct is very likely to achieve monopoly or when conduct is invidious.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

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

HN12[] **Sherman Act, Claims**

In order to prove a conspiracy to monopolize, a plaintiff must show concerted action, a specific intent to achieve an unlawful monopoly, and commission of an overt act in furtherance of the conspiracy. However, unlike an attempted monopolization claim, it is not necessary that the committed acts, themselves, be predatory.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN13[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The "essential facilities" approach to monopolization claims examines whether market power in one market is being used to create or further a monopoly in another market. The four elements of an essential facilities claim are (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors.

Counsel: For ADVANCED HEALTH-CARE INC., plaintiff: John Thomas Arnold, MOSS & ROCOVICH, P.C., ROANOKE, VA. James A. Burt, STRONG & ASSOCIATES, P.C., SPRINGFIELD, MO.

For GILES MEMORIAL HOSPITAL, HEALTH EAST INC., defendants: Michael F. Urbanski, Heman Alexander Marshall, III, WOODS, ROGERS & HAZLEGROVE, P.L.C., ROANOKE, VA. For MEDSERV CORPORATION,

defendant: Charles Nealson Dorsey, William Hitchcock Lindsey, BOUNDS & DORSEY, P. C., ROANOKE, VA.
George R. Clark, Robert J. Aamoth, Alexander P. Starr, REED, SMITH, SHAW & MCCLAY, Washington, DC.

Judges: Turk

Opinion by: JAMES C. TURK

Opinion

[*491] MEMORANDUM OPINION

By: Hon. James C. Turk

United States District Judge

I.

This multi-count antitrust case was filed by Advanced Health Care Services, Inc. ("AHCS"), a corporation engaged in the business [*492] of renting and selling durable medical equipment ("DME") in southwest Virginia.¹ Defendant Giles Memorial Hospital ("Giles Memorial") is a Virginia not-for-profit hospital corporation in Pearisburg, Virginia. Defendant Medserv is a corporation engaged in the business of renting and selling DME.² On August 1, 1985, Giles Memorial and Medserv entered into a contract to provide DME to residents in Giles Memorial's service [***2] area.³ This joint venture contract established a home DME business located in Giles Memorial called Home Connections. Under the contract, Giles Memorial essentially provided office space and Medserv provided personnel and DMB. Giles Memorial received thirty-five percent of Home Connections' collections. In 1991 the Giles Memorial-Medserv contract was terminated. Home Connections terminated at the same time.

AHCS and another DME business, McLean's [***3] Drug, shared the DME business from Giles Memorial prior to the entry of Home Connections into the market.⁴ AHCS' market share predictably declined after Home Connections started up. This decline in business led AHCS to close its Pearisburg office on March 31, 1986. AHCS filed this lawsuit on August 1, 1988. By order of this court dated December 29, 1988, this case was dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)*. The Fourth Circuit Court of Appeals reversed, *Advanced Health-Care Services, Inc. v. Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990) ("Radford") and set forth the law of this case. Extensive discovery is now complete and defendants have filed a joint motion for summary judgment. As the court finds that plaintiff has not met its burdens to go forward with trial, defendants' motion is granted. AHCS' second amended complaint alleges seven counts of federal and state antitrust violations; these will be examined in turn.

[**4] II.

HN1 [↑] The complex nature of antitrust litigation encourages summary disposition of such cases where permissible. The Fourth Circuit Court of Appeals has approved of the use of summary judgment in antitrust cases.

¹ DME consists of canes, crutches, oxygen equipment, wheelchairs, walkers, hospital beds and other items used by persons recuperating at home from an accident or illness.

² Medserv is the corporate successor to Primedica, Inc., which itself was the corporate successor to Inhalation Therapy Services, Inc. Throughout this opinion, these entities will be referred to as "Medserv."

³ This was the second contract between Giles Memorial and Medserv. The first contract involved the provision of respiratory therapy services at the hospital and is not in issue here.

⁴ Indeed, both businesses had paid employees working in Giles Memorial's respiratory services department, and these employees roughly split referrals for DME.

Oksanen v. Page Memorial Hosp., 945 F.2d 696, 708 (4th Cir. 1991) (en banc), cert. denied, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992). HN2 In a case with as much complicated and detailed evidence as this, once the moving party has met its burden under Fed. R. Civ. P. 56(c), the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), but must come forward with sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. See Abcor Corp. v. AM Intern., Inc., 916 F.2d 924, 930 (4th Cir. 1990). After four years **5 of discovery, plaintiff has not been able to come forward with significantly probative evidence sufficient to create a triable issue of fact.

III. Unreasonable Restraint of Trade

Count 1 of plaintiff's second amended complaint alleges that defendants' implementation of the August 1, 1985 contract constituted an unreasonable restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1.⁵ HN3 To prove that the contract constituted *493 an unreasonable restraint of trade, the Fourth Circuit instructed that AHCS must show:

- (1) that the conspiracy produced adverse, anticompetitive effects within the relevant product and geographic market; (2) that the objects and conduct pursuant to the conspiracy were illegal; and (3) that the plaintiff was injured as a proximate result of the conspiracy.

Radford, 910 F.2d at 144. (quoting Terry's Floor Fashions, Inc. v. Burlington Industries, Inc., 763 F.2d 604, 610 n.10 (4th Cir. 1985).

**6 Plaintiff has not produced significantly probative evidence that the contract produced adverse, anticompetitive effects within the relevant product and geographic market. The parties have agreed, at least for the purpose of this motion, that the relevant product market is DME and the geographic market is the "greater Pearisburg, Virginia region," or Giles County. Prior to the entry of Home Connections, AHCS and McLean's Drug roughly split the market.⁶ After Home Connections entered the market, Super-Aid also began to do business in the DME market. The market became less concentrated after the entry of Home Connections, as consumers had a greater choice of suppliers. Plaintiff has submitted no evidence indicating that prices increased upon Home Connections' entry. For example, as might be expected from the appearance of new competitors, prices for oxygen concentrator rentals declined during the period in question. Nor has plaintiff demonstrated a substantial or continuing decline in the quality of DME available to consumers in the market as a result of any actions of Home Connections.⁷ Thus, since plaintiff has neither demonstrated a rise in the price or reduction in quality of **7 DME, nor a decrease in the number of firms supplying DME to consumers in Giles County, "the aphorism that 'the antitrust laws were enacted for the protection of competition not competitors' rings true in this case." Oksanen, 945 F.2d at 709 (citations omitted). See also Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196 (W.D.N.C. 1989) (plaintiff's § 1 claim dismissed -- general market condition for plastic bottles was more competitive after joint venture contract since price and market concentration decreased, production increased and overall quality and service was substantially unchanged), *aff'd per curiam*, 912 F.2d 463 (4th Cir. 1990), cert. denied, 498 U.S. 1110 (1991).

**8 AHCS may have been hurt by Home Connections' entry into the market, but there is no evidence that competition as a whole in the relevant market has been harmed. Based on the foregoing, plaintiff is unable to

⁵ Although plaintiff's second amended complaint alleges that the contract was entered into in 1984, it is clear from the context of the complaint that plaintiff refers to the August 1, 1985 contract between Giles Memorial and Medserv.

⁶ Plaintiff's expert estimates that AHCS and McLean's combined market share exceeded 93 percent in 1985 prior to the entry of Home Connections in the DME market.

⁷ Although plaintiff has found a few specific instances of substandard quality of Home Connections' DME, Home Connections' inter-office memoranda suggest that the company was concerned about the lapses in quality; this concern seems unusual in a firm that was allegedly impervious to competition.

establish that the contract produced adverse, anticompetitive effects within the relevant product and geographic market; therefore, summary judgment is appropriate for Count 1.⁸

IV. Monopolization

Plaintiff alleges in Count 2 that defendants monopolized the DME market in Giles County in violation of [section 2](#) of the Sherman Act. [15 U.S.C. § 2.](#) [HN4](#)⁹ To prevail on a monopolization claim, a plaintiff must show possession of monopoly power in a relevant market, willful acquisition or maintenance of that power in an exclusionary or predatory manner, and causal antitrust injury. [Radford, 910 F.2d at 147.](#) [\[**9\]](#) Plaintiff alleges that Home Connections possessed at least a seventy-five percent market share of the DME market in Giles County and that this constitutes monopoly power. Defendants claim that Home Connections never achieved a dominant share of the DME market in Giles County. [HN5](#)¹⁰ Numerous cases and commentators have suggested that absent extraordinary [\[*494\]](#) circumstances, a market share over fifty percent is required to show market power.⁹ [\[**11\]](#) Plaintiff's evidence of market share was compiled by its expert, Dr. Roger Blair. Dr. Blair reports that Home Connections' market share reached a peak of 57.8 percent in 1989. Dr. Blair made two mistakes in his calculations. First, Dr. Blair calculated Home Connections' market share based on billed revenue, while calculating all other suppliers' market shares on collected revenue. Second, Dr. Blair calculated Home Connections' market share based on revenue from Giles County residents and from non-Giles County residents, but calculated others suppliers' market shares based on revenue from Giles County only.¹⁰ When these mistakes are corrected, Home Connections' true market share of DME in Giles County peaks at 44.1 percent in 1989 and averages 32.9 percent [\[**10\]](#) over the 1986-1989 period of its existence. Thus, defendants' market share was significantly below the established floor for showing monopoly power.

[HN6](#)¹¹ Another means of viewing monopoly power is through market share trends. If the defendants' market share is declining and/or other competitors' markets shares are rising, then the defendants can hardly possess monopoly power. See, e.g., [Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 \(6th Cir. 1982\)](#) ("The fact that [defendant's] share of the market was declining also belies whatever inference of capacity to monopolize that may be drawn from the size of its market share."); [United States v. Syufy Enterprises, 903 F.2d 659, 666 \(9th Cir. 1990\)](#) ("In evaluating monopoly power, it is not market share that counts, but the ability to *maintain* [\[**12\]](#) market share.") (emphasis in original). Toward the end of the relevant time period, Home Connections steadily lost ground to other DME firms. For example, from 1989 to 1990, Home Connections' market share dropped 22.7 percent, while McLean's market share rose 13.7 percent, Hometown's market share rose 62.5 percent, and Super-Aid's market share rose 140 percent.¹¹ AHCS's market share fell 2.7 percent, but given its competitors' gains, it would be

⁸ As discussed in the monopolization section, plaintiff is also unable to establish that the objects and conduct pursuant to the contract were illegal or that it suffered antitrust injury.

⁹ In [United States v. Aluminum Co. of America, 148 F.2d 416, 424 \(2d Cir. 1945\)](#), Judge Learned Hand suggested that while 90 percent of the market "is enough to constitute a monopoly, it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." See also [White Bag Co. v. International Paper Co., 579 F.2d 1384, 1387 \(4th Cir. 1974\)](#) (cases have shown that "when monopolization has been found the defendant controlled seventy to one hundred percent of the relevant market"); [Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 201-02 \(3d Cir. 1992\)](#) ("A significantly larger market share than 55 percent has been required to demonstrate *prima facie* monopoly power."), cert. denied, [122 L. Ed. 2d 677, 113 S. Ct. 1285 \(1993\); Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 489 and 489-90 n. 11 \(5th Cir. 1984\)](#) (requiring a market share of at least 50 percent); P. Areeda and H. Hovenkamp, [Antitrust Law](#) P 518.3c at 549 (1992 Supp.) ("There is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute monopoly power.").

¹⁰ Plaintiff does not deny these errors; rather, plaintiff asserts that the correct measure of market share is in new referrals, not revenues. Dr. Blair claims that Home Connections secured over 78 percent of DME referrals from Giles Memorial. This statistic is not relevant, however, because the proper geographic market for this analysis is Giles County, not Giles Memorial Hospital.

¹¹ It is significant that Super-Aid Pharmacy entered the market during the period of alleged monopoly power. The DME market is characterized by low barriers to entry, which makes exercise of monopoly power nearly impossible, as any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods for less. See [Syufy Enterprises, 903 F.2d at 664-65.](#)

speculative to attribute plaintiff's loss to defendants' exercise of market power. Moreover, in 1991 Home Connections went out of business, which was certainly not indicative of monopoly power.¹²

[**13] Plaintiff contends that extraordinary market circumstances existed that would permit a finding of monopolization despite market shares below 50 percent. See *Fineman*, 980 F.2d at 202. Dr. Blair argues that market share data based on revenues understate Home Connections' market power because [*495] they included ongoing rental revenue from patients who selected their DME supplier before Home Connections began operations in August 1985. However, the majority of rental revenue is derived from oxygen concentrators, and the average rental period for oxygen concentrators is five months. Thus by 1986 the skewing effect of pre-existing oxygen patients would have faded.

Plaintiff's principal allegation of exclusionary or predatory conduct is that discharge planners employed by Home Connections steered to Home Connections all Giles Memorial patients in need of DME upon discharge. Plaintiff alleges that Medserv and Giles Memorial contracted to make Home Connections a "preferred provider" through a kickback arrangement with Giles Memorial's discharge planners. The evidence does not support these allegations. No Giles Memorial discharge planner was employed by Home Connections [**14] or Medserv. In recognition of the potential antitrust implications of the contract, Giles Memorial's Administrator instituted a hospital policy of (1) advising all patients requiring DME of all suppliers in the community, (2) reframing from recommending any particular supplier, and (3) requiring the patient to choose a desired supplier. Giles Memorial prepared a "freedom of choice" form listing known DME suppliers in the community, including AHCS. After the patient made a selection, the chosen supplier was notified and DME was ordered therefrom. Though this form was not found in all patient records, it was found in the files of 83 percent of discharged Giles Memorial patients who chose Home Connections.

Although plaintiff alleged that over 85 percent of discharged Giles Memorial patients in need of DME selected Home Connections, plaintiff's expert was able to trace only 8.9 percent of new DME rentals in Giles County during 1985-1990; he found that 59 of the 75 patients whose records he could trace selected Home Connections. This sample cannot provide a sound statistical basis for inference of steering by defendants, as the few files found may merely show that some firms kept better [**15] records.¹³

Plaintiff has not come forward with a single former Giles Memorial patient who claims to have been influenced to choose Home Connections, or who "did not believe they were given a choice,"¹⁴ despite its identification above of 75 potential candidates for steering. Nor has plaintiff found any Giles Memorial physician or employee who systematically referred patients to Home Connections. Its only evidence of steering comes from two former Home Connections employees who left Home Connections in the spring of 1986, Michael Lawhorn and Debra Lee. They claim to have been told to steer patients to Home Connections, and to switch patients who already had DME in their homes from AHCS or McLean's to Home Connections. Both admit that they have never steered a new DME patient to Home Connections [**16] or switched an existing AHCS or McLean's patient to Home Connections. They never watched a single patient select a DME supplier; they never witnessed a single patient being steered to Home Connections. Therefore, neither has personal knowledge of actual predatory conduct by defendants.¹⁵

¹² During the relevant period, market concentration lessened notably as Home Connections, AHCS and McLean's all possessed more than 10 percent market shares and the smaller DME suppliers' business grew.

¹³ For example, no records of discharged Giles Memorial patients who selected AHCS were found; Dr. Blair therefore speculates that AHCS received zero percent of DME orders by former Giles Memorial patients from 1985-1990.

¹⁴ Plaintiff's one witness who claimed to have not been informed of alternative DME suppliers, Mrs. Ethelene Atwell, later recanted her affidavit, explaining that she did not understand the affidavit that she signed for plaintiff.

¹⁵ Similarly, Mary Ellen Britts and Don Walker have no personal knowledge of whether defendants steered Giles Memorial patients to Home Connections. Their testimony precluded by plaintiff is inadmissible hearsay, as is Lawhorn's assertion that he heard that physicians were coerced to refer patients to Home Connections.

HN7 "A firm, even one with monopoly power, is not guilty of predatory exclusionary conduct when it is simply exploiting the competitive advantages legitimately available to it." *Radford, 910 F.2d at 147 n.14*. **[**17]** Plaintiff has produced no significantly probative evidence that defendants went beyond the competitive **[*496]** advantages legitimately available to Home Connections: goodwill and confidence engendered by the satisfactory provision of hospital services and continuity of care from the hospital to the home.

HN8 Antitrust injury arises only from harm to the competitive process itself and not from harm to a single competitor. AHCS must show that defendants caused harm to the process of competition that existed in the DME market prior to Home Connections entry into it, not just that AHCS was injured. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 487-89, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*; *Military Services Realty, Inc. v. Realty Consultants of Virginia, Ltd., 823 F.2d 829, 832 (4th Cir. 1987)* ("The elimination of a single competitor standing alone, does not prove anticompetitive effect."). As discussed above, the Giles County DME market became more competitive in the late 1980s than it had been prior to Home Connections' entry. From a time where AHCS and McLean's Drug roughly split the DME market, **[**18]** Home Connections' market entry reduced market concentration; consumers had more choice, not less. Since there is no substantial, credible evidence that prices rose or quality declined, AHCS has not shown harm to the process of competition in the Giles County DME market.

Therefore, since AHCS has not come forward with significantly probative evidence of possession by defendants of monopoly power in the Giles County DME market, willful acquisition or maintenance of that power in an exclusionary or predatory manner, or causal antitrust injury, summary judgment is appropriate for Count 2.

V. Monopoly Leveraging

In Count 3, plaintiff alleges that Giles Memorial leveraged its monopoly power in the acute care services market to gain an unfair competitive advantage for Home Connections in the DME market. Under this theory, plaintiff argues, it need not offer proof that Home Connections possessed monopoly power in the DME market in Giles County to establish a violation of Sherman Act section 2. Rather, plaintiff claims it may show that defendants violated section 2 by using its monopoly power in the acute care services market to gain exclusive access to patients who were in need of DME upon **[**19]** discharge. See *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979)*, cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980).¹⁶ The Sixth Circuit elected to follow *Berkey Photo* in *Kerasotes Michigan Theatres, Inc. v. National Amusements Inc., 854 F.2d 135 (6th Cir. 1988)*, cert. dismissed, 490 U.S. 1087 (1989), but the Third and Ninth Circuit Courts of Appeal have emphatically rejected monopoly leveraging as impermissible expansions of the sweep of section 2. See *Fineman, 980 F.2d at 204-06; Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 547 (9th Cir. 1991)*, cert. denied, 118 L. Ed. 2d 316, 112 S. Ct. 1603 (1992). The Fourth Circuit has expressly declined in this case to determine whether there exists a claim for "monopoly leveraging" that materially differs from the classic claim for monopolization under Sherman Act section 2. *Radford, 910 F.2d at 149 n.17* **[**20]** ("We reserve definitive resolution of that issue for a case in which the issue is squarely presented."); see also *M&M Medical Supplies and Service, Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 168-69 (4th Cir. 1992)* (en banc) ("There will be time enough to evaluate the validity of this assumption after the parties have developed a factual record."), cert. denied, 125 L. Ed. 2d 662, 113 S. Ct. 2962 (1993).

[21]** The court finds the reasoning in *Fineman* and *Alaska Airlines* more persuasive. **HN9** *Berkey Photo*'s leveraging theory does not follow from the text of the Sherman Act and destroys the distinction between concerted **[*497]** conduct that "restrains trade" in section 1 and unilateral conduct that "monopolizes or attempts to monopolize" in section 2. See *Fineman, 980 F.2d at 205-06*. Further, when a monopolist has a lawful monopoly in one market and uses its power to gain a competitive advantage in a second market, the anticompetitive dangers that implicate the Sherman Act are not present. See *Alaska Airlines, 948 F.2d at 548*.

¹⁶ In *Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 570-71 (2d Cir. 1990)*, the Second Circuit cautioned that the *Berkey Photo* discussion of what later became known as 'monopoly leveraging' was mere *dictum* and involved a classic tying claim. Therefore, it is unclear if the Second Circuit would recognize monopoly leveraging as distinct from a tying or monopolization claim. See *Sunshine Cellular v. Vanguard Cellular Systems, Inc., 810 F. Supp. 486, 495 n.7 (S.D.N.Y. 1992)*.

Even if the court were to accept the monopoly leveraging theory, AHCS has failed to adduce significantly probative evidence that Home Connections gained an unfair competitive advantage in the DME market in Giles County. Without some sort of overt conduct such as steering, Home Connections had no way to "pull the alleged lever." Therefore, summary judgment is appropriate on Count 3.

VI. Attempted Monopolization

Plaintiff alleges that defendants engaged in a series of exclusionary and predatory acts specifically [**22] intended to acquire monopoly power in the DME market in violation of Sherman Act [section 2](#). [HN10](#)¹⁷ To prove attempted monopolization, the plaintiff must prove a specific intent to monopolize a relevant market, predatory or anticompetitive acts, and a dangerous probability of successful monopolization. [Radford, 910 F.2d at 147](#). Attempted monopolization requires "a specific intent to destroy competition or build monopoly." [Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 \(1953\)](#). "A desire to increase market share or even to drive a competitor out of business through vigorous competition on the merits is not sufficient." [Abcor, 916 F.2d at 927](#). The requisite intent to monopolize may be shown through direct evidence or through inference by showing predatory conduct. *Id.* Plaintiff has no direct evidence of specific intent to monopolize; therefore, the first two elements of attempted monopolization merge into a requisite showing of predatory acts.

As described in the monopolization section, AHCS can produce no significantly probative [**23] evidence of steering of patients by defendants; coercion of doctors or employees by defendants; or uncompetitively high prices or consistently inferior quality of defendants' DME. Therefore, as a matter of law, AHCS cannot satisfy the first two elements of attempted monopolization.

[HN11](#)¹⁷ Where, as in this case, evidence of intent and predatory conduct is weak and entry barriers are low, the plaintiff must show a market share above 50 percent to show a 'dangerous probability of success.' See [M&M Medical Services, 981 F.2d at 168](#) (attempted monopolization "claims involving between 30% and 50% shares should usually be rejected, except when conduct is very likely to achieve monopoly or when conduct is invidious . . ." (citing 3 P. Areeda and D. Turner, [Antitrust Law](#), P 835c, at 350 (1978)); [Barr Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98, 112-15 \(3d Cir. 1992\)](#) (holding that defendant's 50 percent market share was insufficient to show dangerous probability of success)). As discussed in the monopolization section, Home Connections' market share peaked at 44 percent and averaged 33 percent for the period 1986-1990.¹⁷ [**24] Therefore, plaintiff can satisfy none of the elements of attempted monopolization and summary judgment is appropriate on Count 4.

VII. Conspiracy to Monopolize

Plaintiff alleges in Count 5 that Giles Memorial and Medserv conspired to participate in exclusionary and predatory acts with the intent to acquire and share the rewards of monopoly [**25] power in the DME market in Giles County in violation of Sherman Act [section 2](#). [HN12](#)¹⁷ In order to prove a conspiracy to monopolize, "a plaintiff must show concerted action, a specific intent to achieve an unlawful [*498] monopoly, and commission of an overt act in furtherance of the conspiracy." [Radford, 910 F.2d at 150](#). However, "unlike an attempted monopolization claim, it is not necessary that the committed acts, themselves, be predatory." *Id.*

As discussed in the attempted monopolization section, there is no significantly probative evidence that defendants intended to engage in anything other than vigorous competition. See [Abcor Corp., 916 F.2d at 927](#). Therefore, as plaintiff has not shown that defendants intended to monopolize the DME market in Giles County through predatory conduct, summary judgment is appropriate on Count 5.

VIII. Denial of Access to an Essential Facility

¹⁷ As discussed in the monopolization section, Home Connections' market share fell significantly (from 43 to 34 percent) from 1989 to 1990, which is further evidence that there was no dangerous probability of monopolization of the DME market by defendants. See [Richter Concrete, 691 F.2d at 826](#). Finally, the fact that Home Connections so swiftly went out of business makes the likelihood of monopolization seem quite remote. See [Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 270-71 \(7th Cir. 1981\), cert. denied, 455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 \(1982\)](#).

In Count 6, AHCS alleges that defendants violated [section 2](#) of the Sherman Act by denying it access to inpatients at Giles Memorial; it claims that access to these patients constitutes a "facility" essential to the ability to compete in the DME market in Giles [**26] County. Much like monopoly leveraging, [HN13](#) the "essential facilities" approach to monopolization claims examines whether market power in one market (acute care hospital services) is being used to create or further a monopoly in another market (DME). See [Radford, 910 F.2d at 150](#).

The four elements of an essential facilities claim are "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors." [Radford, 910 F.2d at 150](#).

In order to satisfy the second element, AHCS must show that denial of access to Giles Memorial inpatients in their hospital rooms caused "more than inconvenience, or even some economic loss." [Twin Laboratories, 900 F.2d at 569-70](#). Plaintiff must show that this denial inflicted a "severe handicap" that threatened to eliminate competition in the market for DME in Giles County. See id.; [Alaska Airlines, 948 F.2d at 544-45](#) ("A facility that is [**27] controlled by a single firm will be considered "essential" only if control of the facility carries with it the power to *eliminate* competition in the downstream market.") (emphasis in original). Market share statistics have shown that access to Giles Memorial patients is *not essential* to doing business in the DME market in Giles County. Throughout Home Connections' existence, rival DME companies continued to do substantial business, and, with the exception of AHCS, were consistently gaining market share. In fact, McLean Drug's share of the total DME market from 1986-1990 exceeds Home Connections' share.

AHCS is also unable to show that defendants denied competitors any access to Giles Memorial inpatients, or that increased access was feasible. As discussed in the monopolization section, patients were presented with a "freedom of choice" form that listed all known options for DME, including AHCS. Discharge personnel were instructed to remain neutral as to a patient's choice. Plaintiff has not come forward with significantly probative evidence of steering or other manipulation; therefore, AHCS did have reasonable access to Giles Memorial patients, and further access would violate [**28] Giles Memorial's "non-solicitation" policy. Plaintiff argues that Giles Memorial could have implemented a system whereby qualified DME dealers would rotate initial contacts with Giles Memorial inpatients; however, feasibility must be analyzed not in terms of all the possibilities, but in the context of defendant's normal course of business. [Laurel Sand & Gravel, Inc. v. CSX Transp., Inc. 924 F.2d 539, 545](#) (4th Cir.), cert. denied, 116 L. Ed. 2d 39, 112 S. Ct. 64 (1991).

Plaintiff's argument that Giles Memorial's policy of not allowing it face-to-face contact with patients could have been improved to provide more competition does not go far enough to establish a [section 2](#) violation under this framework. Access to patients was not essential to competition in Giles County, nor do Giles Memorial's policies completely deny AHCS patient access, nor is it feasible to permit AHCS to solicit business directly in patient's hospital rooms. Therefore, summary judgment is appropriate on Count 6.

[*499] IX. State Law Claims

Plaintiff alleges in Count 7 that defendants have tortiously interfered in AHCS's contracts with former [**29] Giles Memorial patients in violation of Virginia common law. Since summary judgment is granted as to all federal antitrust claims, plaintiff's pendent state law claim is dismissed without prejudice. [United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 \(1966\)](#).

X. Conclusion

For the reasons discussed above, defendants' motion for summary judgment is granted. An appropriate order shall issue this day.

ENTER: This 15th day of March, 1994.

James C. Turk

UNITED STATES DISTRICT JUDGE

846 F. Supp. 488, *499L 1994 U.S. Dist. LEXIS 7482, **29

FINAL ORDER - March 15, 1994, Filed

By: Hon. James C. Turk

United States District Judge

In accordance with the written Memorandum Opinion entered this day, it is

ADJUDGED AND ORDERED

that defendants' joint motion for summary judgment is GRANTED as to counts one through six of plaintiff's second amended complaint. The state law claims in count seven of plaintiff's second amended complaint are dismissed without prejudice.

The Clerk of the Court is directed to remove this case from the active docket of the court and to send certified copies of this Order and accompanying Memorandum Opinion to all counsel of **[**30]** record.

ENTER: This 15th day of March, 1994.

James C. Turk

UNITED STATES DISTRICT JUDGE

End of Document



Hudson Motors Partnership v. Crest Leasing Enters.

United States District Court for the Eastern District of New York

March 21, 1994, Decided

93-CV-5642

Reporter

845 F. Supp. 969 *; 1994 U.S. Dist. LEXIS 3390 **

HUDSON MOTORS PARTNERSHIP t/a HUDSON TOYOTA, Plaintiff, v. CREST LEASING ENTERPRISES, INC. and METRO AUTO LEASING, INC., Defendants.

Core Terms

punitive damages, Defendants', invoice, bad faith, Chattel, antitrust, ex parte order, counterclaim, seizure, sanctions, motion to quash, vexatiously, inherent power, allegations, proceedings, Leasing, set-off, antitrust action, sales, breach of contract action, breach of contract, fraudulent, motion to consolidate, order of seizure, cause of action, checks, cases, attorney's fees, contractual, multiplied

LexisNexis® Headnotes

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > Breach > General Overview

Civil Procedure > Remedies > Damages > General Overview

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

HN1[] Damages, Punitive Damages

The general rule under New York law is that punitive damages are not available in breach of contract actions because they deal with wrongs between private parties.

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > Breach > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

845 F. Supp. 969, *969LÁ1994 U.S. Dist. LEXIS 3390, **3390

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

HN2[] **Damages, Punitive Damages**

If the wrong associated with a breach of contract is not aimed at the public, but the actions of the breaching party involve that degree of bad faith evincing a disingenuous or dishonest failure to carry out a contract, then punitive damages are appropriate.

Computer & Internet Law > Civil Actions > Damages

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > Remedies > General Overview

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Judicial Review

HN3[] **Civil Actions, Damages**

Punitive damages will not be awarded in a breach of contract action unless to do so would deter morally culpable conduct.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN4[] **Damages, Punitive Damages**

Punitive damages are appropriate when they are necessary to both punish a party for egregious behavior and to deter future similar conduct.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN5[] **Sanctions, Misconduct & Unethical Behavior**

See [28 U.S.C.S. § 1927](#).

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

845 F. Supp. 969, *969L^A1994 U.S. Dist. LEXIS 3390, **3390

HN6 [down arrow] **Sanctions, Misconduct & Unethical Behavior**

Without a demonstration of bad faith on the part of the attorney in question, sanctions pursuant to [28 U.S.C.S. § 1927](#) are inappropriate. Imposition of a sanction under [§ 1927](#) requires a clear showing of bad faith.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN7 [down arrow] **Sanctions, Misconduct & Unethical Behavior**

Like an award made pursuant to the court's inherent power, an award under [28 U.S.C.S. § 1927](#) is proper when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN8 [down arrow] **Sanctions, Misconduct & Unethical Behavior**

Where counsel's alleged misconduct is the filing and arguing of a claim, it is not sufficient that the claim be found meritless; the claim must be without a plausible legal or factual basis and lacking in justification to warrant the imposition of sanctions under [28 U.S.C.S. § 1927](#).

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN9 [down arrow] **Sanctions, Misconduct & Unethical Behavior**

Under [28 U.S.C.S. § 1927](#), a court may infer intent from a total lack of factual or legal basis for a suit.

Civil Procedure > Remedies > Provisional Remedies > General Overview

Contracts Law > ... > Default > Foreclosure & Repossession > General Overview

HN10 [down arrow] **Remedies, Provisional Remedies**

[N.Y. C.P.L.R. 7102\(c\)](#) provides that an order of seizure is available if the affidavit in support of such an application establishes that the plaintiff is entitled to possession by virtue of the facts set forth and that the chattel is wrongfully held by the defendants.

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

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

Contracts Law > Breach > General Overview

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

845 F. Supp. 969, *969LÁ1994 U.S. Dist. LEXIS 3390, **3390

Antitrust & Trade Law > Sherman Act > Defenses

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN11 [blue download icon] **Private Actions, Remedies**

It is well established that the remedy for violation of the **antitrust law** is not avoidance of payments due under a contract, but rather the redress which the antitrust statute establishes, a private treble damage action. Antitrust counterclaims are therefore disfavored in a simple breach of contract claim. The exception to this general rule is limited to those cases where the judgment of the court would itself be enforcing antitrust conduct.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN12 [blue download icon] **Basis of Recovery, American Rule**

Under the inherent power of the court to supervise and control its own proceedings, an exception to the American Rule has evolved which permits the court to award reasonable attorneys' fee to the prevailing party when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN13 [blue download icon] **Sanctions, Misconduct & Unethical Behavior**

Unlike awards pursuant to [28 U.S.C.S. § 1927](#), sanctions pursuant to the court's inherent power may be made against the losing party or against the losing party's attorney, or both. The standard of bad faith is the same under both [§ 1927](#) and the court's inherent power. Furthermore, an award pursuant to the court's inherent power can be assessed against a party for either commencing or for continuing an action in bad faith, vexatiously, wantonly, or for oppressive reasons. Bad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.

Counsel: [**1] For plaintiff: Marjorie Berman, Esq., Leventhal Slade & Krantz, New York, New York.

For defendant: David Goldstein, Esq., Spring Valley, New York.

Judges: Glasser

Opinion by: I. LEO GLASSER

Opinion

[*972] **MEMORANDUM AND ORDER**

GLASSER, United States District Judge:

This is a motion by plaintiff Hudson Motors Partnership t/a Hudson Toyota ("Hudson Toyota"), for summary judgment pursuant to [Rule 56 of the Federal Rules of Civil Procedure](#) against defendants Crest Leasing Enterprises, Inc. ("Crest") and Metro Auto Leasing, Inc. ("Metro") (collectively, the "Defendants"), on plaintiff's breach of contract and Uniform Commercial Code ("UCC") causes of action. In connection therewith plaintiff moves to dismiss Defendants' antitrust counterclaims. Plaintiff also seeks punitive damages on its breach of contract and UCC causes of actions and attorneys' fees and costs pursuant to [28 U.S.C. § 1927](#), and the court's inherent power, against Defendants and their attorney.

FACTS

The material facts are not in dispute. Between July 22, 1993, and October 22, 1993, Hudson Toyota delivered a total of eight Toyota automobiles to Defendants. Defendants took possession of all eight vehicles and [**2] then refused to either pay for or return the automobiles. Defendants then sold seven of the eight vehicles to third parties even though they did not have valid title. Pl.'s 3(g) Statement, PP 6-64. See Complaint, P 1. Specifically, Defendants tendered to plaintiff three checks which were returned for insufficient funds and three checks which were returned and marked "payment stopped." Because one of the eight vehicles involved in this action had not been sold to a third party, Hudson Toyota moved ex parte for a seizure of this car.

A. The Ex Parte Order

On December 13, 1993, this court signed an ex parte order of seizure (the "Order") directing the United States Marshal for the Eastern District of New York to seize a 1994 Toyota Camry, white exterior, grey interior, vehicle identification number 4T1SK12E4RU326466 (the "Chattel"). The court issued the Order based on, among other things, the allegations contained in the papers submitted by Hudson Toyota that it had sold the Chattel to Metro on or about October 18, 1993, in exchange for the promise of payment of \$ 17,557.00, as evidenced by Invoice No. 6315, dated October 18, 1993. Affidavit of Gayle Epstein, December, 1993, [**3] P 4, Ex. A. Ms. Epstein, who is responsible for fleet sales of Toyota automobiles for Hudson Toyota, stated that despite numerous attempts to procure payment for the automobile, Hudson Toyota had not received the \$ 17,557.00. *Id.*, P 6.

Based on this conduct, plaintiff argued that "there is every reason to believe that Metro will sell, at the earliest possible moment, the one and only car it still possesses [and] . . . based on defendants' previous conduct, unless this order is granted without notice to Metro, Metro will sell, transfer, conceal or otherwise dispose of the car." Pl.'s Mem. in Support of Ex Parte Order, at 12. In this regard, plaintiff also brought to the court's attention the order of Justice Shainswit of the Supreme Court of the State of New York, Index No. 43145/90-001, July 24, 1990, in an action by the State of New York against Michael Silverstein ("Silverstein"), President of Crest and Metro, and several of his other companies. In this order, Justice Shainswit granted the Attorney-General's petition for an order (i) permanently enjoining the respondents from engaging in the business of selling or leasing motor vehicles unless a \$ 2,000,000 performance bond was [**4] filed with the Department of Insurance; (ii) enjoining respondents from engaging in any fraudulent or illegal activity; and (iii) directing [*973] the non-bankrupt respondents to make restitution to consumers injured by the fraudulent or illegal conduct, and to pay \$ 2,000 in costs to the State of New York. A copy of Justice Shainswit's order is attached as Exhibit 4 to the Affidavit of Marjorie E. Berman, December 30, 1993. In granting the People's petition, Justice Shainswit noted that,

The petition alleges, in essence, that respondent Michael Silverstein operated the three corporate respondents, each claiming to be an authorized dealer for several makes of foreign and domestic cars. The petition sets forth a litany of fraudulent practices directed at consumers. Submitted in support of these allegations are a selection (several dozen) of the hundreds of complaints received by the State Bureau of Consumer Frauds and

protection against the three respondents. *Id.* at 1-2.¹

¹ Defendants contend that this information is collateral to the issues in this action and that plaintiff should be sanctioned for bringing it to the court's attention. Defs.' Mem. at 5. Although plaintiff has also made reference to this decision in connection with its request for punitive damages, this information first came to light in connection with plaintiff's request for an order of seizure. In

[**5] Based on plaintiff's submissions, the court agreed that unless the Order was granted without notice it was probable that the Chattel would become unavailable for seizure by reason of being transferred, concealed, disposed of, or removed from the state. The court also concluded that seizure was warranted because Defendants had failed to either pay for or return the Chattel and therefore plaintiff enjoyed a superior possessory right to the Chattel.

B. The Attempted Seizure

On December 16, 1993, the United States Marshal for the Eastern District of New York unsuccessfully attempted to seize the Chattel from Defendants' place of business. In his affidavit, Deputy Marshal Steven C. Tocci stated that he had arranged to meet with a representative of plaintiff's, Mr. Scott Malzer, at the corner of 27th Street and 42nd Avenue in Long Island City, who was there to assist him in identifying the Chattel. Affidavit of Steven C. Tocci, undated, P 3. As Deputy Marshal Tocci circled the block looking for Mr. Malzer, "we noticed we were being followed by a white Mercedes with New Jersey license plates. I was told by Mr. Malzer that a similar vehicle belonged to Michael Silverstein, the president [**6] of Metro Auto Leasing, Inc." *Id.*, P 5. When Deputy Marshal Tocci, his partner Ray Wasson, and Mr. Malzer entered Defendants' showroom, "there were three spaces for vehicles and the middle space was noticeably empty. In addition, the showroom smelled of gasoline fumes." *Id.*, P 7. Deputy Marshal Tocci contacted Silverstein's attorney ("Counsel") on the telephone and instructed him to instruct his client to return the car. *Id.*, P 9. Counsel reported to Deputy Marshal Tocci that he could not get in touch with his client but had left messages for him. *Id.*, P 11.

In his affidavit, Scott Malzer, a driver for the fleet sales division of Hudson Toyota, stated that while waiting at the corner of 27th Street and 42nd Avenue for the Deputy Marshal, he was asked by a driver employed by Silverstein what he was doing. Affidavit of Scott Malzer, December, 1993, P 6. Malzer replied that he was "making a delivery." *Id.* Approximately fifteen minutes later he went to a telephone booth to call his employer and "I heard a car behind me and turned around. Silverstein stood in front of me holding a camera trying to take my picture. I went to another phone booth and called my employer." [**7] *Id.*, P 7. Malzer states that as he and the Marshal approached the showroom, "we saw Silverstein's car, a white Mercedes with New Jersey license plates, drive away." *Id.*, P 9. As stated above, when Malzer and the Marshal entered the showroom to seize the Chattel, it was gone.

C. Order of Confirmation

On January 14, 1994, Defendants moved to quash the ex parte order and consolidate this [*974] action with Defendants' antitrust action currently pending before Judge Korman in the Eastern District of New York.² Plaintiff cross-moved to confirm the Order. Defendants based their motion on three grounds: (i) the invoice attached to plaintiff's papers in support of its ex parte order was a "fraud"; (ii) plaintiff failed to report that a "related case" was pending before Judge Korman; and (iii) by bringing its ex parte motion plaintiff breached an agreement with Defendants to retain the status quo pending the filing of plaintiff's answer in the antitrust action. The court rejected these assertions and confirmed the Order in an order dated January 14, 1994. The court also denied Defendants' consolidation motion. The Chattel was eventually surrendered to plaintiff on or about January 17, [**8] 1994. In its Answer dated January 26, 1994, Defendants admitted the essential and material allegations of Hudson Toyota's complaint and asserted as a "set-off" the allegations contained in their antitrust complaint.

Plaintiff now moves to dismiss Defendants' set-off and seeks summary judgment and punitive damages on its breach of contract and UCC causes of action. Defendants offer no opposition to the appropriateness of summary judgment and the dismissal of the set-off. See Affidavit of Counsel, February 24, 1994, P 3 ("... defendants offer

that regard, this information was probative of whether an ex parte order was appropriate. The decision to award punitive damages, *infra*, is not based on this information. However, as the discussion which follows concerning the attempted seizure of the Chattel makes clear, Defendants' actions were commensurate with the allegations in *People of the State of New York v. Michael Oldsmobile Corp., et al.*, No. 43145/90-001.

² In *Crest Leasing Enterprises, Inc. and Metro Auto Leasing, Inc. v. Toyota Motor Sales U.S.A., Inc., et al.*, No. 93 Civ. 5452 (ERK), Crest and Metro seek damages against Hudson Toyota and others based on, among other things, an alleged violation of New York's Donnelly Act, [N.Y. Gen. Bus. L. § 340](#) (McKinney 1988).

no opposition to plaintiff's motion for summary judgment on the non-payment claim relative to the sale of eight (8) cars"). Defendants also offer no [**9] opposition to plaintiff's claim that damages total \$ 127,305.00, plus interest. Defendants, however, do oppose the application for attorneys' fees and costs; they also argue that punitive damages are inappropriate in this situation.

DISCUSSION

I. Punitive Damages

HN1[] The general rule under New York law is that punitive damages are not available in breach of contract actions because they deal with wrongs between private parties. [Hutton v. Klabal, 726 F. Supp. 67, 73 \(S.D.N.Y. 1989\)](#) ("Under New York law, punitive damages cannot be awarded in breach of contract cases which involve private wrongs and where no public rights are involved."); [Payne-Hayden, Inc. v. Loews Theatre Management Corp., 789 F. Supp. 1257, 1267 \(S.D.N.Y. 1992\)](#) ("New York courts, the Second Circuit and courts within this district are virtually unanimous that punitive damages may not be awarded in breach of contract cases, unless the wrong is aimed at the public generally.").³

[**10] The court in *Payne-Hayden*, however, may have overstated the case. **HN2**[] If the wrong associated with the breach is not aimed at the public, but the actions of the breaching party "involve that degree of bad faith evincing a disingenuous or dishonest failure to carry out a contract," [Aero Garage Corp. v. Hirschfeld, 185 A.D.2d 775, 777, 586 N.Y.S.2d 611, 613](#) (1st Dep't) (punitive damages appropriate where defendant was obligated to obtain an extension of certificate of occupancy, did not do so, and thwarted plaintiff's attempts to obtain said certificate) (internal quotations omitted), *leave to appeal denied*, 81 N.Y.2d 701, 610 N.E.2d 388, 594 N.Y.S.2d 715 (1992), then punitive damages are appropriate. See also [Williamson, Picket, Gross, Inc. v. Hirschfeld, 92 A.D.2d 289, 295, 460 N.Y.S.2d 36, 41](#) (1st Dep't 1983) (no punitive damages if the offending conduct merely constitutes breach of contract, but punitive damages are appropriate if offending conduct involves a high degree of bad faith); [Jackson v. Kump, No. 93 Civ. 3519, 1994](#) [**11] [WL 9691](#) at * 6 (S.D.N.Y. Jan. 13, 1994) ("In New York . . . even where a public right is not at issue, punitive damages might be available for breach of contract.") (*citing Aero Garage*). In the leading tort case involving the propriety of punitive damages, New York's Court of Appeals stated that,

Punitive or exemplary damages have been allowed in cases where the wrong [*975] complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future. . . . The list of actions in which punitive damages have been permitted in this State is long . . . libel . . . desecration of a grave . . . forcible abduction of a minor child . . . fraud and deceit "It is not the form of the action that gives the right to the jury to give punitive damages, but the moral culpability of the defendant."

[Walker v. Sheldon, 10 N.Y.2d 401, 404-05, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488, 490-91 \(1961\)](#) (citations omitted) (in fraud and deceit action where defendant induced plaintiff [**12] to enter into a contract by means of false and fraudulent representations and such activities were the means by which it did business, punitive damages are appropriate). Given this standard of review, **HN3**[] punitive damages will not be awarded in a breach of contract action unless to do so would deter "morally culpable conduct." [Werner, Zaroff, Slotnick, Stern & Askenazy v. Lewis, 155 Misc.2d 558, 561, 588 N.Y.S.2d 960, 961-62 \(N.Y. Ct. Cl. 1992\)](#) (where plaintiff's computer crashes due to a conditional statement that defendant had secretly put into plaintiff's program, punitive damages are appropriate in part because defendant's action were arguably criminal). Punitive damages are not appropriate in a Straightforward breach of contract action. [Geler v. National Westminster Bank USA, 770 F. Supp. 210 \(S.D.N.Y. 1991\)](#) (no punitive damages for failure to release funds allegedly owed pursuant to a certificate of deposit).

³ Both parties agree that New York law applies.

Applying these general criteria to this case, punitive damages are appropriate because the actions of Defendants evidence a "degree of bad faith evincing a disingenuous or dishonest failure to carry [**13] out a contract." [Aero Garage, 185 A.D.2d at 777, 586 N.Y.S.2d at 613](#) (internal quotations omitted).⁴ To begin, there is no dispute that Defendants intentionally and willfully breached their contractual obligations under the sales contracts. Defs.' 3(g) Statement, PP 6-64. If that were all Defendants did punitive damages would not be available. However, Defendants went beyond a mere breach of their contracts and embarked on a course to thwart at every turn plaintiff's contractual rights. Moreover, these efforts were performed in bad faith. For example, in connection with the motion to quash the ex parte order of seizure, Silverstein stated under oath as follows:

As defendants' attorneys inform me, the crux of plaintiffs' [sic] argument that they are entitled to possession of the subject automobile rests upon their contention that the car in question was "sold" to Metro Auto Leasing, Inc. Such a contention by plaintiffs is an outright lie!

Affidavit of Michael Silverstein, December 23, 1993 ("Silverstein Aff'd,") P 5. However, Defendants now admit that the car was in fact sold to them by virtue of the fact that they are not opposing [**14] the motion for summary judgment and by the fact that they have left unanswered Paragraph 51 of plaintiff's 3(g) statement ("On or about October 18, 1993, plaintiff and Metro entered into a contract of sale for delivery of a 1994 Toyota Camry . . .").⁵ Silverstein, therefore, was demonstrating bad faith (and perhaps perjury) in his statement to the court that the Chattel had not been sold and that an order of seizure was unwarranted.

[**15] There is also no dispute that Defendants stopped payment on three checks; did not provide funds to cover the other three checks; and refused to return the Chattel in retaliation for plaintiff's alleged violation of New York's antitrust statute. See Defs.' [[*976](#)] Mem. at 3 ("It has been defendants' position throughout this litigation that they stopped payment on the checks as a result of plaintiff's involvement in a conspiracy . . . to put defendants out of business."). [HN4\[↑\]](#) Punitive damages are appropriate when they are necessary to both punish a party for egregious behavior and to deter future similar conduct. [Sharapata v. Town of Islip, 56 N.Y.2d 332, 335, 437 N.E.2d 1104, 1105, 452 N.Y.S.2d 347, 348 \(1982\)](#) ("Punitive or 'exemplary' damages, sometimes known as 'smart money', and thus seemingly attuned to the criminal rather than the civil side of the law, are not intended to compensate the injured party but to punish the tort-feasor for his conduct and to deter him and others like him from similar action in the future.") (footnote omitted). The twin aims of punitive damages in the tort context -- punishment and deterrence -- [**16] are equally applicable in the contract context if, as in this case, a defendant's actions are egregious. Simply put, punitive damages are appropriate to remind Defendants that so-called self-help for antitrust violations in the form of selling cars to third persons without paying the seller for those items is unacceptable commercial behavior.

Punitive damages are also appropriate in this case because the actions of Defendants are similar to those steps taken by the defendants in *Aero Garage*; namely, a campaign to thwart plaintiff's contractual rights. Whereas in *Aero Garage* the defendants affirmatively sought to block plaintiff's contractual rights by, among other things, defying a court injunction and renewing their request that the certificate awarded to plaintiff be revoked, Defendants in this case failed to honor this court's order of seizure. As the discussion above demonstrates, it is more probable than not that Defendants moved the Chattel just prior to the arrival of the Marshal. However, it is uncontested that Defendants knew of the order of seizure as early as December 23, 1993 (the Order is attached to Silverstein's affidavit in support of Defendants' motion to [**17] quash) but did not surrender the automobile until on or about January 17, 1994, following this court's order of confirmation. This is an example of bad faith (and perhaps criminal conduct) by Defendants evincing a dishonest refusal to honor their contractual duty to either pay for the car or return it.

⁴ Plaintiff also argues that punitive damages are appropriate because Defendants' breach harmed the public in general because the persons who purchased the cars were not given the appropriate documentation evidencing ownership. However, there is no indication in the record that Defendants' activities were aimed at the public in general; rather, harm to the public was a byproduct of Defendants' actions.

⁵ Local Rule 3(g) provides in relevant part that "all material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

Furthermore, as in *Aero Garage* where the defendants instituted administrative proceedings in bad faith, Defendants in this action moved to quash the ex parte order on frivolous grounds. They originally argued that an invoice attached to plaintiff's papers in support its ex parte order was a "fraud." Silverstein stated in his affidavit that plaintiff never gave him the invoice in question and that in his dealings with plaintiff invoices were never tendered to him unless they were accompanied by a check from Defendants to plaintiff. Silverstein therefore argued that since he did not tender a check to plaintiff, the invoice must have been fraudulent:

I believe the "invoice" to be the product of a total and complete fabrication and back-dated by Ms. Epstein. Through the course of defendants' dealings with plaintiff (approximately 400 sales per year since 1989), plaintiff never [**18] submitted invoices for any of the cars delivered to defendants unless accompanied by a check. Conspicuous by its absence is defendants' check which should have accompanied the invoice in question. Accordingly, I believe the "invoice" was created by Ms. Epstein solely for the purpose of creating a false pretense upon which plaintiff could proceed to obtain the *ex parte* Order at issue here.

Silverstein Aff'd, P 6 (emphasis in original).

Defendants' arguments were rejected and the Order confirmed because Silverstein's allegations were groundless. First, although Ms. Epstein conceded that she did not tender the invoice upon delivery of the vehicle, she explained that it was common practice to deliver automobiles to Defendants in reliance on their promise that a check would be forthcoming. Affidavit of Gayle Epstein, December 29, 1993 ("Epstein Aff'd"), P 2 ("When I sold the Chattel to Metro, Michael Silverstein, Metro's president, told me that he would send a check. Over the many years during which I sold automobiles to Silverstein's companies, I allowed Silverstein to tender payment a day or two after he took delivery of the automobiles."). Given that this was common practice, [**19] Silverstein's affidavit [*977] is suspect. Moreover, the fact that the invoice was not delivered did not establish that the car was not sold:

If I had received a check for the Chattel I would have given to Silverstein, upon his request, a copy of the invoice. I would have also given him a copy of the Manufacturer's Statement of Origin (the original after his check cleared), the Driver's Manual, the Warranty and the extra keys for the car. I did not give any of these items to Silverstein because I never received a check from him. I have in my possession all of these items.

Id., P 6 (emphasis in original).⁶

Second, although Defendants argued that the number of the invoice indicated that it was "back dated," Silverstein Aff'd, P 6 ("I believe that an examination of plaintiff's business [**20] records will reveal that the number on the 'invoice' . . . will be out of sequence with other invoices written during the relevant time period and that the same was back-dated by Ms. Epstein solely for the purposes of deceiving this Court and obtaining the *ex parte* Order of Seizure."), Ms. Epstein explained that Hudson Toyota's invoices are not executed in sequential order. Epstein Aff'd, P 3 ("[The assistants] use the invoices as needed *in no particular order.*") (emphasis in original). Therefore, "the sequence in which invoices are used does not establish the sequence in which cars are sold and has no bearing on whether an invoice was properly or timely prepared." *Id.*, P 4. Despite their unfounded claim that a review of plaintiff's invoices would indicate wrongful behavior, Defendants have not come forward with any evidence to indicate that plaintiff presented fraudulent documents in connection with its application for an ex parte order of seizure.

Given the actions of Defendants as recounted above, the reasons cited by the *Aero Garage* court in imposing punitive damages apply with equal force to this situation:

We cannot agree with the dissent that this attempt [**21] on [the breaching party's] part to "obtain a solution more in accord with their own interests" should not be penalized when it invoked the types of methods used here, including the fully knowing and intentional breach of unambiguous contractual provisions, the flouting of court ordered injunctions and the bad faith institution of administrative proceedings.

⁶ This was the only logical conclusion because other than presenting the car to Defendants as a gift, there is no other reasonable justification for plaintiff's actions (*i.e.*, transferring the Chattel without receiving a check).

Aero Garage, 185 A.D.2d at 777, 586 N.Y.S.2d at 613.

Defendants, however, argue that punitive damages are not appropriate in this case because their actions did not constitute morally culpable conduct. Defs.' Mem. at 4. Defendants also contend that, pursuant to New York law, punitive damages are not available in breach of contract cases "even if committed wilfully and without justification," Defs.' Mem. at 5, and rely on O'Dell v. New York Property Ins. Underwriting Assoc., 145 A.D.2d 791, 535 N.Y.S.2d 777 (3d Dep't 1988) (no punitive damages for plaintiff who did not receive fire insurance proceeds following destruction of her home because plaintiff is not seeking to vindicate a public right even though breach was wilful); Charles v. Onondaga Community College, 69 A.D.2d 144, 418 N.Y.S.2d 718 [**22] (4th Dep't) (because wrongful discharge was not part of a larger scheme to injure plaintiff punitive damages would not be appropriate), *appeal dismissed*, 48 N.Y.2d 650, 396 N.E.2d 482, 421 N.Y.S.2d 200 (1979); and Wegman v. Dairylea Co-op Inc., 50 A.D.2d 108, 113, 376 N.Y.S.2d 728, 735 (4th Dep't 1975) (because plaintiff's cause of action for retaliatory discharge and fraud in inducement of employment are dismissed, plaintiff's cause of action for punitive damages must be dismissed because "it is well settled that punitive damages are not available in New York for breach of contract."), *appeal dismissed*, 38 N.Y.2d 918, 346 N.E.2d 817, 382 N.Y.S.2d 979 (1976).

However, as the discussion above demonstrates, New York law does allow for punitive damages in breach of contract cases if the actions of the breaching party evidence such bad faith that the twin aims of punitive damages would be vindicated. The blanket statement [*978] against punitive damages for contract actions as stated in *Wegman* is not an accurate reflection [**23] of New York law. Defendants argue that their actions were not egregious because they were simply protecting their business interests from the allegedly predatory behavior of Hudson Toyota. However, an avowed purpose of protecting business interests does not justify the wrongful misappropriation of the property of another. Here, Defendants intentionally and wilfully breached their contractual obligations by stopping payment on certain checks; defied the court's Order in spiriting away the Chattel prior to the arrival of the Marshal; refused to turn over the Chattel even after it was aware of the Order; and moved to quash the Order (and thus further frustrate plaintiff's contractual rights) on frivolous grounds. This is, therefore, that rare case where the actions of the breaching party require the imposition of punitive damages even though the wrongs were not aimed at the public in general.

II. Sanctions

A. 28 U.S.C. § 1927

Section 1927 of Title 28 of the United States Code provides as follows:

HN5 [↑] Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings [**24] in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

"By its terms, § 1927 looks to unreasonable and vexatious multiplications of proceedings; and it imposes an obligation on attorneys through the entire litigation to avoid dilatory tactics." United States v. International Broth. of Teamsters, 948 F.2d 1338, 1345 (2d Cir. 1991). The purpose of the statute is "to deter unnecessary delays in litigation." *Id.* (quoting H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. Code Cong. & Admin. News 2716, 2782). "The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes." Roadway Express v. Piper, 447 U.S. 752, 762, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980). **HN6** [↑] Without a demonstration of bad faith on the part of the attorney in question, sanctions pursuant to this statute are [**25] inappropriate. "Imposition of a sanction under § 1927 requires a 'clear showing of bad faith.'" Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986) (quoting Kamen v. American Telephone & Telegraph Co., 791 F.2d 1006, 1010 (2d Cir. 1986)), cert. denied, 480 U.S. 918 (1987). The court in *Oliveri* wrote,

HN7[Like an award made pursuant to the court's inherent power, an award under [§ 1927](#) is proper when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay.

[Oliveri, 803 F.2d at 1273](#). Furthermore, Second Circuit authority makes clear that awards pursuant to [Section 1927](#) are made only against attorneys. *Id.*; [Teamsters, 948 F.2d at 1345](#) ("clients may not be saddled with such awards.").

Conduct which allows for the imposition of sanctions under [Section 1927](#) pursuant to the discretion of the court include the following: resubmitting a motion that had previously been denied, [Siderpali, S.P.A. v. Judal Industries, Inc., 833 F. Supp. 1023, 1029 \(S.D.N.Y. 1993\)](#); [****26**] bringing a motion based on "facts" the opposite of which were previously found by the court, *id. at 1036*; making several insupportable bias recusal motions and repeated motions to reargue, [Sassower v. Field, 138 F.R.D. 369, 375-76 \(S.D.N.Y. 1991\)](#), aff'd in part and vacated on other grounds, [973 F.2d 75 \(2d Cir. 1992\)](#), cert. denied, 113 S. Ct. 1879 (1993); "'continually engaging in obfuscation of the issues, hyperbolism and groundless presumptions' in addition to insinuating that the court was biased," [Cruz v. Savage, 896 F.2d 626, 634 \(1st Cir. 1990\)](#) (rejecting bad faith standard); and waiting until the eve of trial before making a jury demand, [Kotsilieris v. Chalmers, I*9791 966 F.2d 1181 \(7th Cir. 1992\)](#). In [Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 226-27 \(7th Cir. 1984\)](#), the Seventh Circuit made the following observation which is relevant to the motion in this action:

HN8[Where . . . counsel's alleged misconduct was the filing and arguing of a claim, it is not sufficient [****27**] that the claim be found meritless; the claim must be without a plausible legal or factual basis and lacking in justification.

(footnote omitted). The court in *Harbil* also noted that, **HN9**["[a] court may infer intent from a total lack of factual or legal basis for a suit." *Id. at 227*. Also helpful is the comment by the Third Circuit in reversing a district court's imposition of sanctions based on the fact that an attorney filed a Title VII action even though before filing he had been informed that the complaint was untimely:

In our view, what would be indicative of bad faith in a case such as this one, would be some indication of an intentional advancement of a baseless contention that is made for an ulterior purpose, e.g., harassment or delay.

[Ford v. Temple Hosp., 790 F.2d 342, 347 \(3d Cir. 1986\)](#). With these standards of conduct in mind, we now turn to the specific actions which plaintiff contends unreasonably and vexatiously multiplied these proceedings.

1. Motion to Quash the Ex Parte Order of Seizure

As recounted above in some detail, Defendants brought a motion to quash this court's ex parte order [****28**] of seizure on three separate grounds: (i) a fraudulent invoice was given to the court; (ii) plaintiff failed to report the "related" antitrust action; and (iii) plaintiff breached an agreement to retain the status quo pending the filing of plaintiff's answer in the antitrust action. Plaintiff contends that "Defendants' bad faith is . . . demonstrated by the complete lack of legal or factual basis for bringing this motion to quash." Pl.'s Mem. at 26. I agree. First, with reference to the invoice, although Silverstein claimed that a review of Hudson Toyota's invoices would reveal that the court had been the victim of a fraud, Silverstein Aff'd, P 6, Defendants have not brought to the court's attention *any* evidence which would call into doubt the veracity of plaintiff's claim that the car in question was sold to Defendants; that Defendants took possession of the car; that Defendants then refused to pay for the car; and that the car was then sold to a third person in blatant disregard of plaintiff's contractual rights. Defendants now concede that all of that is true given their silence in the face of plaintiff's motion for summary judgment and plaintiff's 3(g) statement. If Defendants [****29**] and Counsel now know that the automobile was sold and yet never paid for, how is it they could not have known that in December of 1993 when Defendants moved to quash the ex parte order? Counsel's bad faith in moving to quash the Order is also evidenced by his admission that Defendants were holding the car hostage irrespective of the court's Order. He wrote to plaintiff's counsel approximately two weeks *after* the order of seizure had been granted and stated that "upon receipt of an Order indicating that the ex parte Order

regarding seizure of the vehicle in question has been rescinded, we will enter into an agreement regarding the vehicle." Affidavit of Counsel, January 6, 1994, Ex. C (letter of December 27, 1993 to plaintiff's counsel). This evidences the fact that Defendants were in possession of the car at the time of the Order and that Counsel was aware of that fact.

It is clear to this court that Defendants were stalling for time and were unreasonably and vexatiously multiplying these proceedings by compelling Hudson Toyota to oppose a meritless motion to quash. For his part, Counsel argues that "having been informed by the defendants that plaintiff had never forwarded an **[**30]** invoice with regard to the sale of any car during their four (4) year prior course of dealing, there existed a legitimate basis to believe that the invoice in question had been fraudulently generated by plaintiff for the sole purpose of securing this Court's signature on the *ex parte* Order." Defs.' Mem. at 7. However, given that Defendants and Counsel now concede that there was never any legitimate defense to their wrongful withholding of the Chattel, this explanation must be rejected as untenable.

[*980] [Section 7102\(c\) of New York's Civil Practice Law](#) and Rules [HN10](#)↑ provides in relevant part that an order of seizure is available if the affidavit in support of such an application establishes that the plaintiff is entitled to possession by virtue of the facts set forth and that the chattel is wrongfully held by the defendants. Counsel did not offer *any* facts which would rebut plaintiff's allegations that Hudson Toyota delivered the Chattel, that it was not paid for, and that Defendants did not return the vehicle. Under such circumstances, and without more, an order of seizure was appropriate, see [General Motors Acceptance Corp. v. Berg and Duffy, 118 Misc. 2d 525, 529, 460 N.Y.S.2d 899, 901 \(N.Y. Sup. Ct. 1983\)](#) **[**31]** (where purchaser ceases paying seller pursuant to installment contract "plaintiff has established, *prima facie*, a superior possessory right for the purposes of its [CPLR 7102](#) application."), and Defendants offered no credible reason why the Order should have been quashed. Therefore, the motion was brought without any legal or factual justification which drives this court to conclude that it was brought for an improper purpose (*i.e.*, delay or harassment), thus establishing Counsel's bad faith. This conclusion is buttressed by the fact that, as evidenced by Counsel's December 27, 1993 letter, he was aware of the Order and was aware that Defendants had possession of the car and yet informed plaintiff that the Order would not be honored.

Regarding the second and third bases for the motion to quash -- failure to inform the court of the "related" antitrust action and breach of an alleged agreement -- neither of these allegations are sufficient legal or factual justifications for moving to quash an order of seizure. As discussed above, it was incumbent upon Defendants, if they wished to contest the court's Order, to demonstrate that plaintiff did not possess a superior possessory right **[**32]** to the chattel. They have now admitted that Hudson Toyota does have a superior possessory right and are therefore not contesting the motion for summary judgment to rescind the contract for that automobile. When placed in context along side Defendants' other actions of which Counsel was a party (*e.g.*, failing to turn over the car after the court ordered its seizure), it is evident that the motion to quash was another step in unreasonably and vexatiously multiplying these proceedings.⁷

2. Motion to Consolidate

Plaintiff also contends that the motion to consolidate **[**33]** this action with Defendants' antitrust action presently pending before Judge Korman was also brought in bad faith in an effort to vexatiously and unreasonably multiply these proceedings. In the action before Judge Korman, Crest and Metro have alleged that plaintiff and two of its related companies, together with Toyota Motor Sales U.S.A., Inc. and Toyota Motor Distributors, Inc., conspired to deprive Crest and Metro of the right to buy Toyota vehicles in violation of, among other things, New York's antitrust statute, the Donnelly Act, [N.Y. Gen. Bus. L. § 340](#) (McKinney 1988). The complaint states in relevant part as follows:

⁷ Counsel defends the motion to quash on the ground that during a telephone conversation with one of Chambers' law clerks, and in response to Counsel's query, he was informed that an order to show cause was not necessary since the Chattel had not been seized and counsel should therefore proceed via a regular motion. Sanctions, however, are appropriate because of the legal and factual paucity of the motion, not because it was procedurally infirm.

In or about October 1993, [Hudson Toyota] advised Plaintiffs that the Dealership Defendants [Hudson Toyota and its related companies] would no longer permit the sale of any Toyota automobiles to Plaintiffs. [Hudson Toyota] thereafter admitted to Plaintiffs that the decision not to sell any Toyota automobiles to Plaintiffs was the result of agreements and arrangements among and between the Dealership Defendants and [Toyota Motor Sales U.S.A., Inc. and Toyota Motor Distributors, Inc.], and was solely based upon a determination to eliminate the competition from **[**34]** Plaintiffs, and others similarly situated, and Toyota dealers, and to maintain an artificially high retail price level for the Toyota automobile.

Silverstein Aff'd, Ex. D, P 12. The complaint alleges wrongful conduct by the two Toyota **[*981]** corporations who are not parties to this action. *Id.*, PP 14-17 (defendants threatened, coerced, solicited, and otherwise engaged other Toyota dealerships not to sell Toyota automobiles to plaintiffs).

Sanctions are appropriate because this motion to consolidate was completely without merit. As discussed in greater detail below, a defendant in a breach of contract action can not, as a general rule, assert as a counterclaim violations of the antitrust laws. The two causes of action -- even if they involve the same parties -- are not coterminous because there is nothing in an antitrust action which would justify a buyer receiving an item and yet not paying for it. In other words, the issues of law and fact in an antitrust and breach of contract action are rarely, if ever, similar. In this situation, for example, Defendants must prove, among other things, predatory behavior by Hudson Toyota and may recover treble damages if the facts so warrant. The **[**35]** present action, on the other hand, is a garden variety UCC and breach of contract claim. This court is again driven to the conclusion, therefore, that the motion to consolidate was brought in bad faith in order to create more delay. Because the "attorney's actions [were] so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose," *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986), sanctions pursuant to [Section 1927](#) are appropriate.

3. Defendants' Set-off Counterclaim

Although Defendants now concede that summary judgment is available on plaintiff's breach of contract and UCC causes of action, in their Answer to the complaint they asserted as a counterclaim set-off the allegations contained in their antitrust complaint now pending before Judge Korman. Specifically, Defendants asserted that "upon information and belief, during or about October 1993, plaintiff Hudson, acting in concert and in conspiracy with Toyota Motor Sales, USA, Inc. and Toyota Motor Distributors, Inc., agreed not to sell new Toyota automobiles to defendants Crest and Metro." Answer, P 66. Although the court had already **[**36]** held that the antitrust action and Hudson Toyota's UCC and breach of contract action were not related, and hence consolidation was inappropriate, Defendants alleged that "upon information and belief, Hudson's involvement in an agreement with Toyota under which Hudson agreed to refuse to sell new Toyota automobiles to defendants constitutes an agreement, arrangement or combination in restraint of competition in the retail sale and lease of Toyota automobiles, in violation of [§ 340](#) of the General Business Law of the State of New York." Answer, P 70. Defendants also stated that they "stopped payment and did not make funds available to cover the checks referenced in plaintiff's complaint as a set-off on its damages suffered as a result of Hudson's conduct and involvement in an illegal agreement with Toyota not to sell new Toyota automobiles to defendants." Answer, P 73.

Plaintiff argues that the inclusion of this counterclaim set-off warrants sanctions because only in limited circumstances do antitrust claims constitute valid defenses to a breach of contract and hence Defendants' inclusion of this counterclaim in this action was in bad faith and vexatious. [HN11](#) **[Footnote]** "It is now well established **[**37]** that the remedy for violation of the [antitrust law](#) is not avoidance of payments due under a contract, but rather the redress which the antitrust statute establishes, - a private treble damage action." *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 441 (3d Cir. 1967), cert. denied, 390 U.S. 947, 19 L. Ed. 2d 1137, 88 S. Ct. 1035 (1968). Antitrust counterclaims are therefore disfavored in a simple breach of contract claim. *Kelly v. Kosuga*, 358 U.S. 516, 517, 3 L. Ed. 2d 475, 79 S. Ct. 429 (1959) (in diversity action for breach of contract, district court properly granted plaintiff's motion to strike affirmative defense of violation of Section 1 of the Sherman Act; "as a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court.") (footnote omitted). The exception to this general rule is limited to those cases where the judgment of the court would itself be enforcing antitrust conduct. *Viacom Int'l Inc. v. Tandem Prods., Inc.*, 526 F.2d 593, 596-600 (2d Cir.

1975) **[**38]** (court notes that as a general rule a defendant in breach of contract action cannot **[*982]** assert an antitrust defense where the contract was an "intelligible economic transaction in itself" and not "part of . . . any general plan or scheme that the law condemned") (quoting Kelly, 358 U.S. at 521, and Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 260, 53 L. Ed. 486, 29 S. Ct. 280 (1909), respectively). The court in Viacom also noted that "the overriding consideration which has persuaded the Supreme Court [in not allowing antitrust defenses in contract actions] is its concern that the successful interposition of antitrust defenses is too likely to enrich parties who reap the benefits of a contract and then seek to avoid the corresponding burdens." Viacom, 526 F.2d at 599. See also McDonald's Corp. v. Robert A. Makin, Inc., 653 F. Supp. 401, 404-05 (W.D.N.Y. 1986) (in breach of contract action by franchisor against franchisees for nonpayment of franchise fees, franchisees' antitrust **[**39]** counterclaims cannot defeat franchisor's motion for summary judgment).

Counsel for Defendants offers no legal or factual justification for the inclusion of their antitrust counterclaim but states instead that "the assertion of the counterclaim was done for the purpose of attempting to keep the defendants alive while its antitrust claim against plaintiff and Toyota proceeds through the Federal Court system." Defs.' Mem. at 8. Defendants concede, therefore, that they did not impose the antitrust counterclaim because they had a good faith belief based on the law and the facts that this action fell within the narrow exception to the general rule. Given that the contracts at issue in this action are not part of the allegedly predatory behavior of Hudson Toyota, there would not have been any basis upon which to assert this counterclaim. Defendants' assertion of this counterclaim was, therefore, made in bad faith and unreasonably and vexatiously multiplied these proceedings by forcing Hudson Toyota to move for its dismissal.⁸

[40] B. The Court's Inherent power**

HN12 **[↑]** "Under the inherent power of the court to supervise and control its own proceedings, an exception to the American Rule has evolved which permits the court to award a reasonable attorneys' fee to the prevailing party when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons[.]'" Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986) (quoting F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc., 417 U.S. 116, 129, 40 L. Ed. 2d 703, 94 S. Ct. 2157 (1974)). HN13 **[↑]** Unlike awards pursuant to 28 U.S.C. § 1927, sanctions pursuant to the court's inherent power may be made against the losing party or against the losing party's attorney, or both. Oliveri, 803 F.2d at 1273 ("an award made under the court's inherent power may be made against an attorney, a party, or both."). The standard of bad faith is the same under both Section 1927 and the court's inherent power. *Id.* Furthermore, an award pursuant to the court's inherent power can be assessed **[**41]** against a party for either commencing or for continuing an action in bad faith, vexatiously, wantonly, or for oppressive reasons. Oliveri, 803 F.2d at 1272. "Bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." Hall v. Cole, 412 U.S. 1, 15, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973). The Second Circuit has made clear that,

We have declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes, and a high degree of specificity in the factual findings of the [the] lower courts.

Dow Chemical Pacific Ltd. v. Rascator Maritime S.A., 782 F.2d 329, 344 (2d Cir. 1986) (citations and internal quotations omitted). Plaintiff seeks an award of attorneys' fees **[*983]** against Defendants in relation to the following.

1. Dishonoring Contractual Obligations

⁸ Defendants were put on notice that this counterclaim set-off would lead to a motion for sanctions. Affidavit of Marjorie E. Berman, March 2, 1994, Ex. A (letter of January 25, 1994 to Defendants' attorney). In fact, Defendants' law firm again telephoned the law clerk referenced above in footnote 7 on January 26, 1994, the date of the Answer, and informed the clerk that plaintiff had threatened the firm with sanctions and asked if the Court would advise the firm on the propriety of asserting the antitrust counterclaims. The court declined to issue an advisory opinion.

The only justification offered by Defendants for the breach of their contractual obligations was their [**42] desire to punish Hudson Toyota for its allegedly predatory behavior. Although this establishes that its actions were "entirely without color," the court has already determined that punitive damages are appropriate for this, and other behavior, in connection with Defendants' breach. An award of attorneys' fees in addition to this assessment would give plaintiff a windfall and it is therefore unnecessary.

2. Motion to Quash the Ex Parte Order of Seizure

As recounted above, it is clear that Silverstein played a role in avoiding this court's ex parte order. Given the Second Circuit's requirement that this court state with "a high degree of specificity . . . the factual findings" regarding the sanctioned party's conduct, the court notes that the following facts are uncontested: (i) Defendants knew of the ex parte order as early as December 23, 1993 (Silverstein Aff'd) but did not surrender the car to plaintiff until on or about January 17, 1994; and (ii) in support of the motion to quash the Order the president of Crest and Metro stated under oath that the Chattel was never sold to Defendants (Silverstein Aff'd, P 5), but Defendants now admit as much by leaving unanswered Paragraph [**43] 51 of Hudson Toyota's 3(g) Statement. Silverstein stated under oath that there were valid reasons for moving to quash the Order when, in fact, there was no good faith basis in believing that Hudson Toyota had defrauded the court or that Defendants possessed a superior possessory right to the Chattel. Therefore, for the reasons stated above in Section II.A.1 of this memorandum, Defendants as well as Defendants' counsel are to be assessed attorneys' fees in connection with Hudson Toyota's opposition to the motion to quash the ex parte order.

3. Motion to Consolidate

As demonstrated in Section II.A.2 of this memorandum, the motion to consolidate was completely without merit and hence Defendants will be sanctioned for this conduct pursuant to the court's inherent power.

4. Defendants' Set-off Counterclaim

As demonstrated in Section II.A.3 of this memorandum, the assertion of the antitrust counterclaim was brought vexatiously and in bad faith and hence Defendants will be sanctioned for this conduct pursuant to the court's inherent power.

CONCLUSION

For the foregoing reasons, the court orders as follows:

1. Hudson Toyota's motion to dismiss Defendants' antitrust counterclaim [**44] set-off is granted.
2. Hudson Toyota's motion for summary judgment is granted in full as follows:
 - a. Plaintiff is awarded \$ 51,467.00, plus interest, from Crest Leasing Enterprises, Inc., for the first, second, and eighth car sales under the first, third, fifth, and tenth claims for relief set forth in the complaint;
 - b. Plaintiff is awarded \$ 75,838.00, plus interest, from Metro Auto Leasing, Inc., for the third, fourth, fifth, and sixth car sales under the second, fourth, sixth, and tenth claims for relief set forth in the complaint; and
 - c. The contract of sale for the Chattel is hereby rescinded under the seventh claim for relief set forth in the complaint and plaintiff has all rights and entitlements to the Chattel.
3. Hudson Toyota's motion for punitive damages against Defendants is granted in the amount of \$ 5,000.00 with the cost to be born equally by Crest Leasing Enterprises, Inc., and Metro Auto Leasing, Inc.
4. The replevin bond is discharged and the surety on the replevin bond is released of all liability.
5. Hudson Toyota's motion for sanctions against Defendants and their attorney is granted in connection with the following: (i) Hudson Toyota's opposition to Defendants' [**45] motion to quash the court's ex parte order of [*984] December 13, 1993; (ii) Hudson Toyota's opposition to Defendants' motion to consolidate this action with the antitrust action; and (iii) Hudson Toyota's motion to strike Defendants' counterclaim set-off. Hudson Toyota is

therefore instructed to submit contemporaneous time sheets and disbursement records in connection with these motions within 30 days of the date of this order.

SO ORDERED.

Dated: Brooklyn, New York

March 21, 1994

I. Leo Glasser, U.S. D. J.

End of Document



Servicetrends v. Siemens Medical Sys.

United States District Court for the Northern District of Georgia, Atlanta Division

March 21, 1994, Decided ; March 21, 1994, Filed; March 22, 1994, Entered

CIVIL ACTION FILE NO. 1:93-CV-299-JTC

Reporter

870 F. Supp. 1042 *; 1994 U.S. Dist. LEXIS 11383 **; 1995-1 Trade Cas. (CCH) P70,900

SERVICETRENDS, INC., Plaintiff, v. SIEMENS MEDICAL SYSTEMS, INC., Defendant.

Subsequent History: [**1] Motion for Reconsideration Granted June 24, 1994, Reported at: [1994 U.S. Dist. LEXIS 15997.](#)

Core Terms

Lithotripters, customers, shocktube, pricing, monopolization, replacement part, summary judgment, predatory, antitrust, monopoly, Counts, monopoly power, markets, service contract, Counterclaim, patent, manufacturers, competitor, alleges, damages, tortious interference, Disparagement, warranty, buying, repair, no evidence, geographic, discount, contracts, parties

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

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

HN1 [] Summary Judgment, Opposing Materials

Courts should grant summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The general rule of summary judgment in the Eleventh Circuit states that the moving party must show the court that no genuine issue of material fact should be decided at trial. Unless the movant for summary judgment meets its burden under [Fed. R. Civ. P. 56](#), the obligation of the opposing party does not arise even if no opposing evidentiary material is presented by the party opposing the motion.

870 F. Supp. 1042, *1042A 994 U.S. Dist. LEXIS 11383, **1

Civil Procedure > ... > Summary Judgment > Opposing 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

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

HN2 **Summary Judgment, Opposing Materials**

While all evidence and factual inferences are to be viewed in a light most favorable to the nonmoving party, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is merely colorable or is not significantly probative. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case.

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

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

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

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

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

HN3 **Summary Judgment, Opposing Materials**

Where neither party can prove either the affirmative or the negative of an essential element of a claim, the movant meets its burden on summary judgment by showing that the opposing party will not be able to meet its burden of proof at trial. *Fed. R. Civ. P. 56(c)* requires the moving party to demonstrate that the nonmoving party lacks evidence to support an essential element of its claim. Thus, the movant's burden is discharged by showing, that is, pointing out to the district court, that there is an absence of evidence to support the nonmoving party's case.

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

HN4 **Summary Judgment, Burdens of Proof**

Only when the movant meets the burden of showing the nonmovant lacks evidence to support an essential element of its claim, does the burden shift to the opposing party, who must then present evidence to establish the existence of a material issue of fact. The nonmoving party must go beyond the pleadings and submit evidence in the form of affidavits, depositions, admissions and the like, to demonstrate that a genuine issue of material fact does exist.

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

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

870 F. Supp. 1042, *1042L 1994 U.S. Dist. LEXIS 11383, **1

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

[HN5](#)[] Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate in antitrust actions where the plaintiff fails to establish genuine issues of material fact bearing on the elements of the case.

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

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

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

[HN6](#)[] Scope, Monopolization Offenses

Section 2 of the Sherman Act, [15 U.S.C.S. § 2](#), prohibits monopolization, attempts to monopolize, and conspiracy to monopolize.

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

[HN7](#)[] Regulated Practices, Market Definition

In an antitrust action, defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability, actual or potential, to take significant amounts of business away from each other. The reasonable interchangeability of use or the cross-elasticity of demand between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes.

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

[HN8](#)[] Regulated Practices, Market Definition

In an antitrust action, the relevant product market consists of a specific product and its reasonable substitutes.

870 F. Supp. 1042, *1042L994 U.S. Dist. LEXIS 11383, **1

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

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

HN9 [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

Monopolistic conduct can sometimes be found where a seller refuses to supply a competitor with a product essential to the competitor's survival.

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

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

HN10 [down] **Regulated Practices, Market Definition**

There are three essential elements to a claim alleging attempted monopolization: the specific intent to achieve monopoly power by predatory or exclusionary conduct; actual anticompetitive conduct; and a dangerous probability of success in defendant's attempt to achieve monopoly power. The intent element requires an intent to destroy competition or build monopoly. In many cases, intent can be inferred from the defendant's conduct, essentially reducing the analysis to two elements. Anticompetitive conduct often cannot be evaluated independently of the dangerous probability of a firm's acquiring monopoly power. Competitive behavior by a small firm with little market share may become anticompetitive conduct when committed by a company with dominant market power. To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power. Proving a dangerous probability of success first involves defining the relevant market and measuring market share as a proxy for monopoly power.

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

HN11 [down] **Monopolies & Monopolization, Actual Monopolization**

The essential facilities doctrine makes it illegal for the holder of an "essential facility" to deny access to a competitor where there is no legitimate business reason for the refusal.

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

HN12 [down] **Monopolies & Monopolization, Actual Monopolization**

To establish a violation of the essential facilities doctrine, a plaintiff must prove four elements: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. A plaintiff must also demonstrate that, by denying access to an essential facility, defendant caused it a severe handicap amounting to more than inconvenience or even some economic loss.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN13 [down] **Inequitable Conduct, Anticompetitive Conduct**

870 F. Supp. 1042, *1042 (1994 U.S. Dist. LEXIS 11383, **1

Where a patent has been lawfully acquired, subsequent conduct permissible under the patent laws cannot trigger any liability under the antitrust laws.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN14 [] **Monopolies & Monopolization, Actual Monopolization**

A large firm does not violate the Sherman Act, [15 U.S.C.S. § 2](#), simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad based activity.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Evidence > Inferences & Presumptions > 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

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN15 [] **Price Discrimination, Defenses**

Distributor discounts that are completely untethered to the manufacturer's marginal cost savings, or merely subterfuges to avoid restrictions under the Robinson-Patman Act, [15 U.S.C.S. § 13](#), violate prohibitions against price discrimination. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. The burden of proof is on the plaintiff to show that functional discounts constitute illegal price discrimination.

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

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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

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

870 F. Supp. 1042, *10421994 U.S. Dist. LEXIS 11383, **1

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

Antitrust & Trade Law > Sherman Act > General Overview

HN16 [] Sherman Act, Scope

A tying arrangement conditions the sale of one product on the purchase of another. The product the purchaser wants to buy is known as the "tying product," while the unwanted but attached product is the "tied product." The essential antitrust concern regarding tying is that the illegal arrangements foreclose competing manufacturers from selling in the tied product market. Tying the sale of goods is expressly prohibited by the Clayton Act, [15 U.S.C.S. § 14](#). The Sherman Act, [15 U.S.C.S. § 2](#) prohibits tying involving goods or services.

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

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

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

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

HN18 [] Actual Monopolization, Anticompetitive & Predatory Practices

Predatory pricing is a term of art that describes pricing below an appropriate measure of cost for the purpose of eliminating competition in the short run and reducing competition in the long run. A predator prices its product below profit maximizing levels with the expectation of charging monopoly prices in the future when competitors are driven from the market. Predatory pricing is generally analyzed as constituting the conduct portion of an attempt to monopolize, and since intent can be inferred from conduct, evidence of predatory pricing can support an inference of specific intent.

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

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

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

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

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Output & Requirements Contracts

[HN19](#)[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Exclusive dealing arrangements are essentially requirements contracts, whereby the buyer agrees to purchase exclusively the product of the contracting supplier. The specific antitrust concern is that exclusive dealing contracts threaten to foreclose the relevant product market to other sellers, who may be unable to find buyers for their competing goods or services. On the other hand, courts recognize that many ordinary supply contracts, motivated by legitimate business needs, inevitably foreclose some competing seller from a portion of the market. Accordingly, exclusive dealing contracts are not per se illegal. Instead, courts apply a rule of reason approach to weighing the procompetitive and anticompetitive effects of exclusive dealing arrangements.

Evidence > Inferences & Presumptions > General Overview

Torts > Business Torts > Trade Libel > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

[HN20](#)[] Evidence, Inferences & Presumptions

Section 43(a) of the Lanham Act, [15 U.S.C.S. § 1125](#), prohibits deceitful marketing practices, including disparaging comments that misrepresent the quality of a competitor's goods. To prove a Lanham Act charge, plaintiff must show that defendant's misrepresentations were material in effect on buying decisions and were actually or likely injurious to plaintiffs.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Torts > Business Torts > Unfair Business Practices > Elements

Civil Procedure > Remedies > Damages > Monetary Damages

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

[HN21](#)[] Trade Practices & Unfair Competition, State Regulation

The Georgia Uniform Deceptive Trade Practices Act provides relief for a person likely to be damaged by a deceptive trade practice, but proof of monetary damage, loss of profits, or intent to deceive is not required. [Ga. Code Ann. § 10-1-373](#). To the extent a plaintiff's tortious interference claim is based on disparagement, the plaintiff must show that defendant induced a third party or parties not to enter into or continue a business relationship for which the plaintiff suffered some financial injury.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

870 F. Supp. 1042, *1042 (1994 U.S. Dist. LEXIS 11383, **1

Trademark Law > Likelihood of Confusion > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN22 [] **False Designation of Origin, Elements of False Designation of Origin**

See [15 U.S.C.S. § 1125\(a\)\(1\)](#).

Civil Procedure > Remedies > Damages > Monetary Damages

Evidence > Inferences & Presumptions > General Overview

Trademark Law > ... > Remedies > Damages > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN23 [] **Damages, Monetary Damages**

While proof of monetary damages may not be necessary to sustain every cause of action based on a disparagement claim, a showing that some customer's buying decision was adversely affected is a threshold requirement for each. Even the permissive language of the Lanham Act, [15 U.S.C.S. § 1125](#), requires plaintiff to offer something more than a mere subjective belief that he is likely to be injured. He must submit proof which provides a reasonable basis for that belief. The likelihood of injury and causation will not be presumed, but must be demonstrated in some manner.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN24 [] **Intentional Interference, Elements**

Under Georgia law, interference with contractual rights, such as inducing one to breach his contract with another, is an actionable tort. Tortious interference with contractual relations requires plaintiff to prove three elements: (1) the existence of a contractual relationship; (2) interference from the defendant; and (3) resulting damage to the contractual relationship.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

870 F. Supp. 1042, *1042 (1994 U.S. Dist. LEXIS 11383, **1

HN25 [blue document icon] **Intentional Interference, Elements**

To establish a claim for tortious interference with business relations, a plaintiff must prove that the defendant: (1) acted improperly and without privilege; (2) purposefully, with malice, and with intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) plaintiff suffered some financial injury as a result.

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

Evidence > Burdens of Proof > Allocation

Evidence > Inferences & Presumptions > General Overview

HN26 [blue document icon] **Private Actions, Remedies**

Plaintiff's burden of proof concerning the amount of antitrust damages is much less severe than the burden of proving the antitrust violation and its causal relation to plaintiff's injury. While a jury may not base its judgment on speculation or guess-work, all that can be required is a just and reasonable, albeit necessarily imprecise, estimate based upon relevant data.

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

HN27 [blue document icon] **Private Actions, Remedies**

In the absence of more precise proof, a factfinder may conclude as a matter of just and reasonable inference from the proof of a defendant's wrongful acts and their tendency to injure a plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that a defendant's wrongful acts had caused damage to a plaintiff.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN28 [blue document icon] **Private Actions, Remedies**

Private plaintiffs bringing claims under the Clayton Act, [15 U.S.C.S. § 7](#), must show injuries caused by a decrease in competition.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

870 F. Supp. 1042, *1042A 994 U.S. Dist. LEXIS 11383, **1

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

[**HN29**](#) [blue icon] **Clayton Act, Claims**

Plaintiffs seeking treble damages under the Clayton Act, [15 U.S.C.S. § 4](#), must show more than simply an injury causally linked to a particular merger; instead, 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 the defendant's acts unlawful.

Antitrust & Trade Law > Clayton Act > General Overview

[**HN30**](#) [blue icon] **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 18](#).

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN31**](#) [blue icon] **Conspiracy to Monopolize, Elements**

The elements of a conspiracy to monopolize under the Sherman Act, [15 U.S.C.S. § 2](#), are: (1) an agreement to restrain trade, (2) deliberately entered into with the specific intent of achieving a monopoly rather than a legitimate business purpose, (3) which could have had an anticompetitive effect, and (4) the commission of at least one overt act in furtherance of the conspiracy. The elements of a conspiracy to restrain trade under [15 U.S.C.S. § 1](#) are (1) an agreement to enter a conspiracy (2) designed to achieve an unlawful objective. The plaintiff must also prove (3) actual unlawful effects or facts which radiate a potential for future harm to competition.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Trade Secrets Law > Protected Information > Customer Lists

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Civil Actions > Remedies > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Economic Value

Business & Corporate Compliance > ... > Trade Secrets Law > Federal Versus State Law > Uniform Trade Secrets Act

Trade Secrets Law > Protected Information > Business Information

[HN32](#) Basis of Recovery, Statutory Awards

The Georgia Trade Secrets Act of 1990, [Ga. Code Ann. §§ 10-1-760-767](#), supersedes other civil remedies for misappropriation of a trade secret. The Act defines a "trade secret" as information, including technical or nontechnical data, financial plans, or customer lists, that derives economic value from not being known or readily ascertainable to others, and that is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The Georgia statute provides relief in the form of an injunction, damages, and award of attorneys' fees.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Employee Duties & Obligations > Employee Knowledge & Skill

Trade Secrets Law > Employee Duties & Obligations > Misappropriation by Memory

[HN33](#) Trade Secrets & Unfair Competition, Trade Secrets

Trade secrets need not be in the form of written data to warrant protection, but Georgia law generally does not prevent a departing employee from using the skills and information he acquired at work. A person who leaves the employment of another has a right to take with him all the skill he has acquired, all the knowledge he has obtained, all the information that he has received, so long as nothing is taken that is the property of the employer.

Labor & Employment Law > Employment Relationships > At Will Employment > Duration of Employment

Torts > Business Torts > Unfair Business Practices > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > General Overview

Torts > ... > Commercial Interference > Employment Relationships > General Overview

[HN34](#) At Will Employment, Duration of Employment

A competing employer is not liable for hiring away an at-will employee so long as it does not use wrongful means and the recruiting company's purpose is to advance competition.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

[HN35](#) Conditions & Terms, Trade Secrets & Unfair Competition

The law permits destruction of a competing business by attracting away its customers in the fair course of trade, but not destruction or substantial injury by means of attracting away all or a large percentage of personnel upon whom it must depend to function, especially if other circumstances such as the use of confidential information are involved.

Counsel: For Plaintiff: Martin J. Elgison, John Kirk Train, III, Michael P. Kenny, Alston & Bird, Atlanta, GA. John R. Lowery, Jane F. Thorpe, Pursley, Howell, Lowery & Meeks, Atlanta, GA.

For Defendant: Chilton Varner, King & Spalding, Atlanta, GA. Kenneth A. Gallo, Edward Han, Keith E. Pugh, Jr., Howrey & Simon, Washington, DC.

Judges: CAMP

Opinion by: JACK T. CAMP

Opinion

[*1049] ORDER OF THE COURT

This is a complex antitrust case consisting of Plaintiff's eighteen count Complaint and Defendant's eleven counterclaims. The matter is presently before the Court on Defendant Siemens Medical Systems, Inc.'s ("SMS") Motion for Summary Judgment [#139]; Plaintiff Servicetrends, Inc.'s ("Servicetrends") Motion for Summary Judgment on Counterclaims [#147]; and Plaintiff's Motion to Add Defendants [#50]. For the following reasons, Defendant's motion for summary judgment is **GRANTED** in part and **DENIED** in part. Plaintiff's motion for summary judgment on Defendant's counterclaims is **GRANTED**. Plaintiff's motion to add Defendants is **DENIED**.

TABLE OF CONTENTS

- I. Background
- II. Summary Judgment Standard
- III. Defendant's Motion for Summary Judgment
 - A. Monopolization and Attempted Monopolization
 - 1. The Evils of Monopoly Power
 - 2. The Relevant Product Markets
 - 3. Monopolistic Conduct
 - (a) The Essential Facilities Doctrine
 - (b) Monopoly Leveraging
 - (c) Price Discrimination
 - 4. Conclusion
 - B. Tying Arrangements
 - C. Predatory Pricing Claims
 - D. Exclusive Dealing & Concerted Refusal to Deal
 - 1. Exclusive Dealing
 - 2. Concerted Refusal to **[**2]** Deal
 - E. Disparagement and Tortious Interference
 - 1. The Legal Effect of Disparagement
 - 2. Tortious Interference
 - F. Damages
- IV. Plaintiff's Motion for Judgment on Counterclaims

A. Supplemental Facts and Analysis

1. Geographic Market
2. Product Market
3. Market Power
4. Antitrust Injury

B. Defendant's Antitrust Counterclaims

1. Section 7 of the Clayton Act
2. Conspiracy to Monopolize
3. Monopolization and Attempt

C. Defendant's Business Tort Counterclaims

1. Disparagement & Unfair Trade Practices
2. Misappropriation of Confidential Info.
3. Tortious Interference
4. Unjust Enrichment

V. Plaintiff's Motion to Add Defendants

VI. Summary

I. BACKGROUND

Siemens Medical Systems, Inc. is the American subsidiary of the German conglomerate Siemens Aktiengesellschaft ("Siemens AG"). Siemens AG manufactures the "Lithostar," a non-invasive medical device known a lithotripter, which dissolves kidney stones by projecting high energy shock waves into the human body. The Lithostar is one of several brands of lithotripters available from different manufacturers. The Lithostar costs about \$ 1.5 million, is durable [*1050] and long lasting, but requires frequent maintenance and periodic replacement [**3] of parts. Defendant SMS is the exclusive distributor of the Lithostar in the United States, providing sales, service and maintenance contracts after installation. Of the total 378 lithotripters currently in use in this country, 80 are Siemens Lithostars. SMS has contracts with equipment owners to service 67 or 68 Lithostars, amounting to about 85% of the total number of installed Lithostars but only 18% of the total lithotripters in the U.S.

Plaintiff Servicetrends is an independent service company incorporated in July, 1992, to provide maintenance for lithotripters. The company's sole business is servicing the Siemens Lithostar and its competitors, such as the Dornier HM-3.¹ Servicetrends does not operate lithotripters for patient treatment. To date, Servicetrends has secured service contracts on 12 or 13 Lithostars, approximately 16% of the potential Lithostar service contracts available in the United States. Servicetrends also has 27 contracts to service the Dornier HM-3.

[**4] The Lithostar is composed of numerous parts, among them the shocktube, the spark gap, and the shockwave generator. Plaintiff labels these "replacement parts." Replacement parts are modular units made up of several components. Siemens AG is Defendant's sole source of replacement parts, and Defendant is the sole distributor of Lithostar brand replacement parts in the United States. SMS provides replacement parts to its own service personnel for use in servicing equipment, and sells the same replacement parts to equipment owners and independent service organizations, including Servicetrends. SMS services Lithostars at the modular replacement part level only and does not sell or service the individual components that make up the replacement parts.

¹ The HM-3, manufactured by Dornier Medical Systems, received premarket approval from the FDA in 1984 and was the only lithotripter approved for sale in this country until 1988. Approximately 197 HM-3's were sold in the United States. Dornier ceased producing the HM-3 in 1987, with the advent of competing "second-generation" lithotripters using improved technology. In 1988, the FDA approved two new lithotripter manufacturers, Medstone and Siemens, and in 1991 Dornier received approval to sell its own second-generation lithotripter, the MFL 5000.

Although Lithostar parts are not interchangeable with parts produced by other lithotripter manufacturers, components made by independent manufacturers ("OEM's") can be purchased separately and used to repair the Lithostar without buying Siemens' modular replacement parts. For example, Servicetrends buys the spark gap and the shockwave generator components from OEM's and uses these components to service a customer's Lithostar on site. However, [**5] Servicetrends can buy the shocktube replacement part only in its modular form and only from SMS.²

Plaintiff says that SMS forces Lithostar buyers to use SMS parts and repair services, thereby precluding Servicetrends from competing in the market for replacement parts and service contracts. In an extensive eighteen count complaint, Servicetrends alleges a wide variety of antitrust and business tort claims. Servicetrends contends that SMS engages in illegal tying arrangements, monopolization and attempted monopolization of markets for service and parts for lithotripters and Lithostars, exclusive dealing, concerted refusal to deal, violations of the Lanham Act and the Georgia Unfair Trade Practices Act, and tortious interference. Plaintiff [**6] seeks relief as provided under the Sherman and Clayton Acts -- treble damages, injunctive relief, and attorneys' fees.

II. SUMMARY JUDGMENT STANDARD

Rule 56(c), Fed. R. Civ. P., defines the standard for summary judgment: HN1[

Courts should grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." The general rule of summary judgment in the Eleventh Circuit [*1051] states that the moving party must show the court that no genuine issue of material fact should be decided at trial. Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). "Unless the movant for summary judgment meets its burden under Rule 56, the obligation of the opposing party does not arise even if no opposing evidentiary material is presented by the party opposing the motion." *Id.*

HN2[

While all evidence and factual inferences are to be viewed in a light most favorable to the nonmoving party, Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987), "the mere existence of [**7] some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." Id. at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. Id. at 248.

HN3[

Where neither party can prove either the affirmative or the negative of an essential element of a claim, the movant meets its burden on summary judgment by showing that the opposing party will not be able to meet its burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In [**8] Celotex, the Supreme Court interpreted Rule 56(c) to require the moving party to demonstrate that the nonmoving party lacks evidence to support an essential element of its claim. Thus, the movant's burden is "discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Id.*

In either situation, HN4[

only when the movant meets this burden, does the burden shift to the opposing party, who must then present evidence to establish the existence of a material issue of fact. *Id.* The nonmoving party must go beyond the pleadings and submit evidence in the form of affidavits, depositions, admissions and the like, to demonstrate that a genuine issue of material fact does exist. *Id.*

Although some courts disfavor the use of summary procedures in complex antitrust cases, recent Supreme Court decisions have made it clear that HN5[ summary judgment is appropriate in antitrust actions where the plaintiff

² The shocktube replacement part contains three components: a lens, a coil, and a membrane. Siemens does not sell these components, only the modular part itself. However, Siemens AG manufactures the components, and Servicetrends claims it is unable to obtain them from any other source.

870 F. Supp. 1042, *1051-994 U.S. Dist. LEXIS 11383, **8

fails to establish genuine issues of material fact bearing on the elements of the case. See [*Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#). [**9]

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SMS divides Plaintiff's eighteen counts into six groups and addresses them in "descending order of dispositive significance." To assist in organizing and reviewing the extensive record, the Court will follow the same format.

A. MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION CLAIMS

Seven counts of Plaintiff's complaint deal with allegations of monopoly and attempted monopoly:

Count 5: Monopolization of the market for lithotripter and Lithostar service.

Count 6: Monopolization of the market for lithotripter and Lithostar service based on a refusal to deal.

Count 8: Attempted monopolization of the market for lithotripter and Lithostar service.

Count 9: Attempted monopolization of the market for lithotripter and Lithostar service based on leveraging.

Count 10: Attempted monopolization of the market for lithotripter and Lithostar service based on a refusal to deal.

Count 12: Monopolization of the market for lithotripter and Lithostar replacement and component parts.

[*1052] Count 13: Attempted monopolization of the market for lithotripter and Lithostar replacement and component parts.

1. The Evils of Monopoly Power

[Section 101](#) 2 of the Sherman Act [HN6](#) prohibits monopolization, attempts to monopolize, and conspiracy to monopolize.³ In [*United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 \(1966\)](#), the Supreme Court offered what has become the standard definition of an illegal monopoly:

The offense of monopoly under [§ 2](#) of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Thus, the threshold issue is whether the Defendant has monopoly, or market, power. The second requirement, often called monopoly conduct, contemplates bad acts intended to eliminate competition by means unrelated to competitive merit.

[**11] Simply put, monopoly or 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, 76 S. Ct. 994, 1005, 100 L. Ed. 1264 \(1956\)](#); [*American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1581 \(11th Cir. 1985\)](#). The existence of monopoly power can be inferred from a firm's dominant share of the market.⁴ [*Grinnell*, 86 S. Ct. at 1704](#). The key to determining market share as a proxy

³ [Section 2](#) provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspires with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony

[15 U.S.C. § 2](#).

⁴ Market power is the measure of a firm's ability to raise prices above competitive levels without losing profits from decreased sales. The economic evil of monopoly power is simply the threat that a firm with excessive market share will charge more than a competitive price for the monopolized product.

Because the actual data needed to prove monopoly pricing is rarely available, courts typically use "market share" as a convenient proxy. A firm's market share is the percentage of its unit sales to total market sales. Judge Hand originated the classic guidelines of market share sufficient to constitute monopoly power -- 90% market share constitutes a monopoly, 64% is "doubtful," and 33% is not enough. See [*United States v. Aluminum Co. of America*, 148 F.2d 416, 424 \(2d Cir. 1945\)](#); see also

for monopoly power is to define the relevant product and geographic markets. See [T. Harris Young & Assoc., Inc. v. Marquette Electronics, 931 F.2d 816, 823 \(11th Cir. 1991\)](#). The parties agree for purposes of deciding Defendant's motion that the appropriate geographic market is the United States.

[**12] Defining the relevant product market is essentially a factual question. [U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 \(11th Cir. 1993\)](#). The Eleventh Circuit describes the procedure as follows:

[HN7](#) "Defining a relevant product market is primarily 'a process of describing those groups of producers which, because of the similarity of their products, have the ability -- actual or potential -- to take significant amounts of business away from each other.'" The reasonable interchangeability of use or the cross-elasticity of demand between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes.

[*1053] [Id. at 995](#) (citations omitted) (footnote omitted). Cross-elasticity of demand is a measure of the substitutability of products from a consumer's perspective.⁵ Simply stated, [HN8](#) the relevant product market consists of a specific product and its reasonable substitutes.

[**13] The second element of the monopolization offense, monopoly conduct, is more difficult to describe. In addition to the predatory pricing practices described in Part C. below, [HN9](#) monopolistic conduct can sometimes be found where a seller refuses to supply a competitor with a product essential to the competitor's survival. This idea that antitrust liability can arise from a monopolist's "refusal to deal" dates back to an early Supreme Court case, [United States v. Terminal R.R. Ass'n, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 \(1912\)](#). In *Terminal Railroad*, a group of railroad companies gained control of a local cargo terminal and a toll bridge crossing the Mississippi River. The horizontal combination then used its control of this "essential facility" to discriminate against competitors and to profit on their own rail services. The Supreme Court held that the group's conduct violated §§ 1 and 2 of the Sherman Act, and ordered that other railroads depending on the facilities be allowed to participate in ownership and control. See also [Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 \(1945\)](#) [**14] (news information agency operating as a joint venture required to admit nonmembers on nondiscriminatory terms); [Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 \(1973\)](#) (public utility cannot refuse to wholesale power to smaller distribution systems).

The "essential facilities" doctrine underlay a recent "refusal to deal" case, [Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 \(1985\)](#). Plaintiff "Highlands" operated a mountain ski area and joined with its larger competitor "Skiing Co." to offer vacationers a combined "all-Aspen" ski ticket. The package permitted skiers to use any of the four ski areas in Aspen and the two companies divided the revenues on the basis of relative use. Skiing Co. later decided to continue offering the combined pass only if the smaller Highlands would accept a fixed percentage of the revenues. Highlands refused and the all-Aspen ticket was

[Grinnell, 86 S. Ct. at 1704](#) (80% market share is a "substantial monopoly"; 87% "leaves no doubt" of monopoly power; and agreeing Judge Hand's 90% "constituted monopoly power") (citations omitted). The Second Circuit explained: "Sometimes, but not inevitably, it will be useful to suggest that a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power." [Broadway Delivery Corp. v. United Parcel Serv., 651 F.2d 122, 129 \(2d Cir. 1981\)](#). Where the record showed that a defendant exercised market share of only 21%-27% in one market and 16% in another, the Fifth Circuit concluded that "market shares in the range of 16 to 25 percent . . . are insufficient -- at least absent other compelling structural evidence -- as a matter of law to support monopolization." [Dimmitt Agri Indus., Inc. v. CPC Int'l Inc., 679 F.2d 516, 529 \(5th Cir. 1982\)](#).

⁵ The concept of cross-elasticity of demand is critical to determining which products are included in the total market from which a producer's market share is determined. When the price of a product rises above a competitive level, consumers seek to substitute products that are reasonably interchangeable. The relevant product market therefore includes competing products. See [U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995 \(11th Cir. 1993\)](#). A defendant's share of the total product market is calculated as its unit sales divided by the total unit sales of all the firms producing the same, or reasonably similar, products. Failing to consider reasonably substitutable products in the market share calculation understates the size of the total market and overstates the market power of the defendant.

discontinued. Highlands then charged Skiing Co. with monopolization based on its refusal to continue offering the [**15] combined ski package.

The Supreme Court noted that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor." *Id. at 2856*. However, "the high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Id.* The Court indicated that a lack of valid business justifications for the refusal to cooperate, and a change in business policy that did not create a gain in efficiency, was enough to uphold the monopolization verdict for Plaintiff Highlands. *Id. at 2859-61.*

Finally, [HN10](#)[] there are three essential elements to a claim alleging attempted monopolization: (1) the specific intent to achieve monopoly power by predatory or exclusionary conduct; (2) actual anticompetitive conduct; and (3) a "dangerous probability of success" in defendant's attempt to achieve monopoly power. [*U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 993 \(11th Cir. 1993\)](#).

The intent element requires an intent to "destroy competition or build monopoly." [*Times-Picayune Co. v. United States*, 345 U.S. 594, 626, 73 S. Ct. 872, 890, 97 L. Ed. 1277 \(1953\)](#). [**16] In many cases, intent can be inferred from the defendant's conduct, [*1054] essentially reducing the analysis to two elements. See [*Spectrum Sports, Inc. v. McQuillan*, 122 L. Ed. 2d 247, 113 S. Ct. 884, 892 \(1993\)](#) (unfair and predatory tactics may be sufficient to prove the necessary intent to monopolize); see also [*McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1503-04 \(11th Cir. 1988\)](#) (evidence of predatory conduct may support an inference of intent to monopolize).

Anticompetitive conduct often cannot be evaluated independently of the "dangerous probability" of a firm's acquiring monopoly power. Competitive behavior by a small firm with little market share may become anticompetitive conduct when committed by a company with dominant market power. "To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power." [*U.S. Anchor*, 7 F.3d at 994](#). Thus, proving a dangerous probability of success first involves defining the relevant market and measuring market share as a proxy for monopoly power.

2. The Relevant Product Markets

[**17] Plaintiff presents evidence that there are three relevant product markets in this case: (1) the market for second-generation lithotripters; (2) the market for Lithostar parts; and (3) the market for Lithostar service contracts. Deposition of Roger Noll, pp. 10, 40-42, attached as Exhibit 10 to Plaintiff's Memorandum in Opposition [#153]. However, the Complaint also alleges monopolization and attempted monopolization of an alleged market for *all* lithotripter parts and service. Defendant points out that Plaintiff's expert testified that there is no market for all lithotripters -- not for sales, service or for replacement parts. Noll Depo., Defendant's Exh. 1, pp. 74-77. Indeed, Plaintiff apparently no longer asserts the existence of a product market for all lithotripters. Having presented no evidence on the matter, the Court concludes that Plaintiff cannot meet its burden of proving the existence of monopoly power, or the dangerous probability that Defendant will achieve monopoly power, in the alleged market for all lithotripters. Accordingly, the Court **GRANTS** Defendant summary judgment with respect to Plaintiff's claims of monopolization and attempted monopolization of a product [**18] market consisting of all lithotripters.⁶

Plaintiff contends that SMS possesses monopoly power in each of the three product markets it describes. First, SMS dominates the market for sales of second-generation lithotripters with an 80% share of total market sales for the period October, 1989 through August, 1993. Second, SMS' share of the Lithostar parts market was 100% until the formation of Servicetrends in 1992, and remains very substantial today. Finally, prior to Servicetrends' entry, SMS held 94% of the market for Lithostar service. During the period October, 1991 through September, 1992, 79%

⁶ Because Defendant has supported its motion for summary judgment with affirmative evidence demonstrating that Plaintiff will be unable to prove an element of the claims pertaining to a market for all lithotripters, the Court need not address Defendant's contention that Siemens' 18% market share is insufficient as a matter of law to establish market power or a dangerous probability of success.

of all Lithostar sites were **[**19]** under maintenance contract with SMS, and the balance were either covered by warranty or serviced on a time and materials basis. In 1993, SMS serviced 70 of the 80 Lithostars in operation.

For purposes of its summary judgment motion, SMS does not contest Plaintiff's characterization of the three relevant product markets or Defendant's monopoly power therein. The Court's factual inquiry into defining the relevant product market, in order to determine whether Plaintiff has established the first element of a monopolization claim, can therefore be decided on the basis of Plaintiff's evidence alone.

3. Monopolistic Conduct

The second element of Plaintiff's monopolization and attempt claims requires proof of anticompetitive conduct. Servicetrends alleges that SMS engages in anticompetitive conduct in three distinct ways: (a) violation of the "essential facilities" doctrine; (b) monopoly leveraging; and (c) price discrimination.

[*1055] (a) The "Essential Facilities" Doctrine

HN11 [+] The essential facilities doctrine makes it illegal for the holder of an "essential facility" to deny access to a competitor where there is no legitimate business reason for the refusal. See generally [City of Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1379-80 \(9th Cir. 1992\)](#). **[**20]** Although the doctrine originated in the context of a concerted refusal to deal, see [United States v. Terminal R.R. Ass'n, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 \(1912\)](#), more recent formulations by lower courts have broadened its application. In this case, Plaintiff seeks to apply the doctrine by arguing that Siemens AG's patents on the shocktube and its component parts create a "legal monopoly" that enables its subsidiary SMS to price discriminate, to raise entry barriers to the Lithostar service market, and to leverage its parts monopoly into the market for Lithostar service.

HN12 [+] To establish a violation of the essential facilities doctrine, Servicetrends must prove four elements:

- (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

[MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 \(7th Cir. 1983\)](#). Plaintiff must also demonstrate that, by denying access to an essential facility, **[**21]** defendant caused it "severe handicap" amounting to "more than inconvenience, or even some economic loss." See [Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 569-70 \(2d Cir. 1990\)](#).

The undisputed facts show that Siemens AG owns U.S. patents Nos. 4,697,588 and 4,878,488, covering the shocktube replacement part and its components. Jay Affidavit, Defendant's Exh. 63; Rattner Affidavit, Defendant's Exh. 64. Under the patent laws, Siemens AG has a seventeen-year "monopoly" on the right to manufacture, sell or license the patented device. See [35 U.S.C. §§ 101, 154, 271\(d\)\(4\)](#). Pursuant to these rights, Siemens AG appointed its American subsidiary SMS as the exclusive distributor of the shocktube replacement part in the United States.

Defendant SMS employs a "shocktube refund policy" to distribute the patented device. When a Lithostar shocktube needs replacing, Defendant's customers return the old unit to SMS and pay the "exchange price" for a new unit. This exchange price is substantially lower than the "list price," or what a buyer would pay without trading in a used part. SMS then sends the old unit **[**22]** to Siemens AG for remanufacture. If Siemens AG determines that the old part is refurbishable, it sends SMS a credit for the value of the used part. In effect, by charging a discounted price for a new shocktube in exchange for the old repairable unit, SMS is advancing to its service contract customers the credit it later receives from its parent.

Servicetrends buys shocktubes from SMS at the same nominal price as other customers, but SMS does not advance to Servicetrends the offsetting trade-in credit until Siemens AG examines the used device and issues a refund. Consequently, Servicetrends bears the cost of funds for the difference between the list price and the

exchange price during the interim period. See Rankin Depo., Defendant's Exh. 7, pp. 80-81; Christensen Depo., Defendant's Exh. 8, p. 138; DeBrock Depo., Plaintiff's Exh. 8, p. 324; Warlick Depo., Plaintiff's Exh. 13, p. 282.

Servicetrends argues that the shocktube return policy is an exclusionary tactic not justified by SMS' patent rights. "When SMS sells a Lithostar shocktube, SMS in effect forces every purchaser of a shocktube including Servicetrends to send its shocktube to Siemens AG in Germany for repair. This [**23] conduct is anti-competitive and a barrier to entry into the separate Lithostar service market." Plaintiff's Memorandum in Opposition [#155], p. 29.

Plaintiff cites no authority to support its assertion that Defendant's refund policy constitutes anticompetitive conduct. To the contrary, as a competitor, Servicetrends is not by right entitled to enjoy the "free ride" that SMS provides in the form of inventory financing for its own customers. See, e.g., [Abcor Corp. v. AM Int'l Inc.](#), 916 F.2d 924, 929-30 (4th Cir. 1990) (no anticompetitive [*1056] conduct where parts manufacturer shifted inventory carrying cost to competing dealer while continuing to service own customers).

In addition, Defendant SMS maintains that the shocktube refund policy has no anticompetitive effect and produces no significant economic loss for Servicetrends. According to Defendant, the increased cost of funds to Servicetrends amounts to approximately one percent of revenues.⁷ See Shapiro Depo., Defendant's Exh. 60, p. 127. Plaintiff's own antitrust expert says a level of 5% of revenues would indicate a significant adverse effect on Servicetrends. Noll Depo., Plaintiff's Exh. 1, p. 127. [**24] Thus, Plaintiff has produced no facts showing a competitive injury or that it suffered a significant economic loss as a result of Defendant's shocktube return policy.

Servicetrends does not explain exactly how the "essential facilities" doctrine applies to the facts in this case. Since Plaintiff's own evidence proves that SMS does not deny Servicetrends use of the patented shocktube replacement part, the Court concludes that Plaintiff's essential facilities attack is focused on Defendant's refusal to sell the shocktube's patented component parts. Certainly, the inability to purchase the unit's component parts may deprive Servicetrends of the opportunity to repair a customer's shocktube on site. Instead, the shocktube refund policy compels [**25] Plaintiff to return the worn out assembly to the manufacturer and to purchase an entire shocktube for reinstallation. Noting that Defendant's patent permits it to sell the shocktube for a "monopoly price," Servicetrends complains that "the claimed patent, however, does not give SMS the exclusive right to repair the shocktube." Plaintiff's Memorandum in Opposition [#155], p. 28.

As a general proposition, Siemens AG's lawful patent does give it the right to refuse to sell or license the patented device, including the component parts of the shocktube. See, e.g., [SCM Corp. v. Xerox Corp.](#), 645 F.2d 1195, 1204 (2d Cir. 1981). "No court has ever held that the antitrust laws require a patent holder to forfeit the exclusionary power inherent in his patent the instant his patent monopoly affords him monopoly power over a relevant product market." *Id.* Although certain forms of patent abuse may give rise to antitrust liability, see, e.g., [Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.](#), 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965), HN13[] "where a patent has been lawfully acquired, subsequent [**26] conduct permissible under the patent laws cannot trigger any liability under the antitrust laws." [SCM Corp.](#), 645 F.2d at 1206. In the absence of authority to the contrary, the Court finds that SMS has no legal obligation to sell patented component parts to its competitor Servicetrends.

Thus, Plaintiff is likely mistaken in its assertion that Defendant does not have the exclusive right to repair the modular shocktube. Although the Court need not decide the issue here, it appears that Defendant is entitled to a so-called monopoly in the repair of its shocktube replacement part -- a monopoly power that is inherent in its right to sell or refuse to sell the patented components.

Plaintiff and Defendant have access to the same "facility." Siemens AG does not supply the individual shocktube components to its subsidiary SMS for use in servicing customers' equipment. Instead, SMS and Servicetrends

⁷ Plaintiff's damages expert, John Preston, testified that Servicetrends' interest cost resulting from Defendant's refund policy amounted to approximately \$ 9,000, compared to service revenues of \$ 2,141,506 for the same period. See Preston Depo., Defendant's Exh. 4, pp. 78-81.

compete on equal footing in the Lithostar service market. Both have access to the shocktube replacement part and, in addition, Servicetrends purchases components of the spark gap and shockwave generator from other independent OEM's. DeBrock Depo., Defendant's Exh. 6, [\[**27\]](#) pp. 359-78. See [*Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544-45 \(4th Cir. 1991\)](#) (affirming summary judgment where plaintiff "failed to show that it could not reasonably duplicate or pursue a reasonable alternative to the essential facility"). Servicetrends has captured thirteen Lithostar service customers from SMS since mid-1992, and reportedly earned \$ 1 million in operating profits in its first year. The evidence in this case simply does not support an inference [\[*1057\]](#) that Servicetrends has been denied access to an essential facility, or that the shocktube components are essential to competition in the Lithostar service market.⁸

[\[**28\]](#) (b) *Monopoly Leveraging*

Servicetrends cites [*Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 \(2d Cir. 1979\)](#), to advance the proposition that a monopolist violates [§ 2](#) by using its monopoly power in one market to gain a competitive advantage in another market. Plaintiff contends that the list price versus exchange price differential and the credit policy incorporated into Defendant's shocktube refund program are examples of monopoly leveraging in the parts market designed to gain an advantage in the service market. Servicetrends also points to Defendant's refusal to sell shocktube components as another example of leveraging:

"In addition to the return policy, SMS also insures its ability to leverage its monopoly power in the 'patented' shocktube into the separate Lithostar service market by refusing to sell or make available components of the shocktube, effectively thwarting any effort to repair. The effect is that SMS not only has monopoly control and power in the parts market, but also gains and maintains monopoly control and power in the separate Lithostar service market.

Plaintiff's Memorandum in Opposition [#155], p. 30 (citation [\[*29\]](#) omitted).

These claims are essentially identical to those already addressed. The Court has determined that neither the shocktube refund policy nor Defendant's refusal to sell patented component parts offends [antitrust law](#). Moreover, it is not the per se use of leverage that the *Berkey Photo* court condemned, but the anticompetitive conduct accompanying such use. In the absence of bad behavior, i.e., "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor," [*United States v. Griffith*, 334 U.S. 100, 68 S. Ct. 941, 945, 92 L. Ed. 1236 \(1948\)](#), the court endorsed an expansive vision of legitimate monopoly conduct:

[A] [HN14](#) [+] large firm does not violate [§ 2](#) simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad based activity . . .
..

⁸ Defendant offers a number of business justifications for its allegedly monopolistic conduct. Although legitimate business reasons can serve as a defense for a monopolist's exclusionary acts and refusal to deal, see, e.g., [*Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 368-69 \(9th Cir. 1988\)](#) (and cases cited therein), "whether valid business reasons motivated a monopolist's conduct is a question of fact." [*High Technology Careers v. San Jose Mercury News*, 996 F.2d 987, 990 \(9th Cir. 1993\)](#) (citing [*Eastman Kodak Co. v. Image Technical Serv., Inc.*, 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2091 \(1992\)](#)). However, having determined that SMS is not required to sell the patented shocktube components as a matter of law, this Court need not decide whether factual questions precluding summary judgment exist regarding the validity of Defendant's asserted justifications.

[**30] [Berkey Photo, 603 F.2d at 276](#). In the absence of a showing that Defendant's conduct falls outside the scope of competition on the merits, Plaintiff cannot succeed in proving its monopolization and attempt claims.

(c) *Price Discrimination*

Servicetrends contends that SMS engages in anticompetitive conduct through price discrimination in two ways. First, Defendant's pricing and exchange policies for the shocktube replacement part allegedly "are anti-competitive; are a result of monopoly leveraging; create a 'price squeeze' on Servicetrends; constitute illegal price discrimination; raise barriers to entry into the service and parts markets; and have caused antitrust injury." Plaintiff's Memorandum in Opposition [#155], p. 19. Second, Plaintiff contends that Defendant engages in illegal price discrimination with Med-Lab Supply Company ("Med-Lab").⁹

[**31] [*1058] Viewing all evidence and factual inferences in a light most favorable to Plaintiff, the following facts emerge as undisputed. Med-Lab is an authorized service agent for SMS in the Miami area. Noll Depo., Plaintiff's Exh. 10, pp. 176-89. By the terms of a purchased radio ads. These cases do not address the issue of price discounts provided to selected distributors and they are not pertinent here.

Defendant raises [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775](#), (1984), to validate its contention that the 25% parts discount compensates Med-Lab for services and expenditures that benefit SMS. In dictum, the *Monsanto* Court noted that "the manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free-riders' do not interfere." [Id. at 1470](#). This desire, however, does not legitimize every discount program a manufacturer may institute to ensure distributor profits.

Cases challenging unlawful price discrimination [**32] practices under the Robinson-Patman Act are instructive in assessing the possible anticompetitive implications of Defendant's discount price arrangement with Med-Lab.¹⁰ In *Texaco Inc. v. Hasbrouck*, Representation Agreement signed in June, 1989, Med-Lab acts as SMS' sales agent for Siemens' products, installs equipment, pays its own expenses to attend Siemens' training sessions, provides monthly reports and customer training, performs warranty service at its own expense, and assists SMS to meet local regulatory obligations. Representation Agreement, attached as Exh. 89 to Rankin Depo., Plaintiff's Exh. 3. In exchange for performing these marketing functions, Med-Lab receives a 25% discount on parts. Agreement, cover letter; Rankin Depo., p. 387.

[**33] The Representation Agreement prohibits SMS from soliciting sales orders or service business in Med-Lab's assigned territory, unless the customer demands SMS. Agreement, p. 8, P 11. Thus, Med-Lab and SMS generally do not compete within the authorized area. Med-Lab does compete with Plaintiff Servicetrends in the area's

⁹ Plaintiff does not suggest that its price discrimination charge implicates either the Robinson-Patman Act (amending § 2 of the Clayton Act) or antitrust restrictions against resale price maintenance agreements, ruled a per se violation of the Sherman Act by *Dr. Miles* and progeny. See [Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 \(1911\)](#). Instead, Plaintiff argues that the price discount provided to Med-Lab and not to Servicetrends is a form of anticompetitive conduct. See Plaintiff's Memorandum in Opposition [#155], pp. 23-26. Therefore, the Court specifically restricts its review of the Med-Lab Representation Agreement to the narrow issue of whether Plaintiff's practice of extending a price discount to Med-Lab is anticompetitive.

¹⁰ [Section 2\(a\)](#) of the Robinson-Patman Act makes it illegal for a seller to discriminate in price between customers. "Price discrimination" in this context means "price difference." A seller discriminates whenever the difference in price charged to customers does not reflect a difference in the marginal cost of selling to them. However, the statute does not ban all price differences charged to different customers. Instead, the statute provides a number of important limitations, including a defense permitting price discrimination based on differences in costs: "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities . . . [sold]." [15 U.S.C. § 13\(a\)](#). See, e.g., [Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2586 \(1993\)](#).

Lithostar parts and service markets. Further, Med-Lab is not permitted to resell Siemens' products to customers at prices lower than those quoted by SMS in the agreed territory. Agreement, p. 3, P 3(m).

Plaintiff cites *Aspen Skiing* and [*Lorain Journal Co. v. United States*, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 \(1951\)](#), as authority for the legal assertion that SMS' discount price for parts sold to Med-Lab evidences anticompetitive conduct. As discussed above, *Aspen Skiing* involved the termination of a joint marketing agreement in an essential facilities context. *Lorain Journal* concerned a newspaper that attempted to monopolize the sale of advertising by refusing to deal with local advertisers who [*496 U.S. 543, 110 S. Ct. 2535, 110 L. Ed. 2d 492 \(1990\)*](#), [**34] the Court reviewed the role of "functional discounts" granted to distributors as reimbursement for the value of their marketing [*1059] functions. "Such a discount is not illegal." *Id. at 2546*; see also [*Americom Distrib. Corp. v. ACS Communications, Inc.*, 990 F.2d 223, 227 \(5th Cir. 1993\)](#) ("The Act allows a price differential due to savings in costs of manufacture, delivery, or sale."). However, [**HN15**](#)[¹⁵] distributor discounts that are "completely untethered" to the manufacturer's marginal cost savings, or merely "subterfuges to avoid the Act's restrictions," violate prohibitions against price discrimination. "Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer." [*110 S. Ct. at 2547*](#) (quoting [*In re Doubleday & Co.*, 52 F.T.C. 169, 209 \(1955\)](#)). The burden of proof is on the plaintiff to show that functional discounts constitute illegal price discrimination. [*110 S. Ct. at 2545*](#) & n.18.

Uncontroverted facts show that Med-Lab provides marketing functions [**35] for SMS which Servicetrends does not perform. Plaintiff offers no evidence from which a juror might reasonably conclude that the discount does not fairly reflect the value of Med-Lab's marketing services. To the contrary, the evidence indicates that Med-Lab provides at its own expense substantial sales and support functions. In the complete absence of evidence from which an injury to competition might be inferred, the Court concludes that Defendant's conduct with respect to the Med-Lab parts discount is not anticompetitive.

4. Conclusion

The Court finds that there is no genuine dispute of material fact pertaining to the monopolization and attempt claims in Counts 6, 9, 10, 12, and 13. Having found no evidence of anticompetitive conduct in product markets where Defendant admits to possessing monopoly power, the Court hereby **GRANTS** Defendant summary judgment on Counts 6, 9, 10, 12, and 13. As discussed below in Part C., the Court **DENIES** summary judgment on Counts 5 and 8 insofar as they are based on predatory pricing theory.

B. TYING ARRANGEMENTS

Plaintiff's Complaint contains four counts founded on assertions of illegal tying arrangements:

- Count 1: Tying the sale [**36] of Lithostar service to the sale of Lithostar replacement parts.
- Count 2: Tying the sale of the modular replacement parts to the purchase of components.
- Count 3: Tying the sale of Lithostar service to the sale of the Lithostar lithotripter.
- Count 4: Tying the sale of service to the sale of financing for the Lithostar lithotripter and other lithotripters.

[**HN16**](#)[¹⁶] A tying arrangement conditions the sale of one product on the purchase of another. See [*Northern Pacific Ry. v. United States*, 356 U.S. 1, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 \(1958\)](#). The product the purchaser wants to buy is known as the "tying product," while the unwanted but attached product is the "tied product." The essential antitrust concern regarding tying is that the illegal arrangements foreclose competing manufacturers from selling in the tied product market.¹¹ [**38] Tying the sale of goods is expressly prohibited by § 3 of the Clayton Act, [15](#)

¹¹ Tying arrangements are nominally regarded as per se illegal, but the law has undergone substantial changes in recent years and modern tying cases indicate that tying may be subject to a "rule of reason" balancing approach. See, e.g., [*Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 \(1984\)](#) (four Justices favor removing tying from the per se category of antitrust offenses). This evolution in judicial thinking is based on a reevaluation of the economic theory associated with tying. Originally, tying was condemned because of a fear that a firm with monopoly power in the tying product market would be able to

U.S.C. § 14. Section 1 of the Sherman Act prohibits tying involving goods or **[*1060]** services. The standard for distinguishing a tying violation under the Sherman and Clayton Acts was addressed **[**37]** in Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 97 L. Ed. 1277, 73 S. Ct. 872 (1953), but the distinctions have blurred in the lower courts over the past forty years and are unimportant in this case. Plaintiff Servicetrends brings its tying complaints under the Sherman Act.¹²

An illegal tying arrangement under Section 1 has five elements: (1) two products, i.e., a tying and a tied product; (2) evidence of actual coercion by the seller that forced the buyer to purchase the tied product; (3) sufficient market power in the seller's tying product market to force the buyer to accept the tied product; (4) anticompetitive effects in the tied product market; and (5) involvement of a "not insubstantial" amount of interstate commerce in the tied product market. Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502-03 (11th Cir. 1985) (citing Yentsch v. Texaco, Inc., 630 F.2d 46, 56-57 (2d Cir. 1980)).

Count 1 alleges that Defendant ties the sale of Lithostar service (the tied product) **[**39]** to the sale of three Lithostar replacement parts: the shocktube, the shockwave generator, and the spark gap (the tying products). Plaintiff's attack focuses on the shocktube, again arguing that the unavailability of separate component parts forces a customer to buy unwanted repair services in order to purchase a shocktube component.

Servicetrends' real complaint is that it must pay for Siemens AG's repairs of the modular shocktube replacement part because Siemens AG will not sell the shocktube components. However, this contention is different from the allegations contained in Count 1. Count 1 alleges a tie between the market for Lithostar service and the market for Lithostar replacement parts.¹³ See Complaint, P 75, 76. Plaintiff now seeks to reinterpret Count 1 to encompass a tie between service of the shocktube and the sale of shocktube components. Although Defendant admits to a product market for Lithostar service contracts, the record contains no evidence of a product market for shocktube service.

[40]** A tying claim requires evidence that the seller refuses to sell the tying product unless the buyer purchases the tied product: "Where there is no tie, there is no claim." See T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc., 931 F.2d 816, 821-22 & n.10 (11th Cir. 1991). The record is clear that SMS does not refuse to sell shocktubes, spark gaps, and shockwave generators to Servicetrends even though Servicetrends does not purchase Lithostar service. DeBrock Depo., Defendant's Exh. 6, p. 449; Noll Depo., Defendant's Exh. 1, p. 271 ("I am not aware of a tie between parts and service"). The Court finds no evidence of a tie between Lithostar replacement parts and Lithostar service and no basis in fact or in law to sustain Plaintiff's Count 1.

Count 2 alleges that purchasers of Lithostar component parts (the tying product) are forced to purchase the entire modular replacement part (the tied product). Complaint, P 82. However, "a tying arrangement cannot exist unless two separate product markets have been linked." Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 104 S. Ct. 1551,

use that power as a lever into the tied product market. For example, a monopolistic seller of copy machines might be able to monopolize the paper market if it was allowed to tie the sale of copy paper to the sale of the machine. The leverage theory underpinning the per se treatment of tying has lost favor, however, as economists today generally concede that tying cannot transfer monopoly power from one market to another.

¹² Section 1 does not mention "tying," but prohibits contracts in restraint of trade:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1.

¹³ Plaintiff states: "Count I of the Complaint alleges that SMS has illegally tied the sale of Lithostar replacement parts (the tying product) to the sale of Lithostar repair and service (the tied product)." Plaintiff's Memorandum in Opposition [#155], p. 45.

[1562-63, 80 L. Ed. 2d 2 \(1984\)](#). **[**41]** In this case, there is no evidence of a product market for Lithostar component parts.¹⁴ **[*1061]** Consequently, no illegal tie-in can exist and Plaintiff's Count 2 fails.

Count 3 alleges that Defendant ties the sale of Siemens Lithostars (the tying product) to the sale of Lithostar service (the tied product). Complaint, P 89. Specifically, Plaintiff claims that SMS's inclusion of a one-year "warranty" in the Lithostar's purchase price constitutes an illegal tying arrangement.

The Court initially notes that Plaintiff offers no case authority suggesting that the Lithostar and its associated manufacturer's warranty constitute two separate products. **[**42]** See [Jefferson Parish, 104 S. Ct. at 1562-63](#). Defendant has never sold the one-year Lithostar warranty separately from the equipment. Christensen Depo., Defendant's Exh. 8, pp. 23-24. The warranty is not separately priced and its cost is included in the price of the Lithostar.

In *Jefferson Parish*, the Supreme Court considered whether a hospital's surgical and anesthesiological services should be regarded as two products for tying analysis purposes. The Court asked whether the two services could be meaningfully separated: "Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separately from hospital services to identify a distinct product market in which it is efficient to offer [the services separately]." [Jefferson Parish, 104 S. Ct. at 1563](#).

The evidence in this case suggests that no separate demand exists for the purchase of a one year warranty; in fact, Lithostar purchasers view the provision of the manufacturer's warranty as essential to their decision to buy the machine. Buyers **[**43]** indicate that they would consider it "unusual if equipment of this nature came without some warranty." Dills Depo., Defendant's Exh. 55, p. 89. One doctor said that if SMS offered no warranty on its \$ 1.5 million Lithostar, "we would not buy it." Puras-Baez Depo., Defendant's Exh. 34, p. 33. Thus, there is no indication of consumer demand for a one-year warranty provided by anyone other than the Lithostar's manufacturer, and no evidence that providing the warranty separately from the machine would be economically efficient. See, e.g., [Klo-Zik Co. v. General Motors Corp., 677 F. Supp. 499 \(E.D. Tex. 1987\)](#) (sale of truck engines with warranties included did not constitute an illegal tying arrangement).

Moreover, Defendant's Lithostar warranty lacks the necessary element of coercion. The *Jefferson Parish* Court referred to coercion as an independent prerequisite for a tying violation:

Our cases have concluded that [HN17](#) the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might **[**44]** have preferred to purchase elsewhere on different terms.

[Jefferson Parish, 104 S. Ct. at 1558](#); see also [Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1327 \(5th Cir. 1976\)](#) ("it must be shown that the purchaser was coerced into purchasing an unwanted product"). Plaintiff Servicetrends has made no showing of coercion pertaining to the one-year Lithostar warranty.¹⁵ Thus, The Court concludes that Plaintiff has failed to come forward with specific facts demonstrating that a Lithostar

¹⁴ Plaintiff's expert Noll testified: "I thus far have seen no evidence that would support the notion that there's a separate market for each of those specific components that go into the shockhead." Defendant's Exh. 1, p. 77.

Similarly, Defendant's expert Shapiro testified that there is no separate relevant parts market in this case. Shapiro Depo., Defendant's Exh. 60, pp. 36-37.

¹⁵ Plaintiff points to Defendant's execution of an equipment Repurchase Agreement with the Endourological Institute of Puerto Rico as an example of an illegal tie between sales and service. The Agreement concerned a common financing requirement by an equipment lessor that the lessee-buyer designate a third party to assume the debt and remarket the equipment in the event of default. SMS, at the request of the buyer and the lender, agreed to repurchase the equipment if requested, but only if SMS performed the maintenance during the equipment's service life. This arrangement was made to facilitate financing of the equipment and lacks any indication of coercion.

and its manufacturer's warranty are two separate products whose markets are linked through coercive means. Count 3 therefore cannot withstand summary judgment.

[**45] Count 4 alleges an illegal tie between the manufacturer's equipment financing program (the tying product) and the service market (the tied product). Servicetrends admits to [*1062] lacking sufficient evidence to support this claim and does not oppose the granting of summary judgment on Count 4.

In summary, the Court finds no material factual dispute concerning Plaintiff's tying claims and **GRANTS** Defendant summary judgment as a matter of law on Counts 1, 2, 3, and 4.

C. PREDATORY PRICING CLAIMS

Defendant moves for summary judgment under Section 2 of the Sherman Act with respect to Counts 7 and 11, as well as Counts 5 and 8 insofar as they are based on predatory pricing theory:

Count 7: Predatory pricing in the market for Lithostar replacement parts.

Count 11: Predatory pricing in the markets for lithotripter service generally and for Lithostar service.

In Count 7, Plaintiff charges that SMS engaged in predatory pricing "for the purpose of maintaining its monopoly" in the Lithostar replacement parts market. Complaint, P 114. Count 11 is an attempt to monopolize claim, accusing SMS of predatory pricing "with the intent of destroying competition" in the service markets. Complaint, [*46] P 133. Counts 5 and 8, discussed in Part A. above, allege monopolization and attempted monopolization of the lithotripter and Lithostar service market. In this case, then, predatory pricing is relevant as proof of monopolistic conduct to establish an element of monopolization and attempted monopolization -- it does not relieve Plaintiff of the burden of proving at trial that Defendant has monopoly power or a "dangerous probability of success."

HN18 [+] Predatory pricing is a term of art that describes "pricing below an appropriate measure of cost for the purpose of eliminating competition in the short run and reducing competition in the long run." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S. Ct. 484, 493, 93 L. Ed. 2d 427 (1986). A predator prices its product below profit maximizing levels with the expectation of charging monopoly prices in the future when competitors are driven from the market. Predatory pricing is generally analyzed as constituting the conduct portion of an attempt to monopolize, and since intent can be inferred from conduct, evidence of predatory pricing can support an inference of specific [*47] intent. One problem courts have encountered in applying predatory pricing theory is recognizing and distinguishing those instances of legitimate price cutting that epitomize the benefits of unrestrained competition.

In a case where Japanese manufacturers were accused of conspiring to charge predatory prices for televisions sold in the United States, the Supreme Court suggested that predatory pricing schemes are unlikely to succeed:

The success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. . . . Absent some assurance that the hoped-for monopoly will materialize, and that it can be sustained for a significant period of time, "the predator must make a substantial investment-with no assurance that it will pay off." For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1357, 89 L. Ed. 2d 538 (1986) (citations omitted). The Court further noted the danger [*48] of confusing a predatory pricing scheme with the beneficial effects of increased competition:

Cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. "We must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition."

Id. at 1360 (citations omitted). Affirming summary judgment on plaintiff's predatory pricing claims, the Court specifically noted that its observations also applied to predatory pricing by a single firm seeking monopoly power. Id. at 1357.

[*1063] In *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), this circuit established the test a district court must use in evaluating a defendant's motion for summary judgment in an antitrust claim based on predatory pricing: "We hold that when an antitrust defendant moves for judgment as a matter of law, the test for predatory pricing must consider subjective evidence and should use [**49] average total cost as the cost above which no inference of predatory intent can be made." *Id. at 1496* (footnote omitted). The court spelled out the elements of the test: "Average total cost means the average of the total economic cost, which includes the necessary minimum profit." *Id. at 1503* (footnote omitted). If defendant's prices are above short run marginal cost, plaintiff must present other evidence of predatory intent, either objective or subjective. *Id.* "The closer a defendant's price is to average total cost, the stronger this other evidence must be for the plaintiff still to avoid summary judgment." *Id.* Prices below short run marginal cost create a rebuttable presumption of predatory intent. *Id. at 1504*.

In this case, Servicetrends originally based its predatory pricing claim on the assertion that SMS gave away "free" replacement parts to customers solicited by Servicetrends. Complaint, P 64. Plaintiff did not submit an analysis of Defendant's cost structure to support its charge, but relied instead on the logical certainty that "free" must mean a price below any economic [**50] measure of production cost.

Servicetrends asserted that SMS provided free parts to three customers: Lithotripters, Inc.; St. Luke's Medical Center; and Clinicas Las Americas. See Plaintiff's Answers to Defendant's First Interrogatories, Defendant's Exh. 38, pp. 21-22. Defendant denied giving away free parts, explaining that the price of replacement parts is sometimes included in the total price of the service agreement. Defendant stated that it "has never sold replacement parts below cost to any of its customers, including Lithotripters, Inc., Clinicas Las Americas, and St. Luke's Medical Center." Defendant's Memorandum in Support [#143], p. 4. According to SMS, its service contracts are fully priced "to cover costs of providing such parts and service and to allow for a reasonable profit." *Id.* To support its claim, Defendant offered the affidavit of Guenter Westermann, Senior Vice President responsible for pricing replacement parts, who testified: "Siemens Medical prices Lithostar replacement parts above its cost of purchasing those parts from Siemens AG. . . . such that it can recover its cost of buying those parts from Siemens AG and realize a reasonable rate of return." [**51] Westermann Affidavit, Defendant's Exh. 42, P 4. Defendant also supplied testimony from each of the three named customers denying that SMS provided any parts for free. See McCumber Depo., Defendant's Exh. 45, p. 371; Puras-Baez Depo., Defendant's Exh. 34, p. 59; Schmidt Depo., Defendant's Exh. 37, p. 78.

Plaintiff subsequently abandoned its assertion that SMS distributed free parts to customers. Instead, Plaintiff now presents evidence that Defendant executed service contracts priced below its average total direct costs. Specifically, Servicetrends points to a 1988 SMS document that purports to calculate the "direct cost" ¹⁶ of a Lithostar service contract:

Parts:

Shock wave generator	\$ 14,450
High voltage supply.....	\$ 12,000
Other parts.....	\$ 16,000

Subtotal - Parts	\$ 42,450
Labor	\$ 26,970

Subtotal - Parts.....	\$ 69,420
-----------------------	-----------

¹⁶ In this context, "direct cost" refers to parts and labor costs only. Other cost allocations reflecting general and administrative expenses, plus the "necessary minimum profit" component mentioned in *McGahee*, must be added to derive a total average cost. Hence, this direct cost estimate is lower than a comparable total cost figure and strengthens Plaintiff's assertion of predatory intent. Also, these costs are stated in 1988 dollars, versus the revenue figures found in Defendant's 1992 service contracts. Inflation during the intervening four years tends to overstate the income from service contracts and narrow the real amount by which costs exceed revenues.

Shock tube.	\$ 53,750
Total service cost.	\$ 123,170

[*1064] See Rankin Depo., Plaintiff's [**52] Exh. 3, deposition exhibit 73.

In 1992, Defendant signed a service contract with Clinicas Las Americas for \$ 68,335. See Service Agreement, Plaintiff's Exh. 28, marked Puras deposition exhibit 65. Defendant's District Service Manager, David Horgan, states that the contract price "excludes shock wave generating components, *i.e.*, the shockhead, the [**53] shock wave generator, and the spark gap." Horgan Affidavit, Defendant's Exh. 46, P 3. If these parts were in fact excluded, the price of the service contract would exceed SMS' apparent direct cost. However, Mr. Horgan's letter to Dr. Puras-Baez specifically notes that shocktubes are excluded, but the shockwave generator and spark gap is included in the price. See Horgan Letter, Plaintiff's Exh. 28, marked Puras deposition exhibit 64. Thus, the evidence suggests that Defendant sold a service contract costing more than \$ 69,420 to perform for proceeds of \$ 68,335.

Similarly, Plaintiff points to evidence that the direct cost of a service contract sold to St. Luke's Hospital was \$ 93,690, compared to a sales price of \$ 89,000. See Plaintiff's Memorandum in Opposition [#155], pp. 71-72 and citations therein. In addition, Defendant allegedly sold twenty-six three-year service contracts to Lithotripters, Inc. for a price of \$ 150,000 each, compared to an estimated direct cost of [\\$ 174,315. *Id.* at 72-73](#). Plaintiff also presents a 1992 SMS report entitled "Lithotripter Service Analysis" to corroborate the cost figures found in the 1988 document.¹⁷ See Messinger Analysis, [**54] Plaintiff's Exh. 7.

The Court concludes that Plaintiff has produced unrebutted evidence showing the existence of genuine issues of material fact concerning Defendant's alleged predatory pricing policy. Accordingly, Defendant's motion for summary judgment on Counts 7 and 11, and on Counts 5 and 8 insofar as they are based on predatory pricing theory, is **DENIED**.

D. EXCLUSIVE DEALING and CONCERTED REFUSAL TO DEAL

Counts 14 and 15 charge violations of [Section 1](#) of the Sherman Act:

Count 14: Exclusive dealing between SMS and third parties for service of the Lithostar.

Count 15: Concerted refusal to deal based on agreements between SMS and third parties prohibiting use of Servicetrends for Lithostar service.

1. Exclusive Dealing

[HN19](#) Exclusive [**55] dealing arrangements are essentially requirements contracts, whereby the buyer agrees to purchase exclusively the product of the contracting supplier. The specific antitrust concern is that exclusive dealing contracts threaten to foreclose the relevant product market to other sellers, who may be unable to find buyers for their competing goods or services. On the other hand, courts recognize that many ordinary supply contracts, motivated by legitimate business needs, inevitably foreclose some competing seller from a portion of the market. Accordingly, exclusive dealing contracts are not per se illegal. See [Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1036 \(5th Cir. Unit A Feb. 1981\)](#) ("The mere existence of an exclusive dealing clause in a contract does not establish an antitrust violation."). Instead, courts apply a "rule of reason" approach to weighing the procompetitive and anticompetitive effects of exclusive dealing [*1065] arrangements. See, e.g., [Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 631-32, 5 L. Ed. 2d 580 \(1961\)](#) (weighing a range of factors to determine [**56] foreclosure in a competitive coal market under the Clayton Act).¹⁸

¹⁷ Plaintiff also cites several SMS internal memoranda as comprising the type of "subjective evidence" referred to by the McGahee court. Having reviewed the documents, the Court agrees that a fact finder could reasonably find them probative of predatory intent.

¹⁸ Like tying arrangements, exclusive dealing contracts are also prohibited by § 3 of the Clayton Act. Although the possibility of different treatment for similar activities exists depending on whether the court applies the Sherman Act or the Clayton Act,

Beginning in July, 1990, Defendant SMS signed exclusive service contracts with Lithotripters, Inc., the general partner in a group of individual partnerships that owns and operates approximately 25 Lithostars.¹⁹ The machines are covered by a separate, but identical, service agreement. See Tusa Depo., Plaintiff's Exh. 23, service agreements attached as deposition exhibits 1 & 2; see also Defendant's Exh. 79 & 80. The service contracts run for a three-year [**57] term and include parts and labor for a price of \$ 150,000 per year. Early termination requires 90 day notice and payment of a 25% liquidated damages charge. Agreement, P 9. Of the 80 Lithostars currently installed in the United States, the Lithotripters, Inc. agreements cover approximately 38% of the Lithostar service market.

[**58] Servicetrends argues that the Lithotripters, Inc. service agreements constitute illegal vertical restraints of trade. Defendant SMS responds that exclusive contracts for a three-year period cannot be anticompetitive, that foreclosing only 32%-38% of the relevant market is not "substantial" as a matter of law, and that Lithotripters, Inc. had legitimate business reasons for choosing SMS as its service provider.

The *Tampa Electric* Court suggested that the length of an exclusive dealing contract is relevant to judging the substantiality of the alleged foreclosure. See [*Tampa Electric, 81 S. Ct. at 632*](#). After considering various additional factors, the Court held that a 20 year requirements contract between a public utility and a coal company that preempted less than 1% of the relevant market did not violate antitrust laws; see also [*Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976, 982 \(9th Cir. 1988\)*](#) (competitive bidding process for an exclusive six-year lease was not an illegal restraint on competition). As *Tampa Electric* and subsequent cases make clear, however, the term [**59] of the exclusive contract is only one factor to consider in determining the substantiality of market foreclosure.

Defendant asserts that foreclosing only 32% [or 38%] of the market for Lithostar service does not constitute a substantial foreclosure as a matter of law. See, e.g., [*Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 237 \(1st Cir. 1983\)*](#) (indicating that the "limited anticompetitive effects" of a contract foreclosing up to 50% of the relevant market rendered it nonexclusionary); see also *Gonzalez v. Insignares*, No. C84-1261A (N.D. Ga. June 27, 1985) (Tidwell, J.) (exclusive contract foreclosing at least 40% of relevant hospital market was not an unreasonable restraint). Although some minimum level of foreclosure is certainly insufficient as a matter of law, this Court is not prepared to decide that the competitive impact of foreclosing 32%-38% of a uniquely structured market consisting of 80 service sites and only two competitors is so insubstantial as to be per se legal. See [*Tampa Elec., *10661 81 S. Ct. at 629*](#) (factors to weigh in determining substantiality).

Defendant also argues [**60] that the exclusive agreements with Lithotripters, Inc. were not the product of anticompetitive intentions, but resulted from a pre-existing business practice that benefited both parties. The record shows that SMS executed a total of twelve multi-year service agreements with equipment owners before Servicetrends was incorporated, including six three-year agreements with Lithotripters, Inc. See Defendant's Exh. 79. SMS also signed six multi-year contracts with other owners, three of whom are now customers of Servicetrends. See Defendant's Exh. 80.

The record contains uncontested evidence of the business justifications for Lithotripters, Inc.'s decision to sign Defendant's exclusive service contracts. Specifically, Lithotripters, Inc. concluded that Servicetrends could not

Clayton Act cases are particularly instructive in analyzing exclusive dealing claims brought under the Sherman Act. Nevertheless, there are critical distinctions between the two Acts involving sales of services and plaintiff's burden of proof.

¹⁹ The evidence conflicts as to whether Lithotripters, Inc. currently has twenty-four, twenty-six, twenty-eight, twenty-nine, or thirty service agreements with SMS. See Jordon Depo., Plaintiff's Exh. 4, p. 22, (Lithotripters, Inc. owns 29 or 30 Lithostars); McCumber Depo., Defendant's Exh. 45, p. 203 (Lithotripters, Inc. owns 26 Lithostars); Plaintiff's Supplemental Brief (at least 28 machines are under long-term service contracts with SMS); Defendant's Supplemental Brief, Murphy Depo. (Lithotripters, Inc. owns 25 Lithostars, 24 are subject to an SMS service agreement, plus two additional machines owned by a third party with whom Jordon is affiliated). Twenty-six service agreements would equal 32% of the relevant market of 80 Lithostars, while thirty agreements is equivalent to 38%. The Court resolves this factual discrepancy in favor of Plaintiff and assumes that Defendant's exclusive agreements foreclose approximately 38% of the market for Lithostar service.

match "the commitment in resources that [SMS] has" and "the number of people, the distribution network" that SMS offered. McCumber Depo., Defendant's Exh. 45, pp. 298-99. Lithotripters, Inc.'s president testified "it was great for us," and "I couldn't conceive then, nor can I conceive now, that there could be any organization that could offer trained personnel, as many as we needed and trained as well as Siemens [**61] trains them and the availability that we needed." Jordon Depo., Defendant's Exh. 25, pp. 93, 101. Lithotripters, Inc.'s president explained his service concerns regarding the Lithostar in particular:

We're talking about high tech equipment . . . somebody who didn't know what they were doing could cause an unbelievable mess. If we were talking about MRI's or CT scans, diagnostic equipment to be used on people on a purely elective basis, then I might be interested in finding -- going bargain basement shopping for technicians.

We're talking about therapeutic medical equipment to be used on an emergency basis or urgent basis on people in pain. We can't have a machine down for a week waiting for some guy to come and see it, because we've got people who really need to have it done.

I would never be interested, very frankly, as long as I'm happy with what I'm getting, to change.

Id. at 103. The quality of Servicetrends' repair service is not an issue in this case, but Jordon's remarks are the kind of subjective evidence that shows how an exclusive dealing contract might legitimately serve a buyer's perceived needs without implicating a desire to suppress competition.

Taking into [**62] account the extent of the foreclosure and the fact that the practice of executing multi-year service agreements pre-dated the incorporation of Servicetrends, and weighing heavily the buyer's business justifications for signing the service agreements, the Court finds that Defendant's exclusive contracts do not substantially foreclose commerce in the Lithostar service market. Defendant's motion for summary judgment on Count 14 is **GRANTED**.

2. Concerted Refusal to Deal

Count 15 also pertains to the service contracts between Lithotripters, Inc. and Defendant SMS. Plaintiff charges: "The agreements entered into by SMS and third parties not to use Servicetrends for the repair and servicing of Siemens Lithostars constitutes a concerted refusal to deal and an unreasonable restraint of trade in violation of [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#)."

The parties barely argue this claim, essentially relying on the facts and law applicable to Count 14 above. Defendant points out that because no horizontal relationship is involved between SMS and Lithotripters, Inc., Count 15 is likewise properly determined under a rule of reason analysis. The Court [**63] notes also that it finds no factual basis to support Plaintiff's argument that the multi-year service contracts, which unambiguously provide a three-year term, were actually "lifetime" agreements.

In accordance with the reasons discussed under Count 14, and in the absence of proof that Lithotripters, Inc.'s independent exercise of business judgment was tainted by Defendant's alleged anticompetitive conduct, Defendant's motion for summary judgment on Count 15 is **GRANTED**.

[*1067] E. DISPARAGEMENT and TORTIOUS INTERFERENCE

Counts 16, 17 and 18 concern Servicetrends' claims that Defendant falsely stated to potential customers that Plaintiff's replacement parts are inferior:

Count 16: Violation of the Lanham Act based on false and misleading statements in commercial promotion.

Count 17: Violation of the Georgia Unfair Trade Practices Act.

Count 18: Tortious interference with customer business and contracts.

1. The Legal Effect of Disparagement

Section 43(a) of the Lanham Act [HN20](#)[↑] prohibits deceitful marketing practices, including disparaging comments that misrepresent the quality of a competitor's goods.²⁰ To prove a Lanham Act charge, plaintiff must show that defendant's misrepresentations [\[**64\]](#) "were material in effect on buying decisions" and "were actually or likely injurious to plaintiffs." [Energy Four, Inc. v. Dornier Medical Sys., Inc.](#), [765 F. Supp. 724, 730 \(N.D. Ga. 1991\)](#) (Forrester, J.); see also [U.S. Healthcare Inc. v. Blue Cross](#), [898 F.2d 914, 922-23 \(3d Cir. 1990\)](#). [HN21](#)[↑] Similarly, the Georgia Uniform Deceptive Trade Practices Act provides relief for "[a] person likely to be damaged by a deceptive trade practice," but "proof of monetary damage, loss of profits, or intent to deceive is not required." [O.C.G.A. § 10-1-373](#). Finally, to the extent Plaintiff's tortious interference claim is based on disparagement, Servicetrends must show that SMS "induced a third party or parties not to enter into or continue a business relationship . . . for which the plaintiff suffered some financial injury." [Hayes v. Irwin](#), [541 F. Supp. 397, 429 \(N.D. Ga. 1982\)](#) (Vining, J.); see also [Stamps v. Ford Motor Co.](#), [650 F. Supp. 390, 402 \(N.D. Ga. 1986\)](#) (Shoob, J.) (plaintiff must prove "resulting damage to the contractual relationship").

[\[**65\]](#) Servicetrends alleges that SMS representatives stated to three potential customers that Servicetrends' replacement parts are not FDA-approved, when in fact no FDA approval is required. See Plaintiff's Answer to Interrogatory 15, Defendant's Exh. 38, p. 16. Plaintiff presents undisputed factual evidence supporting this assertion, as well as statements showing that Defendant's employees said Servicetrends' parts were different than SMS parts and were "refurbished." See McCumber Depo., Plaintiff's Exh. 17, p. 180-81, 238; Coffey Depo., Plaintiff's Exh. 32, p. 81.

Without admitting to having made any misrepresentations of fact, Defendant argues that Plaintiff "cannot prove that any of the alleged misrepresentations materially affected the buying decisions of any of the three potential customers or induced any of them not to enter into a contract with Servicetrends." Defendant's Memorandum in Support [#146], p. 2. According to Defendant, to prevail on its disparagement claims, Servicetrends must prove injury, defined by Defendant as a showing that "some prospective customer declined to do business with Servicetrends based on the alleged disparagement." [Id. at p. 4](#).

[HN23](#)[↑] While proof [\[**66\]](#) of monetary damages may not be necessary to sustain every cause of action based on Plaintiff's disparagement claim, a showing that some customer's buying decision was adversely affected is a threshold requirement for each. Even the permissive language of the Lanham Act requires plaintiff to "offer something more than a mere subjective belief that he is likely to be injured . . . he must submit proof which provides a reasonable basis for that belief. The likelihood of injury and causation will not be presumed, but must be demonstrated in some manner." [Coca-Cola Co. v. Tropicana Prod., Inc.](#), [690 F.2d 312, 316 \(2d Cir. 1982\)](#); [\[*1068\]](#) see also [Johnson & Johnson v. Carter-Wallace, Inc.](#), [631 F.2d 186, 189 \(2d Cir. 1980\)](#) ("despite the use of the word 'believes,' something more than a plaintiff's mere subjective belief that he is injured or likely to be damaged is required before he will be entitled even to injunctive relief"). Also, federal district courts in this circuit generally hold that Georgia deceptive trade practices and unfair competition counts involve the same dispositive questions as the Lanham Act. See, e.g., [Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.](#), [716 F.2d 833, 839 \(11th Cir. 1983\)](#); [\[**67\]](#) [Energy Four, Inc. v. Dornier Medical Sys., Inc.](#), [765 F. Supp. 724, 731 \(N.D. Ga. 1991\)](#).

²⁰ [HN22](#)[↑] The Lanham Act provides:

Any person who, on or in connection with any goods or services . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which --

(A) is likely to cause confusion . . . or to deceive as to the . . . approval of his or her goods . . . by another person, or
 (B) in commercial advertising or promotion, misrepresents the . . . qualities . . . of his or her or another person's goods
 . . .

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

To disprove an adverse impact on customer buying decisions, Defendant points to the fact that two of the three potential customers Plaintiff identified later entered into service agreements with Servicetrends when their contracts with SMS expired. See Coffey Depo., Defendant's Exh. 29, p. 76 (Urology Center signed Servicetrends agreement in January, 1993); Onglao Affidavit, Defendant's Exh. 5, P 3 (Sun Medical chose Servicetrends as new service provider for two Lithostars). In addition, the record shows that the third customer, Lithotripters, Inc., chose SMS for business reasons entirely unrelated to any product misrepresentations. See Jordan Depo., Defendant's Exh. 4, pp. 101, 103, 130; McCumber Depo., Defendant's Exh. 45, pp. 298-99.

Plaintiff offers no evidence tending to prove that Plaintiff's alleged misrepresentations actually influenced any customer's buying decision. The fact that two of the three parties later selected Servicetrends despite the disparaging remarks tends to show the opposite. The Court has previously considered Lithotripters, Inc.'s **[**68]** business justifications for signing service contracts with SMS, and found them persuasive. Accordingly, the Court **GRANTS** Defendant's motion for summary judgment as to Counts 16 and 17, and also on Count 18 insofar as it relies on disparagement to prove tortious interference.

2. Tortious Interference

In Count 18, Plaintiff charges that "SMS has tortiously, willfully and maliciously interfered with Servicetrends' relationships, business and contracts with customers and potential customers, proximately causing damage to Servicetrends." Complaint, P 162. Georgia law provides a cause of action for interference with contractual rights, as well as for interference with business relations.

HN24 [↑] Under Georgia law, "interference with contractual rights, such as inducing one to breach his contract with another, is an actionable tort." [Sheppard's v. Post, 142 Ga. App. 646, 647, 236 S.E.2d 680 \(1977\)](#). Tortious interference with contractual relations requires plaintiff to prove three elements: "(1) the existence of a contractual relationship; (2) interference from the defendant; and (3) resulting damage to the contractual relationship." [Stamps v. Ford Motor Co., 650 F. Supp. 390, 402 \(N.D. Ga. 1986\)](#) **[**69]** (Shoob, J.). In this case, Servicetrends does not even contend that a contract existed between Plaintiff and the three customers to whom the alleged misrepresentations were made. Thus, there is no legal or factual basis for Plaintiff's tortious interference with contractual relations charge.

HN25 [↑] To establish a claim for tortious interference with business relations, a plaintiff must prove that the defendant: "(1) acted improperly and without privilege; (2) purposefully, with malice, and with intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) plaintiff suffered some financial injury as a result." [Southern Business Communications, Inc. v. Matsushita Elec. Corp., 806 F. Supp. 950, 962 \(N.D. Ga. 1992\)](#) (Carnes, J.) (citing [DeLong Equip. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1518 \(11th Cir. 1989\)](#)).

As noted above, Servicetrends has produced no evidence that it lost business or suffered cognizable financial injury as a result of Defendant's alleged misrepresentations. Therefore, under Georgia law, Plaintiff cannot recover for tortious **[**70]** interference with business relations. See [Jenkins v. General Hosp. of Humana, 196 Ga. App. 150, 151, 395 S.E.2d 396 \(1990\)](#) (affirming summary judgment because "plaintiff is unable to name a single patient he has lost or failed to acquire due to the actions of defendants, nor is plaintiff able to show any financial loss **[*1069]**"). Defendant's motion for summary judgment on Count 18 based on conduct other than disparagement is **GRANTED**.

F. DAMAGES

Plaintiff seeks treble damages under [section 4](#) of the Clayton Act, [15 U.S.C. § 15](#), with respect to every antitrust count. Defendant moves for summary judgment as to damages, based on the contention that "the anticipated self-serving testimony of Servicetrends' president, will not meet the requirement that the amount of damages be proven by 'substantial evidence' consisting of more than 'speculation and guesswork.'" Defendant's Memorandum in Support [#145], p. 4 (citation omitted).

Plaintiff argues that "the current record contains more than enough evidence to provide a reasonable foundation from which a jury could calculate Servicetrends' damages." Plaintiff's Memorandum [**71] in Opposition [#155], p. 99. Servicetrends supports its contention with references to the testimony of its damages expert and its president, and by comparing its experience in the Lithostar service market to the development of the service market for the Dornier HM-3. Also, Plaintiff cites testimony relating to the experiences of other "independent service organizations" competing in the medical equipment markets for x-ray service and for CT Scan service. See [*id. at pp. 102-03.*](#)

HN26[Plaintiff's burden of proof concerning the amount of antitrust damages is "much less severe" than the burden of proving the antitrust violation and its causal relation to plaintiff's injury. [*Graphic Prod. Distrib., Inc. v. Itek Corp., 717 F.2d 1560, 1579 \(11th Cir. 1983\)*](#). "While a jury may not base its judgment on speculation or guess-work . . . all that can be required is a just and reasonable -- albeit necessarily imprecise -- estimate based upon relevant data." *Id.* As the Supreme Court noted:

HN27[In the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency [**72] to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, *not shown to be attributable to other causes*, that defendants' wrongful acts had caused damage to the plaintiffs."

[*Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 1576-77, 23 L. Ed. 2d 129 \(1969\)*](#) (quoting [*Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574, 579, 90 L. Ed. 652 \(1946\)*](#)) (emphasis added).

At this stage of the proceedings, the Court is satisfied that Plaintiff has made the minimal evidentiary showing necessary to avoid summary judgment on the issue of damages. Questions pertaining to the precise amount can await the jury's informed determination. Defendant's motion for summary judgment with respect to damages is therefore **DENIED**.

IV. PLAINTIFF'S MOTION FOR JUDGMENT ON COUNTERCLAIMS

Defendant filed counterclaims asserting various business torts in a consolidated declaratory judgment action between Plaintiffs Servicetrends and Steven DeBrock and Defendant SMS, 92-CV-1915-JTC. In this antitrust action, [**73] 93-CV-299-JTC, SMS filed counterclaims alleging several antitrust violations, along with a Lanham Act and unfair trade practices claim. Plaintiffs now move the Court for summary judgment on each of Defendant's counterclaims.

A. SUPPLEMENTAL FACTS AND ANALYSIS

On March 31, 1993, T<2> Medical, Inc. ("T<2>") acquired a 100% ownership interest in Servicetrends. T<2> is a publicly held company with diversified interests in alternate site health care treatment services. According to the company's annual report for fiscal year 1993, T<2> owned majority interests in 12 lithotripsy partnerships and a minority interest in one other. These lithotripsy ventures operate a total of 25 lithotripsy machines. See Defendant's Exh. 1 [#148].

1. Geographic Market

SMS wants to redefine the geographic boundaries of the relevant product [*1070] markets to suit its counterclaims. Despite the fact that Defendant's expert testified that the relevant geographic market is the United States, see Shapiro Depo., Plaintiff's Exh. A, p. 64, Defendant now suggests that Servicetrends committed antitrust violations in various *local* markets, specifically "the State of Georgia and the Chattanooga, Tennessee [**74] metropolitan area," as well as "Minnesota, North Dakota and South Dakota." ²¹ Plaintiff appropriately notes that

²¹ Although evidence at trial may force a different conclusion, Mr. Shapiro persuasively explained the relevant geographic market in this case:

Defendant's strategy may backfire, since SMS -- the market's only other competitor -- must have monopoly power in the balance of the country.

[**75] The Court rejects Defendant's attempt to redefine the geographic market. Having emphasized its national presence to justify Lithotripters, Inc.'s willingness to sign multi-year service contracts, having urged the Court that Servicetrends is a demonstrably successful and viable competitor in the national markets for Lithostar parts and service, and having offered no evidence to contradict its own expert's testimony, the Court finds Defendant's current attempt to narrow the size of the relevant geographic market wholly without merit.

2. Product Market

The Court analyzed Defendant's motion for summary judgment on the basis of three uncontested product markets: (1) the market for second generation lithotripters; (2) the market for Lithostar parts; and (3) the market for Lithostar service contracts. On the basis of Defendant's contention -- supported by Plaintiff's expert's testimony -- that there is no product market for *all* lithotripters, the Court granted Defendant summary judgment with respect to Plaintiff's antitrust claims pertaining to a product market consisting of all lithotripters.

Nevertheless, SMS does not necessarily agree that the relevant product market consists [**76] of the three sub-markets designated by Servicetrends. Defendant explains:

Servicetrends contends that there exist antitrust markets properly defined as the markets for servicing Lithostars or lithotripters. Siemens Medical denies that such markets exist. It contends that there is a market for lithotripsy systems, which includes sale of equipment and replacement parts and service. Siemens Medical has no power in such a market.

Defendant's Memorandum in Opposition, p. 12 n.9.

Because the assertion that a single product market exists for *all* lithotripters would be inconsistent with Defendant's previous position, as well as unsupported by any factual evidence, the Court assumes Defendant means to argue that all three products are part of one "systems market" restricted to parts and service for second generation machines.

3. Market Power

Defendant's obvious problem in defining any product market intended to show Plaintiff's monopoly power is that SMS is a well established and much larger company. Consequently, SMS would strain credibility by claiming that the smaller Servicetrends has monopoly power in a national market while SMS has none. Only by introducing a geographic [**77] restriction formulated to encompass those areas where Servicetrends' customers are concentrated can SMS hope to prove Plaintiff's market power. For example, although SMS services approximately 85% of the installed Lithostars in the United States, Defendant argues that T<2> owns, and [*1071] Servicetrends services, all but two (86%) of the Lithostars operating in the Georgia-Chattanooga area. On a national basis, however, Servicetrends has no more than 16% of the Lithostar service market, a market share legally insufficient to constitute either monopoly power or the dangerous probability of achieving it. See, e.g., [U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 \(11th Cir. 1993\)](#).

4. Antitrust Injury

I believe Siemens competes in a US market for lithotripsy systems. . . . In this case, its really supply-side substitutability that drives the geographic definition of the market. Specifically, a manufacturer who is selling lithotriptors [sic] in one part of the country can quite easily make them available for sale or make a system available for sale in another part of the country.

Shapiro Depo., Plaintiff's Exh. A, p. 65. It follows that the geographic market for the associated parts and service is the same: "when I said a manufacturer who is selling in one part of the country can sell in another part of the country . . . they would have to make the parts and service available in that other part of the country." [Id. at pp. 65-66.](#)

This is the same geographic market identified by Servicetrends' expert, Roger Noll. See Plaintiff's Exh. B, p. 10.

Servicetrends contends that Defendant SMS has not established sufficient antitrust injury to recover damages or to obtain injunctive relief under [sections 4](#) and [16](#) of the Clayton Act. See [15 U.S.C. §§ 15](#) and [26](#). The Court agrees.

In [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#), and in [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 \(1986\)](#), [\[**78\]](#) the Supreme Court held that [HN28](#)[↑] private plaintiffs bringing claims under [§ 7](#) must show injuries caused by a decrease in competition. Examining the requirements of [§ 4](#), the *Cargill* Court noted:

In *Brunswick* . . . we held that [HN29](#)[↑] plaintiffs seeking treble damages under [§ 4](#) must show more than simply an "injury causally linked" to a particular merger; instead, "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 the defendant's acts unlawful."

[Cargill, 479 U.S. 104, 107 S. Ct. 484, 489, 93 L. Ed. 2d 427 \(1986\)](#) (quoting [Brunswick, 429 U.S. 477, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 \(1977\)](#)). Although [§ 16](#), providing injunctive relief, differs from [§ 4](#) in some respects, under both sections "the plaintiff must still allege an injury of the type the antitrust laws were designed to prevent." [Id. at 490.](#)

The antitrust laws were designed to promote competition. Prior to Servicetrends' entry [\[**79\]](#) into the service market, SMS was the only supplier of Lithostar parts and service. SMS now complains that it "has been injured by the loss to Servicetrends of ten service contracts which would have produced annual revenue of at least \$ 1 million." Defendant's Memorandum in Opposition [#152], p. 22. Like the unwilling competitors in *Brunswick*, SMS wants to protest that Servicetrends has introduced an unwelcome element of competition, thereby depriving Defendant of the substantial profits normally enjoyed by the only vendor in the marketplace. The Court finds no evidence to indicate that this unsubstantiated \$ 1 million loss of revenue resulted from Servicetrends' anticompetitive conduct, and not simply from increased competition.

B. DEFENDANT'S ANTITRUST COUNTERCLAIMS

With this introduction, Defendant's antitrust counterclaims can be easily addressed.

1. [Section 7](#) of the Clayton Act

In Count 1, Defendant SMS alleges that T<2>'s purchase of lithotripsy operating companies and Servicetrends substantially lessens competition "in the market for ownership and operation of lithotripsy equipment in certain geographic areas." Counterclaim [#22], P 35. In addition, Count 1 alleges [\[**80\]](#) that T<2>'s acquisition of Servicetrends may substantially lessen competition "in the alleged market for repair and service of lithotripters in certain geographic areas." Counterclaim [#22], P 36.

[Section 7](#) of the Clayton Act prohibits corporate acquisitions of stock that have a reasonable probability of lessening competition within a market:

[HN30](#)[↑] No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly the whole or any part of the stock or other share capital . . . where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

[15 U.S.C. § 18](#). Perhaps because the statute is entitled "Acquisition by one corporation of stock of another," and explicitly refers to the purchase of "stock or other share capital," the parties do not argue the significance of T<2>'s acquisition of lithotripsy partnership interests.

[\[*1072\]](#) Plaintiff maintains that because T<2>, the acquiring corporation, is not a party to this action, Defendant cannot state a claim for relief under [§ 7](#). [\[**81\]](#) Defendant responds that the Court has sufficient power over Servicetrends to fashion an appropriate remedy. Having determined that Defendant has shown neither antitrust

injury nor a lessening of competition in a national product market, the Court need not address these points. Plaintiff's motion for summary judgment on Count 1 is **GRANTED**.

2. Conspiracy to Monopolize

Count 2 alleges that Servicetrends, T<2>, and Servicetrends' president Warlick conspired to monopolize the lithotripter service market in certain geographic markets. The parties appear to agree that the so-called *Copperweld* doctrine prevents recognizing a conspiracy between the three parties after T<2>'s acquisition of Servicetrends, see *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 2741-42, 81 L. Ed. 2d 628 (1984) (a parent and its wholly owned subsidiary cannot conspire), but Defendant claims that the conspiracy began prior to the acquisition. The alleged conspiracy, says SMS, violates Sections 1 and 2 of the Sherman Act.

This circuit has defined the elements of a conspiracy to monopolize under both Section 1 and 2: [**82]

HN31[] The elements of a conspiracy to monopolize under Section 2 are: (1) an agreement to restrain trade, (2) deliberately entered into with the specific intent of achieving a monopoly rather than a legitimate business purpose, (3) which could have had an anticompetitive effect, and (4) the commission of at least one overt act in furtherance of the conspiracy. . . . The elements of a conspiracy to restrain trade under Section 1 are (1) an agreement to enter a conspiracy (2) designed to achieve an unlawful objective. . . . The plaintiff must also prove (3) "actual unlawful effects [or] facts which radiate a potential for future harm" to competition.

U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 1001 (11th Cir. 1993). However, there is no requirement that a conspiracy have a dangerous probability of success. *Id.* Thus, conspiracy under Section 2 requires specific intent, an agreement, and at least one overt act. Section 1 does not demand intent evidence, but requires proof of an anticompetitive effect.

SMS characterizes pre-merger discussions between T<2> and Servicetrends as a conspiracy to gain control of the market for Lithostar service [**83] in the state of Georgia. Aside from having rejected Defendant's geographic limitation, the Court has reviewed the cited testimony and finds only legitimate business concerns for increased efficiency, better capitalization, and cost savings motivating the merger. See Allegra Depo., pp. 10, 23-24, 70-71; Wheelock Depo., pp. 18, 97, 203, 207-08; DeBrook Depo., pp. 142, 171-73; Warlick Depo., pp. 122-24, 155, 159, 196-97. Defendant points to no evidence establishing a specific intent to create a monopoly or proof of an anticompetitive effect. "Federal **antitrust law** requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted . . . legitimately." *U.S. Anchor*, 7 F.3d at 1002. Therefore, Plaintiff's motion for summary judgment on Count 2 is **GRANTED**.

3. Monopolization and Attempt to Monopolize

Count 3 alleges that Plaintiffs "possess monopoly power in the market for ownership and operation of lithotripters in the State of Georgia and the Chattanooga metropolitan area, Minnesota, North Dakota and South Dakota" and that Plaintiffs "possess market power in the alleged market for repair and service in the [**84] State of Georgia" and in Chattanooga. Counterclaim [#22], P 45. Count 4 alleges an attempt to monopolize certain geographic areas throughout the United States. Counterclaim, P 50.

First, there is no market for ownership and operation of lithotripters involved in this case -- T<2> is not a party and Servicetrends neither owns nor operates lithotripters. Second, the Court has determined that Servicetrends does not possess the requisite market power to monopolize or to render dangerously probable an attempt to monopolize any relevant product market in the geographic United States. Although Defendant correctly [*1073] states that the determination of the relevant product market is a question of fact, the record raises no genuine dispute of fact regarding the national bounds of the product markets at issue. Accordingly, Plaintiff's motion for summary judgment on Counts 3 and 4 is **GRANTED**.

C. DEFENDANT'S BUSINESS TORT COUNTERCLAIMS

1. Disparagement and Unfair Trade Practices

Counts 5 and 6 assert that Servicetrends violated the Lanham Act and the Georgia Unfair Trade Practices Act by making disparaging statements about the quality of Defendant's products. See Part III.E. (discussing [***85**] the two Acts). Defendant SMS alleges Warlick falsely told customers that SMS made unauthorized and illegal promises with respect to Lithostar service contracts. See Warlick Depo., Defendant's Exh. 17, pp. 94, 97-101; Warlick-Schmidt Conversation, Defendant's Exh. 29. The Court has reviewed these exhibits and finds no reasonable basis for Defendant's claim. Defendant also says Servicetrends falsely told customers that Servicetrends sells replacement parts purchased from the same sources as Siemens' parts. See DeBrock Letter to The Urology Center, dated January 15, 1993, Defendant's Exh. 30 ("In fact, every part we have ever utilized has been purchased directly from Siemens or from one of their vendors.").

Plaintiff replies that DeBrock's statement regarding Servicetrends' source of Lithostar component parts was true when made. Although the uncontested facts show that Servicetrends regularly purchases components from OEM's instead of buying the complete modular replacement parts from Siemens, an examination of DeBrock's testimony establishes that, at the time the suspect statement was made, DeBrock was buying parts from the same manufacturers that sold the parts to SMS. For [***86**] example, DeBrock purchased spark gaps from a Massachusetts company known as EE&G. EE&G's technical department confirmed to DeBrock that the spark gap ordered by Servicetrends was exactly the same part EE&G supplied to SMS. See DeBrock Depo., Plaintiff's Exh. F, pp. 366-67; see also pp. 393-94.

Defendant presents no evidence that DeBrock's statement to the Urology Center regarding the sources of Servicetrends' parts was false when made. Therefore, Plaintiff's motion for summary judgment on Counts 5 and 6 is **GRANTED**.

2. Misappropriation of Confidential Information

Count 8 alleges that Plaintiffs maliciously misappropriated trade secrets and confidential information in violation of common law and the Georgia Trade Secrets Act of 1990. Counterclaim, P 68. Count 10 charges "breach of duty of loyalty," based on the circumstances surrounding DeBrock's departure from SMS to join Servicetrends and his subsequent disclosure of purportedly confidential information. See Counterclaim, PP 76-79.

HN32[] The Georgia Trade Secrets Act of 1990, [O.C.G.A. §§ 10-1-760-67](#), supersedes other civil remedies for misappropriation of a trade secret. § 10-1-767(a). The Act defines a "trade secret" [***87**] as information -- including technical or nontechnical data, financial plans, or customer lists -- that derives economic value from not being known or readily ascertainable to others, and that "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." § 10-1-761(4).²² The Georgia statute provides [***1074**] relief in the form of an injunction, damages, and award of attorneys' fees. §§ 10-1-762, 763, 764.

²² Georgia courts have long held that trade secrets are protectable only when they truly are secrets. The Georgia Supreme Court described the typical plaintiff's allegations in a trade secrets case in *Vendo Co. v. Long*:

The allegations in this connection are in substance: that the defendant became familiar with plaintiff's trade secrets, experimental data, and other confidential information concerning names of customers, equipment, prices of machines, price quotations to customers, new models of plaintiff's machines not yet on the market and their prices, method of doing business and procedures

The allegations in this case respecting trade secrets and confidential information seem to encompass practically every phase of the plaintiff's business But in none of these does there appear to be any element of secrecy or confidential information that is peculiar to the plaintiff's business and known only to it and its employees.

[*Vendo Co. v. Long*, 213 Ga. 774, 776-77, 102 S.E.2d 173 \(1958\)](#); see also [*Textile Rubber & Chem. Co. v. Shook*, 243 Ga. 587, 589, 255 S.E.2d 705 \(1979\)](#) (Georgia definition of a trade secret requires that it is "known only to its owner and those of his employees to whom it must be confided in order to apply it to the uses intended") (citation omitted).

[**88] The facts show that DeBrock was employed by SMS in 1987 and became a Lithostar service engineer in Atlanta in October, 1990. DeBrock Depo., Defendant's Exh. 2, pp. 24-25, 56-58, 81-82. DeBrock was an at-will employee who never had an employment contract for a definite period of time. DeBrock Affidavit, Plaintiff's Exh. C. He left SMS' employment in July of 1992, and is now Servicetrends' Vice President of Technical Operations. DeBrock Affidavit, Plaintiff's Exh. C. While at SMS, DeBrock received extensive lithotripsy and Lithostar training. DeBrock Depo., pp. 24-25; 65-79.

Although Defendant describes an elaborate system for classifying and handling designated confidential information, SMS does not deny Plaintiff's well documented assertion that "all of the information that DeBrock and other field service engineers were provided, such as manuals or wiring diagrams, was also provided to SMS customers." See Transcript of Proceedings, Plaintiff's Exh. G, p. 10; DeBrock Depo., pp. 595-96.²³ In at least one instance, SMS provided a customer's employees comprehensive training in servicing a Lithostar. Rankin Depo., Defendant's Exh. 39, p. 58. In response to a request for a water [**89] cleaning kit, Servicetrends itself received a schematic diagram of the water system and shockheads, complete with repair instructions, all marked "proprietary data" and "confidential." Transcript of Proceedings, Plaintiff's Exh. H, pp. 16-18.

The Court concludes from the evidence presented that Defendant's wide distribution of the allegedly confidential technical data removes any legal protection it might otherwise have had as trade secrets. Moreover, undisputed facts also prove that DeBrock returned all manuals, drawings, notes and client lists to SMS before his departure. DeBrock Depo., Plaintiff's Exh. F, pp. 185-86; Christensen Depo., Plaintiff's Exh. L, p. 149. DeBrock, [**90] then, took from SMS only the technical information residing in his mind.

HN33 [↑] Trade secrets need not be in the form of written data to warrant protection, see *Avnet, Inc. v. Wyle Labs., Inc.*, 263 Ga. 615, 619, 437 S.E.2d 302 (1993), but Georgia law generally does not prevent a departing employee from using the skills and information he acquired at work. "A person who leaves the employment of another has a right to take with him all the skill he has acquired, all the knowledge he has obtained, all the information that he has received, so long as nothing is taken that is the property of the employer." *Vendo Co. v. Long*, 213 Ga. 774, 778, 102 S.E.2d 173 (1958); see also *Smith v. Mid-State Nurses, Inc.*, 261 Ga. 208, 209, 403 S.E.2d 789 (1991) (employer's customer list held in employee's memory was not protectable as a trade secret). Thus, DeBrock was under no obligation to keep the skills and customer knowledge he acquired at SMS confidential, first because SMS did not maintain the confidentiality of its technical data, and second because the law does not [**91] prohibit the exploitation of an employee's accumulated knowledge. It follows that Servicetrends could not have induced DeBrock to breach a confidentiality obligation. The Court finds that Plaintiffs Servicetrends and DeBrock did not misappropriate confidential information and **GRANTS** Plaintiff's motion for summary judgment on Counts 8 and 10.

3. Tortious Interference

Count 7 alleges "tortious interference with employment relationships," claiming that Plaintiffs sought to maliciously injure Defendant's business by attracting away key employees. [*1075] Counterclaim [#122], PP 64, 65. Count 9 claims that Servicetrends intentionally interfered with SMS' ongoing business and contractual relationships with its customers. Counterclaim, P 73.

Count 7 rests on Defendant's contention that Servicetrends is illegally hiring Defendant's key employees. Under the broader category of interference with business or contractual relations, Georgia courts have held that interference with an employment relationship can be tortious, even if employment is at-will. See, e.g., *Ott v. Gandy*, 66 Ga. App. 684, 684, 19 S.E.2d 180 (1942). **HN34** [↑] However, a competing employer [**92] is not liable for hiring away an at-will employee so long as it does not use "wrongful means" and the recruiting company's purpose is to advance competition. See *E.D. Lacey Mills, Inc. v. Keith*, 183 Ga. App. 357, 363, 359 S.E.2d 148 (1987). Georgia law also permits an individual to freely compete with his previous employer: "The law grants a former employee a privilege to

²³ See also Haist Affidavit, Plaintiff's Exh. J, P 4 ("There is no information concerning the Lithostar which is kept secret from customers purchasing the equipment. A customer is given the same service manual with a purchased Lithostar that service technicians such as myself are supplied with."); Conner Affidavit, Plaintiff's Exh. K (same).

compete with his former employer for customers and employees." *Id.* [HN35](#) Thus, the law permits destruction of a competing business by attracting away its customers in the fair course of trade, but not "destruction or substantial injury by means of attracting away all or a large percentage of personnel upon whom it must depend to function, especially if other circumstances such as the use of confidential information . . . are involved." *Id. at 364* (quoting *Architectural Mfg. Co. v. Airotec, Inc.*, 119 Ga. App. 245, 251, 166 S.E.2d 744 (1969) (internal punctuation omitted)). In the absence of malicious conduct, Servicetrends and DeBrock are entitled as a matter of law "to engage in direct [**93] competition, to hire others who formerly worked for the employer, even to persuade them that their company offers better economic opportunity, so long as they interfere with no contractual rights." *Id. at 250-51.*

Defendant SMS -- itself a wholly-owned subsidiary of a German parent -- is a large company, with annual sales of \$ 1.8 billion, seven subsidiary corporations, and 26 district offices. MacKinnon Depo., Plaintiff's Exh. V, pp. 18-19, 41, 105. Each district office is staffed with field service engineers. *Id. at 105.* SMS' Atlanta district office has five service supervisors and approximately 28 field service engineers working on a variety of Siemens equipment. Christensen Depo., Plaintiff's Exh. L, pp. 10-17. Conversely, Servicetrends is a small company, with service and parts revenue just over \$ 2 million and a total staff of 21 persons. Bennett Depo., Defendant's Exh. 9 [Motion for Summary Judgment], p. 86; DeBrock Affidavit, Plaintiff's Exh. C.

Four Servicetrends employees, including DeBrock, are former SMS employees. Servicetrends hired Daniel Jordon, previously a SMS field service engineer located in Utah. Jordon, now based [**94] in Sacramento, California, works exclusively on servicing Dornier HM-3 machines for Servicetrends. Jordon Depo., Plaintiff's Exh. I, pp. 59-66, 81. Rob Austin left his position as an SMS field service engineer in Atlanta and now works in Milwaukee servicing Lithostars for Servicetrends. Austin Depo., Plaintiff's Exh. N, pp. 10-11, 34. The final transplanted employee, Alfredo DeLeon, was laid off by SMS in September, 1992, six months before Servicetrends hired him. DeBrock Depo., Plaintiff's Exh. F, pp. 223-24.

On the basis of the record before it, the Court concludes with confidence that SMS does not face the "destruction or substantial injury" addressed by Georgia law and experienced by Lacey Rug Mills, for example, when defendants hired away 17 of Lacey's 21 sales representatives. Although SMS may resent the departures of its three engineers, and may even feel the pinch of competition in a small measure relative to its size, it presents no evidence that Servicetrends engaged its "key" employees for any purpose other than fair competition. It does not seem unusual, or illegal so far as this Court can determine, that the employer of a corps of maintenance engineers operating alone [**95] in an obviously lucrative service market would be the target of recruiting efforts by invading competitors. Plaintiff's motion on Count 7 is **GRANTED**.

Count 9 maintains that Plaintiffs have interfered with SMS' customer relationships. As the discussion above indicates, an employee's knowledge of the firm's customers [*1076] is not a trade secret. See *Textile Rubber & Chem. Co. v. Shook*, 243 Ga. 587, 592, 255 S.E.2d 705 (1979). Here, DeBrock and Servicetrends are entitled to competitively exploit their knowledge of Lithostar customers gained as a result of employment with SMS. See, e.g., *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1519 (1989) (customer lists are not protectable from post-employment disclosure and use) (citing Georgia cases). In fact, the law provides a privilege to foster such competition. See *E.D. Lacey Mills, Inc. v. Keith*, 183 Ga. App. 357, 362-63, 359 S.E.2d 148 (1987) (noting also that an employee breaches no fiduciary duty to an employer simply by making plans to enter a competing business while he is still employed).

The [**96] elements of tortious interference with contractual rights and with business relations are set out in Part III.E.2. above. In this instance, the Court finds no evidence that Plaintiffs acted improperly or without privilege to interfere with SMS' contractual or business relationships with customers. SMS does not even claim that a customer breached its service contract as a result of Servicetrends' successful sales efforts. The Court therefore finds no merit to Defendant's Count 9 and **GRANTS** Plaintiff's motion for summary judgment.

4. Unjust Enrichment

Count 11 charges unjust enrichment, as a result of the unlawful conduct described in Counts 1-10. Counterclaim, P 82.

All counterclaims having been dismissed on summary judgment, Defendant's claim of unjust enrichment is without foundation. Plaintiff's motion for summary judgment is **GRANTED**.

V. PLAINTIFF'S MOTION TO ADD DEFENDANTS

In May of 1993, Plaintiff moved the Court to amend its Complaint to add as new Defendants Siemens AG, Lithotripters, Inc., and William Jordan, the Chief Executive Officer of Lithotripters, Inc. [#50]. Following a hearing to resolve numerous outstanding discovery disputes in October, 1993, the **[**97]** Court deferred action on Plaintiff's motion to add defendants.

In essence, Plaintiff maintains that Siemens AG controls the pricing and availability of the Lithostar and its replacement parts, and that Lithotripters, Inc. and Jordan are engaged in a conspiracy with Defendant to "boycott" Servicetrends. Plaintiff argues that Rule 20, or alternatively Rule 19(a), operate so as to require joinder of these three absent parties.

Having reviewed the record in exhausting detail, the Court is convinced that joining these additional parties is not necessary to obtain Plaintiff's complete relief. Moreover, adding defendants would further complicate trial preparation and result in needless expense and delay. The parties have completed extensive discovery and have produced sufficient information to convince the Court that Plaintiff is capable of pursuing its remaining claims without adding defendants. Therefore, Plaintiff's motion is **DENIED**.

VI. SUMMARY

The Court has decided the following matters:

Defendant's Motion for Summary Judgment:

Monopolization and Attempt,	
Counts 6, 9, 10, 12, 13	GRANTE D
Counts 5 and 8, [as to predatory pricing]	DENIED
Tying Claims, Counts 1, 2, 3, 4	GRANTE D
Predatory Pricing Claims,	
Counts 7 and 11	DENIED
Exclusive Dealing, Count 14	GRANTE D
Concerted Refusal to Deal, Count 15	GRANTE D
Disparagement, Counts 16 and 17	GRANTE D
Tortious Interference, Count 18	GRANTE D
Damages	DENIED

Plaintiff's Motion for Summary Judgment:

Defendant's Motion for Summary Judgment:

Clayton Act § 7, Count 1	GRANTE D
Conspiracy to Monopolize, Count 2	GRANTE D
Monopolization and Attempt, Counts 3 and 4	GRANTE D
Disparagement and Unfair Trade Practices, Counts 5 and 6	GRANTE D
Misappropriation of Confidential Info., Counts 8 and 10	GRANTE D
Tortious Interference, Counts 7 and 9	GRANTE D
Unjust Enrichment, Count 11	GRANTE D
Plaintiff's Motion to Add Parties	DENIED

[**98] **SO ORDERED**, this 21 day of March, 1994.

JACK T. CAMP

UNITED STATES DISTRICT JUDGE

End of Document



Carlson & Erickson Builders v. Lampert Yards

Court of Appeals of Wisconsin

November 23, 1993, Submitted on briefs ; March 22, 1994, Decided ; March 22, 1994, Filed
No. 93-0195

Reporter

183 Wis. 2d 220 *; 515 N.W.2d 305 **; 1994 Wisc. App. LEXIS 457 ***; 1994-1 Trade Cas. (CCH) P70,569

Carlson & Erickson Builders, Inc., Plaintiff-Respondent-Cross-Appellant, v. Lampert Yards, Inc., Portside Properties, Inc., and Door County Material Specialists, Inc., Defendants-Appellants-Cross-Respondents

Subsequent History: [***1] Petition to review granted.

Prior History: Appeal and Cross-Appeal from an order of the circuit court for Door County: John D. Koehn, Judge.

Disposition: *By the Court.* -- Order affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

Core Terms

burden of proof, discount, trial court, damages, secret, purchasers, unearned, convincing, buyer, terms and conditions, new trial, unfair

LexisNexis® Headnotes

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

HN1[] Regulated Practices, Trade Practices & Unfair Competition

Wis. Stat. § 133.05 provides in part: (1) The secret payment or allowance of rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, or the secret extension to certain purchasers of special services or privileges not extended to all purchasers purchasing upon like terms and conditions, such payment, allowance or extension injuring or tending to injure a competitor or destroying or tending to destroy competition, is an unfair trade practice and is prohibited. (2) No person may induce, solicit or receive anything of value that is prohibited under subdivision (1). (3) Any person knowingly violating §133.05 may be fined not more than \$ 25,000 or imprisoned in the county jail for not more than one year or both.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] Public Enforcement, State Civil Actions

183 Wis. 2d 220, *220L⁵15 N.W.2d 305, **305L⁴994 Wisc. App. LEXIS 457, ***1

Wis. Stat. § 133.04 provides in part: (1) No person may discriminate, either directly or indirectly, in price between different purchasers of commodities of like grade and quality, for the purpose or intent of injuring or destroying competition in any level of competition or any person engaged therein. (2) Any person violating § 133.04 may be fined not more than \$ 25,000 or imprisoned in the county jail for not more than one year or both.

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

Governments > Legislation > Statute of Limitations > General Overview

[HN3](#) [down] **Private Actions, Remedies**

Wis. Stat. § 133.18(1)(a) provides that, except as provided under § 133.18(1)(b), any person injured, directly or indirectly, by reason of anything prohibited by Wis. Stat. ch. 133 may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees. Any recovery of treble damages shall, after trebling, be reduced by any payments actually recovered under Wis. Stat. § 133.14 for the same injury.

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

Evidence > Burdens of Proof > Clear & Convincing Proof

[HN4](#) [down] **Private Actions, Remedies**

Civil damage claims alleging violations of Wis. Stat. §§ 133.04 and 133.05 require the "middle" standard of proof: clear, satisfactory and convincing evidence.

Contracts Law > Defenses > Ambiguities & Mistakes > Mutual Mistake

Evidence > Inferences & Presumptions > General Overview

[HN5](#) [down] **Ambiguities & Mistakes, Mutual Mistake**

Wisconsin courts require the middle burden of proof where there may be a finding against a defendant who will be subjected to the stigma attached to the commission of certain classes of acts. This requirement extends to civil actions that involve fraud, undue influence, criminal acts, reformation, mutual mistakes, and others that public policy requires to be proved by evidence that is clear, satisfactory and convincing.

Evidence > Inferences & Presumptions > General Overview

[HN6](#) [down] **Evidence, Inferences & Presumptions**

The federal courts do not require middle burden protection in civil actions regulating commerce, even where fraud is involved.

Governments > Legislation > Interpretation

[**HN7**](#) Legislation, Interpretation

A statute is ambiguous when it is capable of being understood by a reasonably well-informed person in either of two or more senses. Even where a statute appears unambiguous on its face, it can be rendered ambiguous by its interaction and its relation to other statutes.

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

[**HN8**](#) Regulated Practices, Trade Practices & Unfair Competition

Under [Wis. Stat. § 133.05](#), a buyer must know that unearned discounts, special services or privileges are secret and not extended to all purchasers purchasing on like terms and conditions.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[**HN9**](#) Public Enforcement, State Civil Actions

[Wis. Stat. § 133.01](#) provides that the intent of Wis. Stat. ch. 133 is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices that destroy or hamper competition. It is the intent of the legislature that ch. 133 be interpreted in a manner that gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of the state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Governments > Legislation > Overbreadth

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Governments > Legislation > Vagueness

[**HN10**](#) Procedural Due Process, Scope of Protection

A statute is presumptively constitutional, and a party challenging the act has the burden of establishing unconstitutionality beyond a reasonable doubt. The void for vagueness concept rests upon the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. If a statute is so obscure that persons of common intelligence must necessarily guess as to its meaning and differ as to its applicability, it is unconstitutional. Where a great and varied number of offenses may come within a statutory category, they defy a precise statutory definition. Impossible standards of specificity are not required.

Counsel: On behalf of plaintiff-respondent-cross-appellant Lampert Yards, Inc., the cause was submitted on the briefs of *Tom Rusboldt* of *Nash, Spindler, Dean & Grimstad* of Manitowoc. On behalf of plaintiffs-respondents-cross-appellants Portside Properties, Inc., and Door County Material Specialists, Inc., the cause was submitted on the briefs of *William J. Ewald* of *Denissen, Kranzush, Mahoney & Ewald, S.C.* of Green Bay.

On behalf of plaintiff-respondent-cross-appellant, the cause was submitted on the briefs of *Robert L. Binder*, *William M. Conley* and *Lynn J. Splitek* of *Foley & Lardner* of Madison.

Judges: Cane, P.J., LaRocque and Fine, JJ. Cane, P.J. concurring. Judge Ralph Adam Fine joins in this concurrence.

Opinion by: LaROCQUE

Opinion

[*224] [**306] The defendants in an antitrust suit appeal an order partially denying their challenge to a jury verdict in favor of the plaintiff, Carlson & Erickson Builders, Inc. (C&E), a general building [***2] contractor. The jury found that Lampert Yards, Inc., a lumber supplier, and Portside Properties, Inc.,¹ [**3] a contractor in competition with C&E, violated the unfair trade practice provisions of [§ 133.05\(1\)](#) and [\(2\)](#), Stats.² [*225] Specifically, the jury found that [**307] the defendants engaged in the secret payment of unearned discounts, special services or privileges not extended to all purchasers upon like terms and conditions.³ [**4] The jury also found that Lampert violated the provisions of [§ 133.04](#),⁴ by engaging in price discrimination between [*226] different purchasers with

¹ Door County Material Specialists, Inc., Portside's corporate purchaser was also a named defendant. For purposes of discussing the issues raised on appeal, we refer to Portside and DCMS collectively as Portside.

² [HN1](#) [↑] [Section 133.05](#), Stats., provides in part:

Secret rebates; unfair trade practices. (1) The secret payment or allowance of rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, or the secret extension to certain purchasers of special services or privileges not extended to all purchasers purchasing upon like terms and conditions, such payment, allowance or extension injuring or tending to injure a competitor or destroying or tending to destroy competition, is an unfair trade practice and is prohibited.

(2) No person may induce, solicit or receive anything of value which is prohibited under sub. (1).

(3) Any person knowingly violating this section may be fined not more than \$ 25,000 or imprisoned in the county jail for not more than one year or both.

³ The jury verdict inquired only into the acts of the seller, Lampert, and not the acts of the buyer, Portside. [Section 133.05\(2\)](#), Stats., sets forth the prohibited conduct of a buyer. The jury was not asked whether Portside *induced, solicited or received* anything of value which is prohibited under sub. (1) of [§ 133.05](#).

Despite this apparent discrepancy, Portside does not reply to C&E's argument on appeal:

Portside conceded that if the jury found that Lampert had extended an unearned discount or special privilege to Portside within the meaning of [sec. 133.05\(1\)](#), then Portside "induced, solicited or received" this benefit under [sec. 133.05\(2\)](#). That is why the jury was not even asked if Portside induced, solicited or received the unearned discount or secret privilege. Having failed to object to the jury instruction below -- indeed, having acquiesced in the instructions which failed to require a showing that receipt be "knowing" -- Portside has waived any claim to the contrary on appeal. See *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333, 342 (Ct. App. 1983) (noting that court will "normally . . . not review an issue raised for the first time on appeal").

⁴ [HN2](#) [↑] [Section 133.04](#), Stats., provides in part:

intent to injure or destroy competition. The jury found that Lampert and Portside did not enter into an agreement to restrain trade as prohibited by § 133.03. The jury awarded damages in the sum of \$ 177,100. Before computing C&E's treble damages as provided in [§ 133.18\(1\)\(a\)](#),⁵ the trial court entered a remittitur order, granting C&E the option of a reduced verdict of \$ 67,907.65 (trebled) or a new trial on damages.

The defendants argue that the trial court erred by instructing the jury to apply the [***5] ordinary burden rather than the middle burden of proof, and that the evidence was insufficient to sustain the verdict. Portside separately argues: (1) [§ 133.05\(2\)](#), Stats., requires proof that it *knowingly* received benefits prohibited by [§ 133.05\(1\)](#), Stats.; and (2) the statute is unconstitutionally vague. Lampert separately argues: (1) [§ 133.05](#) violates the constitutional equal protection and the commerce clause; (2) "meeting competition" and "cost justification" defenses were erroneously denied as to the claim under [§ 133.05](#); and the "functional discount" defense was erroneously denied as to the claim under [§ 133.04](#); and (3) the trial court erred by denying its motions for summary judgment, directed verdict and judgment notwithstanding the verdict.

[*227] We conclude that the defendants were entitled to the middle burden of proof. Further, although Portside initially waived the issue, see note 3, because the matter must be retried, C&E must prove that Portside knew that any unearned discounts, special services or privileges it received were secret and that they were not extended to all purchasers on like terms and conditions. We reject the defendants' remaining arguments. [***6] Because we remand for a new trial, we also need not address C&E's cross-appeal challenging the remittitur order. We therefore [**308] reverse and remand for a new trial on both liability and damages.⁶

BURDEN OF PROOF IN ANTITRUST CLAIMS

We are convinced that [HN4](#)[↑] civil damage claims alleging violations of [§ 133.04](#) and [§ 133.05](#), Stats., require the "middle" standard of proof: clear, satisfactory and convincing evidence. Over defense objection, the trial court applied the lower or "ordinary" burden.⁷

Price discrimination; intent to destroy competition. (1) No person may discriminate, either directly or indirectly, in price between different purchasers of commodities of like grade and quality, for the purpose or intent of injuring or destroying competition in any level of competition or any person engaged therein.

(2) Any person violating this section may be fined not more than \$ 25,000 or imprisoned in the county jail for not more than one year or both.

⁵ [HN3](#)[↑] [Section 133.18\(1\)\(a\)](#), Stats., provides:

Treble damages; statute of limitations. (1) (a) Except as provided under par. (b), any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees. Any recovery of treble damages shall, after trebling, be reduced by any payments actually recovered under s. 133.14 for the same injury.

⁶ We agree with Portside's uncontested contention that it can be retried only as to the allegation that it violated [§ 133.05](#), Stats. The jury exonerated Portside of making a contract with Lampert in restraint of trade under § 133.03. Absent any conspiracy by a buyer, the prohibition against price discrimination under [§ 133.04](#) applies on its face only to a seller.

⁷ Wis JI -- Civil 200 sets forth the "ordinary" burden of proof:

The burden of proof . . . is to satisfy you to a reasonable certainty, by the greater weight of the credible evidence

By the greater weight of the credible evidence is meant evidence which when weighed against evidence opposed to it has more convincing power. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.

Wis JI -- Civil 205 sets forth the "middle" burden of proof: "The burden of proof . . . is . . . to convince you to a reasonable certainty by evidence that is clear, satisfactory, and convincing"

[***7] C&E concedes an absence of controlling Wisconsin precedent, but notes that ch. 133, Stats., is drawn [*228] largely from federal *antitrust law*, and that state courts will "look to the federal courts for guidance" where "Wisconsin case law [is] scarce." *Independent Milk Producers Co-op v. Stoffel*, 102 Wis. 2d 1, 6-7, 298 N.W.2d 102, 104 (Ct. App. 1980).

Wisconsin case law on the burden in civil actions involving crime-like torts is not scarce. That law consistently demonstrates a special interest in protecting defendants so accused, or those who face enhanced civil liability damages. **HN5** We require the middle burden where there may be "a finding against a defendant who will be subjected to the stigma attached to the commission of certain classes of acts." *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 300, 294 N.W.2d 437, 458 (1980) (requiring the middle burden in punitive damage claims) (quoting *Layton School of Art & Design v. WERC*, 82 Wis. 2d 324, 362-63, 262 N.W.2d 218, 236 (1978)). This requirement extends to "civil actions which involved fraud, [*229] undue influence, criminal acts, reformation, mutual mistakes, and others, which public policy requires to be proved by evidence which is clear, satisfactory and convincing." *Madison v. Geier*, 27 Wis. 2d 687, 692, 135 N.W.2d 761, 763 (1965).⁸

[*229] In respect to the preceding standards, ch. 133, Stats., provides for treble damages and, to that extent, it is penal and not remedial in nature. *Open Pantry Food Marts v. Falcone*, 92 Wis. 2d 807, 811, 286 N.W.2d 149, 151 (Ct. App. 1979). [*230] The choice of a given standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). Unfair trade practices are punishable as criminal conduct. *Section 133.04* deals with an "intent of injuring or destroying competition." *Section 133.05* proscribes "an unfair trade practice" of "secret payment[s] . . . tending to injure a competitor or . . . tending to destroy competition. . . ." They subject a civil violator to a stigma no less dishonorable than other tortious conduct that must be proven to an elevated degree of certainty. These defendants must therefore be held liable only upon a finding that their actions were proven by evidence that is clear, satisfactory and convincing. While this may be inconsistent with federal law,⁹ to hold otherwise would render the law of Wisconsin internally inconsistent.

[**10] [**309] ELEMENT OF KNOWLEDGE IN § 133.05, Stats.

Portside contends that failure to require a buyer *knowingly* induce, solicit or receive secret rebates, not extended to all purchasers purchasing upon like terms and conditions, permits the imposition of treble damages [*230] upon an innocent person. C&E responds that Portside abandoned this issue by failing to raise it in the trial court. It also asserts that C&E's contention is contrary to the plain language of the statute. While we agree that a waiver occurred, the same issue will no doubt arise on remand. We therefore address it.

HN7 A statute is ambiguous when it is capable of being understood by a reasonably well-informed person in either of two or more senses. *Kearney & Trecker Corp. v. DOR*, 91 Wis. 2d 746, 753-54, 284 N.W.2d 61, 65 (1979). Even where a statute appears unambiguous on its face, it can be rendered ambiguous by its interaction and its relation to other statutes. *State v. White*, 97 Wis. 2d 193, 198, 295 N.W.2d 346, 348 (1980). We conclude that § 133.05(2), Stats., is ambiguous. Subsection (3) of the statute [*231] states that any person "knowingly" violating its terms may be criminally prosecuted, while subsec. (2) contains no reference to knowledge or state of mind. Arguably this denotes, as C&E contends, that the legislature contemplated the requirement of knowledge only in criminal prosecutions.

⁸ Wisconsin's pattern jury instructions also suggest use of the middle burden in civil conspiracy claims, Wis JI -- Civil 2800; intentional interference with a contractual relationship, Wis JI -- Civil 2780; bad faith claims against insurance companies, Wis JI -- Civil 2761; and misrepresentation claims, Wis JI -- Civil 2401-2402. The supreme court has recognized the instruction committee's work as persuasive. *State v. Gilbert*, 115 Wis. 2d 371, 379, 340 N.W.2d 511, 515-16 (1983).

⁹ **HN6** The federal courts do not require middle burden protection in civil actions regulating commerce, even where fraud is involved. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (claims of fraudulent misrepresentation under the federal Securities Exchange Act may be proven by a preponderance of the evidence).

The general legislative intent expressed in [§ 133.01](#), Stats., however, suggests otherwise. That intent is to prohibit unfair business practices.¹⁰ [***12] A [*231] buyer who receives prohibited benefits, innocent of any knowledge that the seller is so acting, is not engaged in an unfair trade practice. Further, for much the same reason that the penal damages of [§ 133.18](#) require a greater than ordinary burden of proof, we conclude that [HN8](#)[] a buyer must know that unearned discounts, special services or privileges are secret and not extended to all purchasers purchasing on like terms and conditions. Finally, the nature of the practices prohibited by [§ 133.05](#), suggest that proof of the buyer's knowledge is no great barrier to a civil claim. Ordinarily, in the process of proving secret activities, the same evidence would circumstantially demonstrate the necessary knowledge.¹¹

SUFFICIENCY OF THE EVIDENCE

The defendants argue that the evidence was insufficient to support the verdict. Because we remand for a new trial, we will not address the evidence in detail. The trial court instructed the jury that the elements of [*232] price discrimination require that (1) the commodities involved in the sales being compared were of like grade and quality; (2) the prices charged were discriminatory, that is, different; (3) the price difference was for the [***13] purpose or with the intent of injuring competition or a competitor; and (4) the discriminatory pricing caused the plaintiff injury. The court instructed that the elements of proof of a secret discount are: (1) the payment or allowance of unearned discounts, [*2310] special services or privileges; (2) made in secret; and (3) that these acts injure or tend to injure a competitor or to destroy competition.

The transcript of the nine-day jury trial reveals extensive evidence on each of the preceding elements. Further, based upon our examination of the record, the trial court properly denied defense motions for summary judgment, directed verdict and judgment notwithstanding the verdict.

DEFENSES AVAILABLE TO LAMPERT

The trial court instructed the jury on a "meeting the competition" defense and a "cost justification" defense relating to the [§ 133.05](#), Stats., claim, and a "functional discount" defense as to the [§ 133.04](#) claim. Lampert argues that each of these defenses is equally applicable to both statutes. C&E responds that even if this were true, any error would be harmless because the jury rejected the defenses in relation to the claims to which they were given. Because [***14] Lampert's argument is unsupported by authority and otherwise inadequately briefed, we decline to review it. See [In re Estate of Balkus v. Security First Nat'l Bank, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 \(Ct. App. 1985\)](#).

[*233] VOID FOR VAGUENESS AND OTHER CONSTITUTIONAL ARGUMENTS

¹⁰ [HN9](#)[] [Section 133.01](#), Stats., provides:

Legislative intent. The intent of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

¹¹ C&E's evidence would tend to demonstrate that in this case. C&E refers to a public meeting between Lampert and its contractors where Lampert "falsely told contractors that all contractors received the same discount." C&E cites evidence that other contractor prices were left openly on display on a front counter except for Portside's, which were kept in Lampert's back offices, even though each was used on a daily basis. C&E refers to evidence that Lampert furnished Portside with lists reflecting Lampert's charges to other contractors on a competitively bid project, ostensibly to give Portside a competitive advantage.

Portside argues that [§ 133.05](#), Stats., is void because "unearned discounts" and "like terms and conditions" are not defined. [HN10↑](#) A statute is presumptively constitutional, and a party challenging the act has the burden of establishing unconstitutionality beyond a reasonable doubt. [Madison v. Hyland, Hall & Co., 73 Wis. 2d 364, 385, 243 N.W.2d 422, 433 \(1976\)](#). The void for vagueness concept rests upon the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. [State ex rel. Hennekens v. River Falls Police & Fire Comm'n, 124 Wis. 2d 413, 420, 369 N.W.2d 670, 674 \(1985\)](#). If the statute is so obscure that persons of common intelligence must necessarily guess as to its meaning and differ as to its [***15] applicability, it is unconstitutional. [State v. Zwicker, 41 Wis. 2d 497, 507, 164 N.W.2d 512, 517 \(1969\)](#). Where a great and varied number of offenses may come within a statutory category, they defy a precise statutory definition. See *id.* Impossible standards of specificity are not required. *Id.* (citing [Jordan v. De George, 341 U.S. 223, 231 \(1951\)](#)). Moreover, the trial court gave the defendants' requested instruction as follows:

Defendants have raised the functional discount defense to the unearned discount claim. "Functional discounts" are given by a seller to a buyer based on the buyer's performance of marketing functions for the seller's product. In this case, Portside or DCMS claim that they received the discounts because they performed certain services, including design functions, drafting of blueprints, preparation of material takeoff lists, materials cost estimates, [*234] coordinating of deliveries of building materials to construction sites, and also that they assumed the risks of error in estimating the materials necessary for construction projects, which other contractors, [***16] including the plaintiff, Carlson & Erickson, ordinarily relied on Lampert to perform.

The jury was informed that if the lower price granted to Portside was justified as a functional discount, then the jury must find for the defendants on the unearned discount claim. We conclude that Portside fails to demonstrate that the statute denies due process and is thereby void for vagueness.

Lampert raises constitutional challenges relating to the commerce clause and equal protection. Its arguments are unpersuasive, and we reject them. The remittitur order is reversed and the matter remanded for a new trial consistent with this opinion.

By the Court. -- Order affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

Concur by: CANE

Concur

CANE, P.J. (*concurring*).

I concur only for the purpose of urging that the courts reconsider having different burdens of proof in civil cases. As a former trial judge, I presided over hundreds of civil jury trials, and I seriously doubt that any juror can realistically tell the difference between the "ordinary" and "middle" burden of proof. Under the "ordinary" burden of proof, the jury is told: "The burden of proof . . . [**311] [***17] is to satisfy you to a reasonable certainty by the greater weight of the credible evidence . . ." Wis J I -- Civil 200. In comparison, under the "middle" burden of proof, the jury is told: "The burden of proof . . . is . . . to convince you to a [*235] reasonable certainty by evidence that is clear, satisfactory, and convincing . . ." Wis J I -- Civil 205. Arguably, one could contend the "ordinary" burden of proof is the higher standard.

As lawyers and judges, we somehow perceive a difference between the burden of proofs. Realistically, I say there is no difference. The important differences are the elements to be proven for liability, not the burden of proof. For those who face an enhanced civil liability or who will be subjected to a stigma if found liable, we require additional elements to be proven, such as knowledge, bad faith, conspiracy, intentional acts or misrepresentations. That should be sufficient to distinguish the various forms of civil liabilities. We should not continue to engage in this subtle difference, if any, in the burden of proofs. The courts realized this when abandoning the concept of ordinary versus gross negligence, and we should likewise [***18] abandon the concept of ordinary versus middle burden of proof.

End of Document



THK Am., Inc. v. NSK, Ltd.

United States District Court for the Northern District of Illinois, Eastern Division

March 22, 1994, Decided ; March 23, 1994, DOCKETED

Case No. 90 C 6049

Reporter

157 F.R.D. 660 *; 1994 U.S. Dist. LEXIS 18174 **; 33 U.S.P.Q.2D (BNA) 1248 ***

THK AMERICA, INC., Plaintiff, v. NSK, LTD. and NSK CORPORATION, Defendants.

Subsequent History: [\[**1\]](#) Reported at: 33 U.S.P.Q.2d (BNA) 1248 at 1260.

Costs and fees proceeding at, Application granted by, Objection overruled by *THK Am., Inc. v. NSK Co., LTD*, 157 F.R.D. 651, 1994 U.S. Dist. LEXIS 21795 (N.D. Ill., 1994)

Prior History: [THK Am. v. NSK Co., 151 F.R.D. 625, 1993 U.S. Dist. LEXIS 19147 \(N.D. Ill., 1993\)](#)

Core Terms

patent, counterclaims, discovery, antitrust, patent infringement, parties, linear, price-fixing, depositions, lawsuit, license, join, sham, translator, licensee, requests, alleges, motions, antitrust claim, motion to amend, pleadings

LexisNexis® Headnotes

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Civil Procedure > Parties > General Overview

Civil Procedure > Parties > Joinder of Parties > General Overview

[**HN1**](#) **Compulsory Joinder, Necessary Parties**

Under [Fed. R. Civ. P. 19\(a\)](#), a party is necessary where: (1) the party's absence from the litigation will preclude the court from providing complete relief for those already parties in the action, or (2) the party claims an interest relating to the subject of the action and is situated such that the disposition of the action in the party's absence may (i) impair or impede the party's ability to protect that interest, or (ii) leave any of the existing parties subject to a substantial risk of multiple or inconsistent obligations as a result of the claimed interest. Where a party meets one of these criteria, the court is required to join the party unless the court lacks jurisdiction over the party or where joinder would destroy the court's jurisdiction over the existing litigants.

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN2 Conveyances, Assignments

Generally, patent rights may be enforced in court only by the patent's owner or assignee. However, courts have recognized that an exclusive licensee having substantial patent rights qualifies as an assignee for enforcement purposes. Therefore, because the exclusive licensee has standing to sue on the patent in its own right, the patent's owner is not a necessary party under [Fed. R. Civ. P. 19\(a\)](#).

Antitrust & Trade Law > Clayton Act > Penalties

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 > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

HN3 Clayton Act, Penalties

[Section 2](#) of the Sherman Antitrust Act punishes every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states. [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > General Overview

HN4 Antitrust & Trade Law, Sherman Act

Evidence of anti-competitive intent or purpose standing alone cannot transform otherwise legitimate activity, such as the filing of a lawsuit, into "sham" litigation.

Antitrust & Trade Law > Sherman Act > General Overview

HN5 Antitrust & Trade Law, Sherman Act

Litigation is not a sham unless it is objectively baseless. A lawsuit is objectively baseless if no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that a lawsuit is reasonably calculated to elicit a favorable outcome, the suit is not subject to an antitrust challenge predicated on a charge of "sham" litigation. Only if the challenged litigation is objectively meritless may a court examine a litigant's subjective motivation. Under this second prong of the "sham" litigation analysis, a district court focuses on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor. This two-tiered analysis requires a plaintiff to disprove the challenged lawsuit's legal viability, before a court will entertain evidence of the suit's economic viability.

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

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

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

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN6 Ownership & Transfer of Rights, Assignments

Congress gave inventors the right to obtain patents on their inventions and thereby gain the right to exclude others from making, using or selling the invention, without the consent of the patent owner, for a period of 17 years. Congress specifically granted patent owners the right to commence a civil suit in order to protect their inventions.

Patent Law > Infringement Actions > Infringing Acts > General Overview

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

HN7 Infringement Actions, Infringing Acts

As patents are cloaked in a presumption of validity, a patent infringement suit is presumed to be brought in good faith.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN8 Pleadings, Amendment of Pleadings

Amendments to pleadings are liberally allowed under the Federal Rules of Civil Procedure. However, the general rule in favor of liberal amendment has been somewhat tempered in that [Fed. R. Civ. P. 15\(a\)](#) is not a license for carelessness or gamesmanship. Parties to litigation have an interest in speedy resolution of their disputes without undue expense. Generally, courts will deny leave to amend only where the party seeking leave is guilty of bad faith, dilatory motive, or undue delay. [Rule 15\(a\)](#) analysis must take into account the prejudice to the opposing party, the burdens on the judicial system, and the extent of the delay.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN9 Pleadings, Amendment of Pleadings

Prejudice in the context of [Fed. R. Civ. P. 15\(a\)](#) means undue difficulty in prosecuting or defending a lawsuit as a result of a change in tactics or theories on the part of the other party.

Counsel: For THK AMERICA INC, plaintiff: Robert Edward Wagner, James Joseph Jagoda, Alan L. Barry, Wallenstein, Wagner & Hattis, Ltd., Chicago, IL. William F. Westerman, Anderson, Kill, Olick & Oshinsky, P.C., New York, NY. John E. Daniel, Michael O'Shea, Lara Fetsco, Rogers & Wells, New York, NY. John E. Kidd, Walter G. Marple, Jr., Shea & Gould, New York, NY. James E. Armstrong, III, Armstrong, Nikaido, Marmelstein, Kubovcik & Murray, Washington, DC.

For NIPPON SEIKO K K, defendant: Daniel Michael Riess, Thomas D. Paulius, Lockwood, Alex, Fitzgibbon & Cummings, Chicago, IL. Allen H. Gerstein, Edward M. O'Toole, Anthony Nimmo, Edward M. O'Toole, Marshall, O'Toole, Gerstein, Murray & Borun, Chicago, IL. James William Teevans, Gardner, Carton & Douglas, Chicago, IL. Charles E. Miller, Scott D. Stimpson, Pennie & Edmonds, New York, NY. Daniel Robert Pastirik, Office of Intellectual Property Counsel, St. Paul, MN. For N.S.K. CORPORATION, defendant: Daniel Michael Riess, Thomas D. Paulius, Lockwood, Alex, Fitzgibbon & Cummings, Chicago, IL. Edward M. O'Toole, Marshall, O'Toole, Gerstein, Murray & Borun, Chicago, IL. James William Teevans, Gardner, Carton & Douglas, Chicago, IL. Charles E. Miller, Scott D. Stimpson, Pennie & Edmonds, New York, NY. Daniel Robert Pastirik, Office of Intellectual Property Counsel, St. Paul, MN.

For N.S.K. CORPORATION, counter-claimant: Thomas D. Paulius, Lockwood, Alex, Fitzgibbon & Cummings, Chicago, IL. James William Teevans, Gardner, Carton & Douglas, Chicago, IL. Charles E. Miller, Scott D. Stimpson, Pennie & Edmonds, New York, NY. For NIPPON SEIKO K K, counter-claimant: Thomas D. Paulius, Lockwood, Alex, Fitzgibbon & Cummings, Chicago, IL. Anthony Nimmo, Marshall, O'Toole, Gerstein, Murray & Borun, Chicago, IL. James William Teevans, Gardner, Carton & Douglas, Chicago, IL. Charles E. Miller, Scott D. Stimpson, Pennie & Edmonds, New York, NY.

For THK AMERICA INC, counter-defendant: Robert Edward Wagner, Wallenstein, Wagner & Hattis, Ltd., Chicago, IL. Michael O'Shea, Roger & Wells, New York, NY. John E. Kidd, Shea & Gould, New York, NY. For THK AMERICA INC, counter-defendant: Robert Edward Wagner, Wallenstein, Wagner & Hattis, Ltd., Chicago, IL. John E. Daniel, Michael O'Shea, Rogers & Wells, New York, NY. John E. Kidd, Shea & Gould, New York, NY.

Judges: W. Thomas Rosemond, Jr., United States Magistrate Judge

Opinion by: W. Thomas Rosemond, Jr.

Opinion

[***1260] [*660] ORDER

This action was commenced on October 17, 1990 by plaintiff THK America ("THK"). In its complaint, THK charged defendants NSK, Ltd. and NSK Corporation (collectively "NSK") with infringement of two United States patents concerning linear guides with re-circulating ball bearings. These products [*661] are primarily used in the industrial arena for the linear movement of large and heavy objects or machinery, such as industrial robots, with great precision.¹ In the period since the case was commenced, the parties have filed scores of motions and discovery requests. This order addresses the latest of these motions, a motion made by NSK on November 30, 1992, for leave to file amended answers, to join THK Co. (hereinafter "THK Japan") as a party plaintiff, and to add substantive counterclaims alleging violations of federal and state antitrust law and common law tort causes of action. **NSK's motion is denied in its entirety.**

[**2] A. NSK's Motion to Join THK Japan as a Necessary Party.

The first component of NSK's present motion seeks joinder of THK Japan as a necessary party under Rule 19(a) of the Federal Rules of Civil Procedure. **HN1** Under Rule 19(a), a party is necessary where: (1) the party's absence from the litigation will preclude the court from providing complete relief for those already parties in the action, or (2) the party claims an interest relating to the subject of the action and is situated such that the disposition of the action in the party's absence may (i) impair or impede the party's ability to protect that interest, or (ii) leave any of the existing parties subject to a substantial risk of multiple or inconsistent obligations as a result of the claimed interest.² Where a party meets one of these criteria, the court is required to join the [***1261] party unless

¹ United States Patent No. 4,040,679 expires in August of 1994, and United States Patent No. 4,253,709 expires in March of 1998.

the court lacks jurisdiction over the party or where joinder would destroy the court's jurisdiction over the existing litigants.³

[**3] **HN2**⁴ Generally, patent rights may be enforced in court only by the patent's owner or assignee.⁵ However, courts have recognized that an exclusive licensee having substantial patent rights qualifies as an assignee for enforcement purposes.⁶ Therefore, because the exclusive licensee has standing to sue on the patent in its own right, the patent's owner is not a necessary party under [Rule 19\(a\)](#). In this case, the owner (THK Japan - who has relinquished the right to sell the product in the United States to the exclusive licensee - THK America) faces no threat of having its interests compromised in the litigation, and the existing parties (i.e., the exclusive licensee and the alleged infringer) are fully able to gain complete relief.⁶

[**4] THK is an exclusive licensee of the patents at issue here. While NSK has gone to great effort to recharacterize the license granted THK by THK Japan as a "mere license,"⁷ the very language of the license clearly grants THK an exclusive right to "make, use and sell and otherwise practice the inventions covered by [the subject patents] and to sue others for past and future infringement thereof."⁸ As the language and validity of the agreement is plain and unambiguous, we decline to accept NSK's invitation to look behind the document for any ulterior motivation that might have prompted the parties to enter into it.

Furthermore, we cannot help but note that NSK's present position on the exclusivity of the license carries a strong scent of eleventh-hour litigation delay strategy. THK alleged in its complaint that it was the exclusive licensee of the subject patents.⁹ NSK raised no issue as to this fact in its answer.¹⁰ And we do not believe [**5] that it would take two years of discovery to unearth new facts concerning the exclusivity of THK's license. [*662] For NSK to now submit a motion devoting sixteen pages to argue the exclusivity of THK's license - a point that it conceded without the slightest hesitation at the time the suit was commenced - strikes us as an eleventh-hour afterthought. In any event, we find that THK Japan is not a necessary party in this litigation under [Rule 19\(a\)](#). **NSK's motion to join THK Japan is therefore denied.**

B. NSK's Motion to Amend.

The second component of NSK's present motion involves an attempt to amend its pleadings to assert four counterclaims against THK and to raise an affirmative defense of patent misuse. As with its motion to join THK Japan, NSK claims that its discovery efforts have revealed new (unspecified) facts purportedly supporting the misuse defense and four counterclaims against THK. NSK argues that in light of the liberal amendment policy embodied in Rule 15(a), [**6] these assertions provide an ample basis for the Court to permit its proposed amendments.

² [Fed. R. Civ. P. 19\(a\)](#).

³ *Id.*

⁴ [Waterman v. Mackenzie](#), 138 U.S. 252, 255, 34 L. Ed. 923, 11 S. Ct. 334 (1891).

⁵ See, [Vaupel Textilmaschinen v. Meccanica Euro Italia](#), 944 F.2d 870, 875 (Fed. Cir. 1991).

⁶ *Id.* See also, [Surgical Laser Technologies, Inc. v. Laser Industries, Ltd.](#), 1991 U.S. Dist. LEXIS 17191, 21 U.S.P.Q.2D (BNA) 1593 (E.D. Pa. 1991).

⁷ See, Def. Mem., at 15-16.

⁸ Pl. Exh. 3 (License Agreement).

⁹ Complaint P5.

¹⁰ Answer P5.

THK counters that the motions should be denied as a result of NSK's delay in raising the counterclaims, the potential for prejudice by allowing amendment at this late date, the potential burden on the judicial system, and the fact that NSK's counterclaims fail to state a cause of action. In light of the background facts and history of the litigation, it is clear that THK has the better of the argument.

NSK seeks to amend its answer to the complaint to include counterclaims charging THK with antitrust violations and various state-law infractions. NSK's first counterclaim alleges that THK has attempted to monopolize the linear guide market in violation of [Section 2](#) of the Sherman Antitrust Act.¹¹ Particularly, NSK claims that from 1988 until the time this litigation was commenced, THK and THK Japan, through their founder and president, Mr. Hiroshi Teramachi, attempted to gain NSK's participation in a plan to reduce competition in the linear guide industry by raising prices in the United States and elsewhere. NSK also alleges that THK requested that NSK withdraw from the linear guide market in [\[**7\]](#) return for THK's withdrawal from the ball screw market. NSK claims that THK attempted to coerce NSK's compliance with these anti-competitive schemes by threatening and commencing the present action, which NSK [\[***1262\]](#) characterizes as "sham" litigation. ***Such charges will not support an antitrust claim.***

[HN4](#) [↑]

Evidence of anti-competitive intent or purpose - standing alone - cannot transform otherwise legitimate activity - such as the filing of a lawsuit - into "sham" litigation.¹² [\[**8\]](#) Thus, even an "improperly motivated" lawsuit is not a sham unless such it is "baseless".¹³

[HN5](#) [↑]

Litigation is not a sham unless it is "objectively baseless". Under the *Real Estate Investors* case, a lawsuit is "objectively baseless" if no reasonable litigant could realistically expect success on the merits.¹⁴ [\[**9\]](#) If an objective litigant could conclude that a lawsuit is reasonably calculated to elicit a favorable outcome, the suit is not subject to an antitrust challenge predicated on a charge of "sham" litigation.¹⁵ Only if the challenged litigation is objectively meritless may a court examine a litigant's subjective motivation.¹⁶ Under this second prong of the "sham" litigation [\[*663\]](#) analysis, a district court focuses on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor."¹⁷ This two-tiered analysis requires a plaintiff to

¹¹ [HN3](#) [↑] [Section 2](#) of the Sherman Antitrust Act punishes "every person who shall monopolize, or **attempt to monopolize**, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." [15 U.S.C. § 2](#) (emphasis added).

¹² See, [Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.](#), [U.S. , 113 S. Ct. 1920, 1927, 123 L. Ed. 2d 611 \(1993\)](#) ("an objectively reasonable effort to litigate cannot be sham regardless of subjective intent."). See also, [Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.](#), [365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 \(1961\)](#); and [Mine Workers v. Pennington](#), [381 U.S. 657, 669, 85 S. Ct. 1585, 1593, 14 L. Ed. 2d 626 \(1965\)](#).

¹³ [Real Estate Investors, 112 S.C. 1920 at 1927](#).

¹⁴ [Id., at 1928.](#)

¹⁵ [Id.](#)

¹⁶ [Id.](#)

¹⁷ [Real Estate Investors, 113 S. Ct. at 1928](#), quoting, [Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.](#), [365 U.S. 127, 144, 81 S. Ct. 523, 533, 5 L. Ed. 2d 464 \(1961\)](#).

disprove the challenged lawsuit's *legal* viability, before a court will entertain evidence of the suit's *economic* viability.
¹⁸

THK's suit easily satisfies the first prong, precluding the Court from entertaining NSK's invitation to scrutinize THK's underlying motivations. The first prong is met because THK lawfully enjoys exclusivity rights granted to it by the patent laws of the United States.

The patent laws were enacted by Congress pursuant to *Article I, Section 8 of the United States Constitution:*

The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries ... ¹⁹

HN6[] Congress gave inventors the right to obtain patents on their inventions and thereby gain **[**10]** the right to exclude others from making, using or selling the invention, without the consent of the patent owner, for a period of seventeen years.²⁰ **And Congress specifically granted patent owners the right to commence a civil suit in order to protect their inventions.**²¹ Accordingly, regardless of whether THK intended any monopolistic or predatory purpose in filing suit, THK has statutory patent rights which it may protect in American courts.²² Moreover, **HN7**[] as patents are cloaked in a presumption of validity, a patent infringement suit is presumed to be brought in good faith.²³

[11]** Probable cause to institute this patent infringement suit requires no more than a reasonable belief on the part of THK that there is a chance that its claims may be held valid upon adjudication.²⁴ The patent laws of the United States grant THK the right to sue, and the presumption of the validity of patents provides THK with a reasonable expectation that its patent infringement claims may be held valid upon adjudication. That THK has an objectively reasonable expectation of success on the merits is further evidenced by the Magistrate Judge's February 1st, 1993 *Order* denying NSK's summary judgment motion on the issue of non-infringement.²⁵ Accordingly, since NSK's federal antitrust counterclaim appears not to state a claim upon which relief may be had, all the more reason exists for precluding its introduction into this case.

[12]** The same considerations apply to NSK's second counterclaim, which realleges the same facts as a violation of [§ 3\(3\)](#) of the **[***1263]** Illinois Antitrust Act.²⁶ Therefore, like the federal antitrust counterclaim, NSK's state

¹⁸ [Real Estate Investors, 113 S. Ct. at 1928](#).

¹⁹ [U.S. Const. Art. I, § 8](#).

²⁰ [45 U.S.C. § 154](#).

²¹ [35 U.S.C. § 281](#).

²² [Real Estate Investors, 113 S. Ct. at 1930](#).

²³ See, [Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 996, 202 U.S.P.Q. \(BNA\) 342, 351 \(9th Cir. 1979\)](#), cert. denied, **444 U.S. 1025, 100 S. Ct. 688, 62 L. Ed. 2d 659, 100 S. Ct. 689** (1980).

²⁴ [Real Estate Investors, 113 S. Ct. at 1912](#).

²⁵ At the January 19th, 1993 oral argument on NSK's summary judgment motion, THK articulated numerous issues of fact which must be determined in order for the Court to decide whether or not infringement exists. The Court concurred in THK's assessment. Moreover, because the plain language of the patent claims, themselves, is subject to several interpretations, perforce expert testimony is needed to determine how one skilled in the art would read the claims.

²⁶ Ill. Rev. Stat. 1981 Ch. 38 par. 60-3. See, [Ray Dancer, Inc., v. DMC Corp., 230 Ill. App. 3d 40, 54, 594 N.E.2d 1344, 1354, 171 Ill. Dec. 824 \(2d Dist. 1992\)](#).

antitrust counterclaim would be subject to dismissal under Rule 12(b)(6), and should not be introduced into this litigation.

[*664] NSK's third and fourth counterclaims allege that THK committed two common law torts under Illinois law. The third counterclaim alleges that THK committed the torts of commercial disparagement and unfair trade practices by disseminating false information about NSK's products.²⁷ The fourth alleges intentional interference with business relations.²⁸ Like the antitrust claims, THK claims that these counterclaims as pled could not withstand a motion to dismiss under [**13] Rule 12(b)(6). The Court agrees that NSK's skeletal allegations would wither under the scrutiny of a Rule 12(b)(6) motion. However, rather than dwell on the prospective merit of the common law claims, the Court turns to the heart of this dispute, *to-wit*: whether NSK should be foreclosed from amending its pleadings in light of its two-year delay.²⁹

NSK has noted correctly that [HN8](#)[↑] amendments to pleadings are liberally allowed under the Federal Rules of Civil Procedure.³⁰ However, the general rule in favor of liberal amendment has been somewhat tempered:

[FRCP 15\(a\)](#) is not a license for carelessness or gamesmanship. Parties to litigation have an interest in speedy resolution of their disputes without undue expense. Substantive amendments to the [Answer] just before trial are not to be countenanced [**14] and only serve to defeat these interests.³¹

Generally, courts will deny leave to amend only where the party seeking leave is guilty of bad faith, dilatory motive, or undue delay.³² [**15] The Seventh Circuit has explained that Rule 15(a) analysis must take into account the prejudice to the opposing party, the burdens on the judicial system, and the extent of the delay.³³ **All of the factors to be considered weigh in favor of THK.** These factors, coupled with the apparent lack of merit of NSK's counterclaims as pled, as well as the lack of a common factual predicate for the counterclaims **and** the claims and defenses in the patent infringement suit, compel denial of NSK's motion to amend.

NSK's motion to amend was filed on November 30, 1992. By this time, the litigation was already well over two years old.³⁴ At present, except for certain outstanding discovery motions still under advisement, fact discovery is closed, and the parties are nearly finished with expert discovery. The case is now very close to trial.

Granting NSK's motion to amend would result in considerable prejudice to THK:

[HN9](#)[↑] Prejudice in the context of [Fed. R. Civ. P. 15\(a\)](#) "means undue difficulty in prosecuting [or defending] a lawsuit as a result of a change in tactics or theories on the part of the other party."³⁵

²⁷ Counterclaim PP47-50.

²⁸ Counterclaim PP51-6.

²⁹ We do not decide whether any of NSK's four proposed counterclaims are compulsory or not. For purposes of NSK's motion, we assume that they are so.

³⁰ See, [Fed. R. Civ. P. 15\(a\)](#) (leave to amend pleadings shall be granted freely where justice requires); [Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 \(1962\)](#).

³¹ [Id., at 1379](#) (quoting, [Feldman v. Allegheny Intern, Inc., 850 F.2d 1217, 1225 \(7th Cir. 1988\)](#)).

³² [Foman, 371 U.S. at 182](#).

³³ [Fort Howard Paper Co. v. Standard Havens, 901 F.2d 1373, 1379-80 \(7th Cir. 1990\)](#).

³⁴ THK's patent infringement action was filed on October 17, 1990.

³⁵ [Tarkett, Inc. v. Congoleum Corp., 144 F.R.D. 289, 291 \(E.D. Pa. 1992\)](#), quoting, [Deakyne v. Commissioners of Lewes, 416 F.2d 290, 300 \(3d Cir. 1969\)](#).

Adding NSK's proposed counterclaims will raise entirely new issues of law. In turn, plaintiff will necessarily advance new defenses not previously [**16] raised in this litigation. That new discovery would be required is evident from NSK's numerous attempts throughout the discovery phase of this litigation to delve into matters related to its proposed counterclaim amendments, but unrelated to the pending patent infringement action.³⁶ Additionally, if leave of court is [*665] granted to NSK to file its proposed counterclaims, concurrent with that filing, NSK will serve upon THK "Counterplaintiffs' Requests (1-40) To THK America, Inc. For Production Of Documents And Things" containing 40 document requests.³⁷

[**17] As reflected by the Magistrate Judge's June 30, 1993 *Order* regarding deposition [***1264] discovery, the patent infringement action has already been unbearably long and tedious and extremely expensive for the parties. The June 30th *Order* essentially concerned the deposition discovery phase of the litigation. NSK had noticed nineteen depositions. The identity of all of the noticed deponents was obtained by NSK from THK answers to NSK interrogatories ***submitted by THK to NSK in 1991.*** Even with such knowledge, by June 30, 1993, NSK had only deposed two of the individuals identified in THK's interrogatory answers. After a discovery conference in open-court, the Magistrate Judge issued the June 30th *Order* which reduced the proposed nineteen depositions to seven. Over NSK's objections, the Magistrate Judge also set a discovery cut-off date for fact discovery. Issuance of the June 30th *Order* was necessary because "NSK had not utilized its time well"³⁸, thereby necessitating judicial intervention to add momentum to the discovery process. Permitting NSK's counterclaims would launch the parties upon another waive of discovery of unknown duration and destination.

[**18] As we have noted in a number of orders, virtually all of the relevant documents produced in discovery are in Japanese and are required to be translated into English for American counsel. The translations take considerable time. In addition, virtually all of the key depositions are in Japanese. Most have been taken in Japan. For these depositions, a triumvirate of translators is used consisting of a translator for each party and a third translator agreed upon by both parties. Translation disputes are resolved by a majority of the triumvirate. Thus, depositions are considerably longer than normal and far more expensive.

Finally, the propensity of NSK to file overbroad discovery requests has resulted in a plethora of discovery motions being filed - which have "bogged down" the Court. NSK has won some, but lost most. And, even with respect to its few victories, the discovery sought was substantially narrowed by the Court. In any event, resolution of the motions consumed considerable judicial time. To permit the filing of NSK's proposed counterclaims would clearly unduly delay and complicate this case, and prejudice THK by imposing additional expensive and time-consuming new discovery. [**19]³⁹

The 40 document requests which NSK seeks to serve upon THK concurrent with the filing of its proposed amended answer and counterclaims would bring the progress of this patent infringement litigation to a virtual stand-still. For example, Document Request No. 21 reads as follows:

Request 21.

All documents identifying or relating to patent applications, including the patent applications themselves (domestic or foreign) assigned to THK or Teramachi which relate to linear guides.⁴⁰ [**20]

³⁶ See, e.g., the Magistrate Judge's February 9, 1993 *Minute Order* sustaining THK's objections to certain deposition questions put to a THK deponent "on the ground, among others, that the line of inquiry related to counterclaims not yet permitted by the District Court to be filed."

³⁷ Exhibit 7, "Exhibits To Plaintiff's Memorandum In Opposition To Defendants' Motion For Leave To File Answers, To Join THK Co., Ltd. As A Party Plaintiff, And To Add Counterclaims."

³⁸ Magistrate Judge's June 30, 1993 *Minute Order*, at 3 n. 2.

³⁹ *Stoller v. Curtis Homes, Inc.*, No. 86 C 7817, [1988 U.S. Dist. LEXIS 2637](#) (March 29, 1988, Williams, J.) [citations omitted].

Allegedly, "THK holds over 200 patents in Japan, the United States and elsewhere in the world, and has applied for over 400 additional patents." ⁴¹ Document production for between 200 and 400 patent applications [***666**] would bring the patent infringement action which is close to trial to a virtual stand-still.

Document requests similar to the above-quoted request were propounded by NSK to THK in the paper discovery phase of the patent litigation, but they were never allowed. They were always narrowed in scope to the patents at issue, *to-wit*: United States Patent No. 4,040,679 and United States Patent No. 4,253,709. ⁴² NSK makes no such effort with respect to proposed Document Request No. 21.

[**21] Perforce, NSK's counterclaim amendments would result in considerable delay in the final disposition of the patent infringement action. While delay itself can be prejudicial, ⁴³ the delay in this case would have palpable and harmful effects on THK. As noted previously, one of the subject patents will expire in August of 1994. The other will expire in March of 1998. THK clearly has a compelling interest in obtaining the quickest possible resolution of its patent claims. [***1265] Courts have found that even where money damages for lost royalties are available, infringement results in substantial harm. ⁴⁴ [**22] The subject amendments, by requiring additional discovery, pleading, and briefing, will clearly delay resolution of this case, and have an adverse effect on THK. ⁴⁵

The filing of NSK's counterclaim motion at this juncture of the litigation when virtually all of the key facts underlying the antitrust claims **were known at the time that the patent infringement suit was filed** suggests that the filing of the motion is for dilatory purposes. This suggestion is buttressed by NSK's antitrust-complaint-filing odyssey begun in this Court on June 4, 1993.

On June 4, 1993, NSK filed **a five-count complaint** ⁴⁶ against THK, THK Japan, and Mr. Hiroshi Teramachi, the founder and president of both corporate defendants, essentially charging the same with monopolization and attempts to monopolize the linear guide market in the United States in violation of § 2 of the Sherman Act. ⁴⁷ Among the allegations of the complaint was the charge that THK's monopoly power had been [****23**] achieved and maintained, not through lawful conduct or through lawful use of patent monopolies, but through defendants' unlawful efforts to fix prices for linear guides and to divide markets; deceptive, false, and unfair trade practices; disparagement of NSK products and services; tortious interference with NSK's business relations and expectations; misuse of patents; accumulation of blocking patents; sham predatory patent litigation; and threats of litigation to coerce defendants' price-fixing and market division schemes and to foreclose competitors from the market.

⁴⁰ "Counterplaintiffs' Request (1-40) To THK America, Inc. For Production Of Documents And Things", at 13, attached as Exhibit 7 to, "Exhibits To Plaintiff's Memorandum In Opposition To Defendants' Motion For Leave To File Answers, To Join THK Co., Ltd. As A Party Plaintiff, And To Add Counterclaims."

⁴¹ Counterclaim P16, attached as Exhibit 3 to, "Memorandum In Support Of Defendants' Motion For Leave To File Amended Answers; To Join THK Co., As A Party Plaintiff; And To Add Counterclaims."

⁴² See, e.g., the Magistrate Judge's September 17, 1991 Order limiting Document Request No. 2 of NSK's First Set Of Requests (1-5) To Plaintiff THK America, Inc. For Production Of Documents to the patents at issue. Due to NSK's propensity for re-litigating matters already ruled upon, the September 17th Order had to be re-affirmed by the Magistrate Judge's October 19, 1993 Order.

⁴³ See Fort Howard, 901 F.2d at 1380.

⁴⁴ Atlas Powder Co. v. Ireco Chemicals, 773 F.2d 1230, 1233 (Fed. Cir. 1985); Smith Int'l., Inc. v. Hughes Tool Co., 718 F.2d 1573, 1581 (Fed. Cir.), cert. denied 464 U.S. 996, 78 L. Ed. 2d 687, 104 S. Ct. 493 (1983).

⁴⁵ See Richardson v. Suzuki Motor Co., Ltd., 868 F.2d 1226, 1247 (Fed. Cir.) (harm to patentee increases as patent nears expiration), cert. denied 493 U.S. 853, 107 L. Ed. 2d 112, 110 S. Ct. 154 (1989).

⁴⁶ Case No. 93 C 3352 (Judge Kocoras).

⁴⁷ 15 U.S.C. § 2.

According to the allegations, all of the complained of antitrust conduct occurred "**from at least as early as January 1988, until the commencement" of the present patent infringement suit on October 17, 1990.** On July 19, 1993, before issue was joined, NSK voluntarily dismissed its antitrust complaint.⁴⁸ **[**24]** By Minute Order dated July 22, 1993, the action was "dismissed without prejudice".⁴⁹

On August 5, 1993, in the United States District Court for the Western District of Louisiana (Shreveport, Louisiana), NSK filed **a two-count complaint** against THK America, THK Japan, and Mr. Hiroshi Teramachi, **[*667]** charging them with unlawful restraint of trade by illegally fixing the prices of linear guides through threats of patent litigation and the actual commencement of same.⁵⁰ More specifically, the antitrust complaint charged that beginning as early as January of 1988, Mr. Teramachi repeatedly proposed to THK's competitors in the linear guide market, including NSK, that they cooperate with THK in raising prices world-wide, including in the United States. The complaint charged further that Mr. Teramachi and THK used THK's patents as an integral part of their illegal price-fixing scheme. Injunctive and declaratory relief, as well as money damages, were sought.

[25]** The above-recited antitrust filing saga reflects the expensive extremes to which NSK is prone. It also reflects NSK's litigious nature and its propensity for delay. Rather than press its antitrust claims in the forum originally selected, NSK chose to delay resolution of its antitrust claims until its antitrust action could be re-filed in another more favorable forum.⁵¹ Its litigation strategy in this regard was all for naught - for the United States District Court for the Western District of Louisiana transferred the antitrust action back to the Northern District of Illinois. However, time did pass. The transferred action bears Case No. 93 C 7032, and has been assigned to The Honorable Milton I. Shadur.

[26]** According to NSK, its top management received a January 21, 1988 letter from Mr. Teramachi threatening them with patent litigation if they did not agree to the price-fixing proposals set forth therein.⁵² Allegedly, in April of 1988, Mr. Teramachi again sent **[***1266]** NSK a letter proposing the same price-fixing scheme.⁵³ Additionally, from May 6, 1988 through June 26, 1990, Mr. Teramachi and other THK representatives met with NSK Japan's management on at least eight occasions.⁵⁴ At every meeting he attended - and he attended seven of the eight meetings - Mr. Teramachi demanded price-fixing and threatened NSK with patent infringement litigation if NSK did not cooperate.⁵⁵

NSK's delay in seeking leave of court **[**27]** to file its proposed antitrust counterclaims remains unexplained - as perforce it must, given that NSK must be deemed to have knowledge of THK price-fixing correspondence admittedly received by NSK and of verbal price-fixing threats made at eight THK-NSK meetings admittedly attended by NSK top management. The facts simply do not permit absolving explanation.

⁴⁸ See, "Notice Of Dismissal Pursuant To [Fed. R. Civ. P. 41\(a\)\(1\)\(i\)](#)" (filed July 19, 1993).

⁴⁹ See, July 22, 1993 Minute Order, Case No. 93 C 3352 (N.D. Ill. Judge Kocoras).

⁵⁰ *NSK Ltd. and NSK Corporation v. THK Co., Ltd., THK America, Inc., and Hiroshi Teramachi*, Civil Action No. 93-1312 "S" (W.D. La. Judge Walter) (filed August 5, 1993).

⁵¹ The Western District of Louisiana had absolutely "no connection whatsoever to the [antitrust] dispute." *Report and Recommendation*, at 3, Civil Action No. 93-1312 (October 18, 1993) (Magistrate Judge Payne). The primary motivation for selecting that forum was the favorable case law of the Fifth Circuit Court of Appeals. *Id.*

⁵² *Complaint*, PP 7 and 8 (Civil Action No. 93-1312 "S").

⁵³ *Id.*

⁵⁴ "Memorandum In Support Of Plaintiff's Motion For (1) Summary Judgment Of Attempted Price-Fixing And Patent Misuse; And(2) Injunctive Relief," at 4 (filed August 27, 1993), Civil Action No. 93-1312 "S".

⁵⁵ *Id.*

In any event, to summarize, the factors weighing against the granting of NSK's motion - the likelihood of dismissal of the counterclaims, NSK's unexplained delay in pursuing its claims, the likelihood of prejudice to THK, and the considerable expansion of the scope of the litigation far outweigh the policy favoring free amendment of pleadings. **Based on these factors, the Court denies NSK's motion to amend its answer to add counterclaims and a new defense.**

C. NSK's Motion to Add THK Japan and Hiroshi Teramachi as Counterclaim Defendants.

Having ruled that NSK may not amend its pleadings to assert counterclaims, there is no basis for adding THK Japan and Mr. Teramachi as counterclaim defendants. **This portion of NSK's motion is therefore denied.**

[*668] Accordingly, it is adjudged, decreed, and ordered as [*28] follows:

"Defendants' Motion For Leave To File Amended Answers; To Join THK Co., Ltd. As a Party Plaintiff; And To Add Counter-claims" is denied.⁵⁶

So Ordered.

Dated: March 22, 1994

W. Thomas Rosemond, Jr.

United States Magistrate [*29] Judge

End of Document

⁵⁶ Pursuant to [Rule 72\(a\) of the Federal Rules of Civil Procedure](#), the parties are given ten (10) days after being served with a copy of this order to file objections thereto with the Honorable Charles R. Norgle, Sr. Failure to file objections within the specified time period waives the right to appeal the Magistrate Judge's Order. [Video Views, Inc. v. Studio 21, Ltd.](#), 797 F.2d 538 (7th Cir. 1986). See also [Provident Bank v. Manor Steel Corp.](#), 882 F.2d 258, 261 (7th Cir. 1989) (when a matter has been referred to a Magistrate Judge acting as a special master or § 636(b)(2) jurist, a party waives his right to appeal if he has not first preserved the issues for appeal by presenting them to the District Judge as objections).



Segura v. Abbott Labs.

Court of Appeals of Texas, Third District, Austin

March 23, 1994, Filed

No. 3-93-319-CV

Reporter

873 S.W.2d 399 *; 1994 Tex. App. LEXIS 590 **

CRYSTAL SEGURA, TERI NORTON, SHERRI CHRETIEN, JANICE KIMLER, TESSIA INNOCENTI, ANGELA CHRISTINE MARONEY, MELISSA WHITTAKER DURAN, TRACEY FREEZIA LEUDEMAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS v. ABBOTT LABORATORIES, INC. (ROSS LABORATORIES DIVISION), BRISTOL-MYERS SQUIBB COMPANY, MEAD JOHNSON & COMPANY, AND AMERICAN HOME PRODUCTS CORPORATION (WYETH-AYERST LABORATORIES DIVISION), APPELLEES

Subsequent History: [**1] Motion for Rehearing Overruled May 4, 1994. Released for Publication May 4, 1994.

Writ granted by, 11/03/1994

Cause set for submission by, 11/03/1994

Reversed by [Abbott Lab. \(Ross Lab. Div.\) v. Segura, 907 S.W.2d 503, 1995 Tex. LEXIS 118 \(Tex., June 29, 1995\)](#)

Prior History: FROM THE DISTRICT COURT OF TRAVIS COUNTY, 331ST JUDICIAL DISTRICT. NO. 91-13079-A, HONORABLE PETER M. LOWRY, JUDGE PRESIDING

Disposition: Reversed and Remanded

Core Terms

Antitrust, consumers, unconscionable, plaintiffs', products, infant formula, disparity, provisions, purchasers, pleadings, exempt, indirect-purchaser, indirect, summary judgment, defendants', cognizable, trial court, cause of action, grossly unfair, later-enacted, deprives, flagrant, damages, prices, light most favorable, value received, advertising, allegations, unmitigated, noticeable

LexisNexis® Headnotes

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

Business & Corporate Compliance > ... > Types of Damages > Consequential Damages > Actions for Price

Antitrust & Trade Law > Clayton Act > General Overview

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

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

Business & Corporate Compliance > ... > Remedies > Buyer's Damages & Remedies > General Overview

HN1 [] **Private Actions, Purchasers**

A "direct purchaser" is one who purchases goods or services directly from a manufacturer, wholesaler, or other provider who has violated § 4 of the Clayton Act, [15 U.S.C.S. § 15\(a\) \(1988\)](#). An "indirect purchaser" is one who purchases such goods or services from a seller or provider who is down the marketing chain from the antitrust violator. The indirect-purchaser rule deprives indirect purchasers of standing to sue manufacturers or wholesalers for antitrust violations.

Governments > Courts > Court Personnel

Governments > Legislation > Enactment

Governments > Legislation > Interpretation

HN2 [] **Courts, Court Personnel**

When two statutes conflict irreconcilably, the later-enacted statute controls. [Tex. Gov't Code Ann. § 311.025\(a\)](#) (1988). In addition, where there is a positive and clear repugnance between two statutes, courts are enjoined to harmonize and give effect to both enactments if at all possible by assigning to each a meaning that will permit both to stand in harmony. Courts may not create repugnance by implication. The repugnance between two statutes must be positive as well as clear from the terms of the statute itself. This rule is based on the assumption that a legislature enacts a statute with complete knowledge of the existing law and with reference to it.

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

HN3 [] **Regulated Practices, Price Fixing & Restraints of Trade**

The Texas Free Enterprise and Antitrust Act of 1983, [Tex. Bus. & Com. Code Ann. §§ 15.01- .52](#), states that the provisions of the act are cumulative of each other and of any other provision of law of Texas in effect relating to the same subject. § 15.02(a).

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

HN4 [] **Private Actions, Remedies**

See [Tex. Bus. & Com. Code Ann. § 17.43\(a\)](#).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN5 Consumer Protection, Deceptive & Unfair Trade Practices

The Texas Supreme Court looks to the plain meaning of the provisions of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), [Tex. Bus. & Com. Code Ann. §§ 17.41-63](#), and has refused to approve implied exceptions to, or adopt unwarranted limiting constructions of, those provisions. The Texas Supreme Court relies on two principles: (1) that the DTPA must be construed liberally, and (2) that the legislature expressly limits the DTPA when it so wishes.

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

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

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

HN6 Summary Judgment, Entitlement as Matter of Law

In reviewing a summary judgment granted on the pleadings, an appellate court must consider the allegations in the pleadings in the light most favorable to the non-movant. It must accept as true every allegation of the pleadings against which the motion is directed. If the pleadings, when liberally construed, are sufficient to show a material fact issue the motion must be overruled. Moreover, all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the opposing party is entitled to the benefit of every reasonable inference that can properly be drawn in its favor.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN7 Regulated Practices, Price Fixing & Restraints of Trade

Section 17.50(a)(3) of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), [Tex. Bus. & Com. Code Ann. § 17.41-63](#), provides that a consumer may maintain a cause of action where any unconscionable action or course of action by any person constitutes a producing cause of actual damages.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN8 Regulated Practices, Price Fixing & Restraints of Trade

See [Tex. Bus. & Com. Code Ann. § 17.45\(5\)](#).

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

The two acts delineated under [Tex. Bus. & Com. Code Ann. § 17.45\(5\)](#) are the only means of engaging in an unconscionable action or course of action under the Texas Deceptive Trade Practices-Consumer Protection Act, [Tex. Bus. & Com. Code Ann. § 17.41-63](#).

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN10[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Texas Supreme Court interprets the term "gross", for purposes of determining unconscionable conduct under [§ 17.45\(5\)](#) of the Texas Deceptive Trade Practices-Consumer Protection Act, [Tex. Bus. & Com. Code Ann. § 17.41-63](#), as meaning glaringly noticeable, flagrant, complete and unmitigated.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

In order to support a finding of unconscionable conduct under [§ 17.45\(5\)](#) of the Texas Deceptive Trade Practices-Consumer Protection Act, [Tex. Bus. & Com. Code Ann. § 17.41-63](#), a slight disparity between the consideration paid and the value received is not unconscionable; a glaring and flagrant disparity is. The disparity between value and price must be determined at the time of the transaction.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN12[] **Regulated Practices, Price Fixing & Restraints of Trade**

In determining a claim of unconscionable conduct under [§ 17.45\(A\)](#) of the Texas Deceptive Trade Practices-Consumer Protection Act, [Tex. Bus. & Com. Code Ann. § 17.41-63](#), the same standard of glaringly noticeable, flagrant, complete and unmitigated applies in determining whether plaintiff was subjected to gross unfairness. Further, there is no requirement that the unconscionable conduct take place at the exact time of the sale of the product; rather, a court must examine the entire transaction.

Counsel: For APPELLANTS: Mr. Philip K. Maxwell; Longley & Maxwell, L.L.P.--Austin.

Mr. Brian S. Greig; Fulbright & Jaworski, L.L.P.--Austin--Attorney for Abbott Laboratories and Ross Laboratories.

Mr. Louis P. Bickel; Akin, Gump, Hauer & Feld, L.L.P.--Dallas--Attorney for American Home Products Corporation and Wyeth-Ayerst Laboratories.

Ms. D. L. (Lin) Hughes; McGinnis, Lochridge & Kilgore--Austin--Attorney for Bristol-Myers Squibb Company and Mead Johnson & Company.

Judges: Before Justices Powers, Jones and Kidd

Opinion by: J. WOODFIN JONES

Opinion

[*401] Crystal Segura and others,¹ on behalf of themselves and all others similarly situated ("plaintiffs"), appellants, intervened as plaintiffs in an antitrust suit originally brought by the State of Texas against several defendants. Asserting claims of unconscionable conduct under the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"), *Tex. Bus. & Com. Code Ann. §§ 17.41-63* [**2] (West 1987 & Supp. 1994), plaintiffs sought damages from Abbott Laboratories, Inc. (Ross Laboratories Division), Bristol-Myers Squibb Company, Mead Johnson & Company, and American Home Products Corporation (Wyeth-Ayerst Laboratories Division) ("defendants"), appellees. The trial court granted summary judgment for defendants, concluding that plaintiffs did not state a cognizable claim under the DTPA and, alternatively, that plaintiffs lacked standing to bring the suit. On appeal, plaintiffs assert that the trial court erred in both conclusions. We will reverse the trial court's judgment and remand the cause.

FACTUAL AND PROCEDURAL BACKGROUND

In September 1991 the State of Texas brought an antitrust action against defendants Abbott, Bristol-Myers, and Mead Johnson, as well as the American Academy of Pediatrics, alleging a price-fixing conspiracy [**3] and monopolization in the sale of infant formula. See Texas Free Enterprise and Antitrust Act of 1983 ("Texas Antitrust Act"), *Tex. Bus. & Com. Code Ann. §§ 15.01-52* (West 1987 & Supp. 1994). Among other claims, the State sought, on behalf of Texas consumers, injunctive relief and damages for alleged overcharges for infant formula. See Texas Antitrust Act § 15.21. In February 1992 the trial court dismissed these claims, concluding that when the Texas Antitrust Act was interpreted in harmony with federal **antitrust law**, the "indirect purchaser" doctrine deprived the State of standing to sue. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977).

Three months later, plaintiffs intervened in the action, dropping the American Academy of Pediatrics as a defendant but adding American Home Products. In alleging violations of the DTPA's unconscionability provisions, plaintiffs complained of the same conduct as that on which the State's antitrust [*402] causes of action were based. See DTPA § 17.50(a)(3). In response to defendants' special exceptions and plea to the jurisdiction, the trial court determined that plaintiffs had not [**4] stated a cognizable cause of action under the DTPA and gave plaintiffs thirty days to amend their pleadings.

Plaintiffs subsequently amended their plea in intervention and petition. Alleging that defendants acted both independently and in conspiracy, plaintiffs summarized their allegations of unconscionable actions as follows:

- (A) Creating and maintaining the illusion that their infant formula products are somehow unique and different nutritionally when the infant formula products which they sell are generic formulations which are set and monitored by the U.S. Government;
- (B) Creating and maintaining dedicated franchise relationships with physicians and hospitals that endorse the purchasing of a particular brand name product of the Defendants while Texas consumers are kept ignorant of the monies and lavish promotional resources which these physicians and hospitals receive for these endorsements;
- (C) Selling their infant formula products at unconscionably high prices to Texas consumers when the costs of such products are very low;

¹ Other plaintiffs were Teri Norton, Sherri Chretien, Janice Kimler, Tessia Innocenti, Angela Christine Maroney, Melissa Whittaker Duran, and Tracey Freezia Leudeman.

- (D) Giving free samples of infant formula products to Texas consumers through their franchise physicians and hospitals during the [**5] first months of their newborns' lives thereby creating an endorsement of the products and later grossly overcharging Texas consumers in the retail market for baby formula products;
- (E) Using their market dominance to prevent other companies from selling baby formula products to consumers through direct consumer advertising which would inform Texas consumers about the generic nature of these products and permit informed buying decisions based upon price and nutritional information;
- (F) Implementing price increases for more than twelve years which were nearly identical and grossly unfair to Texas consumers while giving false and misleading reasons for the price increases;
- (G) Taking unfair advantage of Texas consumers to a grossly unfair degree by preventing other sellers of infant formula products from entering the market and introducing competitive, lower prices for these generic foods [sic] products.

Defendants moved for summary judgment on two grounds. First, defendants argued that plaintiffs' claims were not cognizable under the DTPA. Second, defendants argued that plaintiffs lacked standing because: (1) the indirect-purchaser doctrine applies to the Texas Antitrust [**6] Act under § 15.04 of that act; (2) the DTPA and the Texas Antitrust Act would be conflicting statutes if one provided a remedy for indirect purchasers while the other did not; and (3) the Texas Antitrust Act should exclusively control, because it is the later-enacted statute, and thus the indirect-purchaser rule deprives plaintiffs of standing to sue under the DTPA.

The trial court granted defendants' motion for summary judgment and dismissed plaintiffs' claims. The court concluded that plaintiffs' claims were not cognizable under the DTPA and, alternatively, that the indirect-purchaser doctrine deprived plaintiffs of standing under the DTPA. Plaintiffs' claims were severed from those remaining in the State's original suit, resulting in the final judgment from which plaintiffs now appeal.

Plaintiffs bring four points of error in this appeal, asserting that the trial court erred in (1) granting defendants' motion for summary judgment, (2) determining that plaintiffs have no standing to pursue their claims, (3) holding that the claims alleged by plaintiffs are not cognizable under the DTPA, and (4) concluding that, to the extent plaintiffs' claims may be cognizable under the DTPA, [**7] the DTPA must be harmonized with the direct-purchaser rule applicable to the Texas Antitrust Act, the later-enacted and more specific statute; as indirect purchasers under that statute, plaintiffs lack standing under the DTPA to assert their claims. We will [*403] combine the points of error for purposes of discussion.

DISCUSSION

A. Indirect Purchaser Standing Under the DTPA

In the present context, [HN1](#)[] a "direct purchaser" is one who purchases goods or services directly from a manufacturer, wholesaler, or other provider who has violated section 4 of the Clayton Act, [15 U.S.C. § 15\(a\) \(1988\)](#). An "indirect purchaser" is one who purchases such goods or services from a seller or provider who is down the marketing chain from the antitrust violator. The indirect-purchaser rule of *Illinois Brick* deprives indirect purchasers of standing to sue manufacturers or wholesalers for antitrust violations. As the United States Supreme Court explained, allowing indirect purchasers to recover against antitrust violators would create difficult issues of how much of the monopoly price was "passed on" to the end consumer by the middleman, usually a retailer. See [Illinois Brick](#), [\[*8\]](#) 431 U.S. at 741-47.

Defendants assert that the indirect-purchaser rule should apply in Texas because the Texas Antitrust Act requires that "the provisions of this Act shall be construed . . . in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with" the purpose of maintaining and promoting economic competition in trade and commerce. Texas Antitrust Act § 15.04. Accordingly, defendants argue that the indirect-purchaser doctrine established in *Illinois Brick* deprives plaintiffs of standing to sue under the DTPA. Reaching this conclusion would require accepting the following propositions: (1) that the indirect-purchaser rule applies to the Texas Antitrust Act to deny indirect purchasers standing under that statute; (2) that, since plaintiffs allege some

claims cognizable under both the Texas Antitrust Act and the DTPA, the two statutes must conflict; and (3) that this conflict must be resolved by concluding that the later-enacted statute, the Texas Antitrust Act, controls, thus depriving plaintiffs of standing under the DTPA. We decline to accept this reasoning. Assuming arguendo that the indirect-purchaser rule applies **[**9]** to the Texas Antitrust Act,² we conclude that there is no conflict between that Act and the DTPA.

[HN2](#)[↑]

When two statutes conflict irreconcilably, the later-enacted statute controls. See [Tex. Gov't Code Ann. § 311.025\(a\)](#) (West 1988). In addition, "where there *is* a positive and clear **[**10]** repugnance between two statutes, courts are enjoined to *harmonize* and give effect to *both* enactments if at all possible by assigning to each a meaning that will *permit both to stand in harmony*." [Commissioners Court of Caldwell County v. Criminal Dist. Attorney, Caldwell County, 690 S.W.2d 932, 936](#) (Tex. App.--Austin 1985, writ ref'd n.r.e.) (citing [Duval Corp. v. Sadler, 407 S.W.2d 493](#) (Tex. 1966); [Standard v. Sadler, 383 S.W.2d 391](#) (Tex. 1964)); and [State v. Standard Oil Co., 130 Tex. 313, 107 S.W.2d 550](#) (Tex. 1937)); see also [State v. Jackson, 370 S.W.2d 797, 800](#) (Tex. Civ. App.--Houston 1963), aff'd, [376 S.W.2d 341](#) (Tex. 1964). Courts may not create repugnance by implication. The repugnance between two statutes must be "positive as well as clear from the terms of the statute itself." [Commissioners Court of Caldwell County, 690 S.W.2d at 936](#). This rule is based on the assumption that a legislature enacts a statute "with complete knowledge of the existing law and with reference to it." [Acker v. Texas Water Comm'n, 790 S.W.2d 299, 301](#) (Tex. 1990).

Both the Texas Antitrust Act and the DTPA have cumulative-remedies provisions. [HN3](#)[↑] **[**11]** The Texas Antitrust Act states that "the provisions of this act are cumulative of each **[*404]** other and of any other provision of law of this state in effect relating to the same subject." Texas Antitrust Act § 15.02(a). Similarly, the DTPA states:

[HN4](#)[↑] The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law; *provided, however, that no recovery shall be permitted under both this subchapter and another law of both actual damages and penalties for the same act or practice. A violation of a provision of law other than this subchapter is not in and of itself a violation of this subchapter. An act or practice that is a violation of a provision of law other than this subchapter may be made the basis of an action under this subchapter if the act or practice is proscribed by a provision of this subchapter*

DTPA [§ 17.43\(a\)](#) (emphasis added). The emphasized portions of [section 17.43](#) were added by the legislature in 1979. See Act of May 11, 1979, 66th Leg., R.S., ch. 603, § 1, 1979 Tex. Gen. Laws 1327, 1327 (codified as above). The effect of **[**12]** this amendment was to "keep a violation of the DTPA from automatically resulting from the violation of another law and to preclude double recovery under the DTPA and another statute for the same act or practice." [Frizzell v. Cook, 790 S.W.2d 41, 44](#) (Tex. App.--San Antonio 1990, writ denied). The existence of cumulative-remedies provisions in the two statutes indicates that the legislature did not, as a general matter, consider the DTPA and the Texas Antitrust Act to be conflicting statutes and did not intend one to supersede or preempt the other.

Other statutory enactments demonstrate that when the legislature wishes to exempt certain defendants or claims from the coverage of the DTPA, it does so in unequivocal terms. Several provisions of other acts have specifically exempted defendants from or limited claims under the DTPA. See Act of May 29, 1989, 71st Leg., R.S., ch. 1072, § 1, 1989 Tex. Gen. Laws 4338, 4338 (codified at [Tex. Prop. Code Ann. § 27.002](#) (West Supp. 1994)) (stating in part

² Since we conclude that the indirect-purchaser doctrine does not deprive plaintiffs of standing under the DTPA, we need not and do not determine whether the doctrine actually applies to the Texas Antitrust Act; nor do we determine whether, if the indirect-purchaser doctrine does apply to that Act, it deprives the court of subject matter jurisdiction or is simply a proper ground for judgment on the merits against the indirect purchaser. Cf. [Texas Ass'n of Business v. Texas Air Control Bd., 852 S.W.2d 440, 444](#) (Tex. 1993) (holding that the standing requirement "is implicit in the open courts provision, [Tex. Const. art. I, § 13], which contemplates access to the courts only for those litigants suffering an in jury").

that "to the extent of conflict between this chapter and any other law, including the Deceptive Trade Practices-Consumer Protection Act . . . , this chapter prevails"); Act of June 21, [**13] 1987, 70th Leg., R.S., ch. 1122, § 20, 1987 Tex. Gen. Laws 3844, 3851 (codified at [Tex. Rev. Civ. Stat. Ann. art. 8890, § 18C](#) (West Supp. 1994)) (exempting veterinarians from DTPA claims for malpractice or damages resulting from negligence); Medical Liability and Insurance Improvement Act, 65th Leg., R.S., ch. 817, [§ 12.01\(a\)](#), [1977](#) Tex. Gen. Laws 2039, 2053 (codified at [Tex. Rev. Civ. Stat. Ann. art. 4590i, § 12.01\(a\)](#) (West Supp. 1994)) (exempting physicians and health care providers from DTPA claims for damages resulting from death or personal injury caused by negligence). It is also clear that the legislature knows how to make provisions of the Texas Antitrust Act exclusive, as it did with the provisions regarding the enforceability of covenants not to compete. See Act of May 29, 1993, 73d Leg., R.S., ch. 965, § 3, 1993 Tex. Gen. Laws 4201, 4201-02 (codified at Texas Antitrust Act § 15.52) (providing that Texas Antitrust Act's new provisions regarding covenants not to compete are "exclusive and preempt any other criteria for enforceability of a covenant not to compete"). Finally, the legislature has created specific exceptions within the DTPA itself. Section 17.49 states [**14] that the DTPA does not apply to advertisers and others who run advertisements under certain circumstances, see DTPA § 17.49(a), and does not apply to "acts or practices authorized under specific rules or regulations promulgated by the Federal Trade Commission under Section 5(a)(1) of the Federal Trade Commission Act [[15 U.S.C. § 45\(a\)\(1\)](#)]." DTPA § 17.49(b). Finally, the DTPA's definition of consumer exempts any business consumer that "has assets of \$ 25 million or more, or that is owned or controlled by a corporation or entity with assets of \$ 25 million or more." DTPA [§ 17.45\(4\)](#). See also Act of June 14, 1989, 71st Leg., ch. 380, R.S., § 2, 1989 Tex. Gen. Laws 1490, 1491 (codified at DTPA § 17.50(b)(1)) (applying limitations of Tex. Civ. Prac. & Rem. Code chapters 33 & 41 to DTPA claims involving death, personal injury, and damage to property other than goods forming basis of claim).

[*405] In light of the legislature's demonstrated ability to voice its intent with unmistakable clarity, defendants' argument that the two statutes conflict is not persuasive. Holding that a conflict exists between the DTPA and the Texas Antitrust Act would create a conflict by [**15] implication and would force us to conclude that two statutes "conflict" any time they regulate the same activity. This we will not do. The fact that one statute makes certain conduct actionable while a later statute fails to make it actionable does not create a conflict requiring harmonization of the statutes. Such a holding would also require accepting the proposition that the DTPA is implicitly amended each time the legislature passes a statute that fails to give consumers a cause of action. We do not accept this proposition.

This case is not one in which one statute explicitly makes legal certain conduct that another statute makes illegal. See *Jackson*, 370 S.W.2d at 799-800 (holding that where later-enacted statute specifically makes certain conduct legal, regulation promulgated pursuant to earlier-enacted statute could not make that conduct illegal). Nor is it a case of two statutes imposing inconsistent obligations on defendants. See [Texas State Bd. of Pharmacy v. Kittman](#), [550 S.W.2d 104, 105-06](#) (Tex. Civ. App.--Tyler 1977, no writ) (describing earlier-enacted statute's requirement that appeal from board's order must be made within twenty days of order and later-enacted [**16] statute's requirement that motion for rehearing must be submitted to board issuing order as prerequisite to appeal).³

This conclusion is consistent with the Texas Supreme Court's repeated refusal to recognize exemptions from or exceptions to the DTPA except where clearly mandated by the legislature. [HN5](#) Without fail, the supreme court has looked to the plain meaning of the DTPA's provisions and has refused to approve implied exceptions to, or adopt unwarranted limiting constructions of, those provisions. [**17] See, e.g., [Birchfield v. Texarkana Memorial Hosp.](#), [747 S.W.2d 361, 368 \(Tex. 1987\)](#) (holding that newborn baby was consumer of hospital's services); [Chastain v. Koonce](#), [700 S.W.2d 579, 582-83 \(Tex. 1985\)](#) (refusing to require intent or knowledge for defendant to be liable for unconscionable conduct); [Kennedy v. Sale](#), [689 S.W.2d 890, 892 \(Tex. 1985\)](#) (holding that "consumer" can be anyone who acquires goods that provide basis for DTPA complaint even if goods were paid for by someone

³ It is important to note that the indirect-purchaser doctrine is *not* founded on the principle that the antitrust defendant's conduct is legal under the antitrust laws. Rather, it is founded on the principle that indirect purchasers are not the proper parties to seek enforcement of those laws. See [Kansas v. Utilicorp United, Inc.](#), [497 U.S. 199, 203-04, 111 L. Ed. 2d 169, 110 S. Ct. 2807 \(1990\)](#). Thus the DTPA and the Texas Antitrust Act do not regulate defendants' conduct in an inconsistent manner.

other than plaintiff); [*Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 \(Tex. 1983\)*](#) (refusing to require that DTPA plaintiff be in privity with DTPA defendant and concluding that "the only requirement is that the goods or services sought or acquired by the consumer form the basis of his complaint"); [*Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540-41 \(Tex. 1981\)*](#) (refusing to limit liable defendants to those who actually provided good or service that was basis of DTPA complaint). Such cases are based on two principles: (1) that the DTPA must be construed liberally, and (2) that the legislature expressly limits the DTPA when it so wishes. If the legislature had intended **[**18]** to exclude indirect purchasers from coverage of the DTPA, "it could easily have done so by simply drafting the restriction into the definition of *consumer* or some other provision of the Act." [*Cameron, 618 S.W.2d 535 at 540.*](#)

This conclusion is consistent with the decision in [*Frizzell v. Cook, 790 S.W.2d 41*](#) (Tex. App.--San Antonio 1990, writ denied). In *Frizzell*, the plaintiff asserted a DTPA claim involving a broker's failure to properly advise her regarding financial investments. The defendant asserted that the provisions of the Texas Securities Act ("TSA"),⁴ which establish a cause of action for misrepresentation in connection with a securities transaction, preempted the plaintiff's DTPA claim. [*Id. at 1*406J 42.*](#) Since the TSA did not have a provision exempting any conduct from the DTPA, the court looked to section 17.49 of the DTPA and concluded: "The only exemptions intended by the Legislature are those delineated in section 17.49, which do not exempt securities transactions." [*Frizzell, 790 S.W.2d at 44.*](#)

[19]** Based on the absence of an express exemption in either the DTPA or the Texas Antitrust Act, combined with the presumption against finding statutes to be in conflict by implication, we decline to hold that the indirect-purchaser rule applies to the DTPA.

B. Plaintiffs' Cause of Action for Unconscionability

The trial court also based its summary judgment on the ground that plaintiffs had not stated a claim for unconscionable conduct under DTPA § 17.50(a)(3). We will, therefore, review the trial court's decision to grant defendants' motion for summary judgment directed solely at plaintiffs' pleadings.

HN6[↑] In reviewing a summary judgment granted on the pleadings, we must consider the allegations in the pleadings in the light most favorable to the non-movant.⁵ We must accept as true every allegation of the pleadings against which the motion is directed. [*Trunkline LNG Co.v. Trane Thermal Co., 722 S.W.2d 722, 724*](#) (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Labbe v. Carr*, 369 S.W.2d 952, 954 (Tex. Civ. App.--San Antonio 1963, writ ref'd n.r.e.). If the pleadings, when liberally construed, are sufficient to show a material fact issue the motion must **[**20]** be overruled. [*Abbott v. City of Kaufman, 717 S.W.2d 927, 929*](#) (Tex. App.--Tyler 1986, writ dism'd). Moreover, all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the opposing party is entitled to the benefit of every reasonable inference that can properly be drawn in its favor. *Id.* Taking all of plaintiffs' allegations as true, we must consider whether the acts alleged support a cause of action for unconscionability under the DTPA.

HN7[↑]

Section 17.50(a)(3) of the DTPA provides that a consumer may maintain a cause of action where "any unconscionable action or course of action by any person" constitutes a producing cause of actual **[**21]** damages.

HN8[↑] [*Section 17.45\(5\)*](#) contains two alternative definitions of "unconscionable":

"Unconscionable action or course of action" means an act or practice which, to a person's detriment:

⁴ [*Tex. Rev. Civ. Stat. Ann. art. 581-1*](#) to 581-41 (West 1964 & Supp. 1994).

⁵ Even then, such a summary judgment generally can be granted only after the non-movant has had an opportunity to amend his pleadings after special exceptions have been sustained. See [*Texas Dep't of Corrections v. Herring, 513 S.W.2d 6, 9-10 \(Tex. 1974\)*](#). In the present case, the trial court followed this procedure.

(A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or

(B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.

DTPA [§ 17.45\(5\)](#). [HN9](#)[↑] These two acts are the only means of engaging in an unconscionable action or course of action under the DTPA. [Griffith v. Porter, 817 S.W.2d 131, 136](#) (Tex. App.--Tyler 1991, no writ).

In *Chastain*, the [HN10](#)[↑] supreme court interpreted the term "gross" as meaning "glaringly noticeable, flagrant, complete and unmitigated." [700 S.W.2d at 583](#). Thus, plaintiffs must allege either (1) that defendants' course of conduct took advantage of plaintiffs' lack of knowledge, ability, experience, or capacity to a glaringly noticeable, flagrant, complete and unmitigated degree; or (2) that the disparity between the value and the price of the infant formula was glaringly noticeable, flagrant, complete and unmitigated. [**22](#)⁶

1. Gross Price Disparity

[**23](#) Plaintiffs allege that defendants overcharged infant formula consumers to the extent [\[*407\]](#) that a gross disparity existed between the value given and the value received. The court in *Chastain* stated that [HN11](#)[↑] "[a] slight disparity between the consideration paid and the value received is not unconscionable; a glaring and flagrant disparity is." [700 S.W.2d at 583](#). The disparity between value and price must be determined at the time of the transaction. [Id. at 582](#).

Plaintiffs specifically alleged that defendants "have abused their overwhelming market dominance and, by direct action and by a conspiracy among them, have grossly overcharged Texas consumers." Plaintiffs further alleged that defendants coordinated their price increases, and they specifically set forth the following example of disparity in pricing: "The average wholesale cost for a can of Similac 13 ounce concentrate increased from \$.54 in 1978 to \$1.73 in August, 1990. During the same period, total manufacturing costs for that product increased from just 20 cents a can to 32 cents a can."

Construing these allegations in the light most favorable to plaintiffs, we believe plaintiffs have alleged a gross disparity [**24](#) between the price charged and the value received.⁷ For example, plaintiffs allege that the price of Similac in 1990 was over five times its cost.⁸ This disparity could certainly be considered more than "slight."

⁶ The supreme court did not give much guidance as to whether these four terms should be construed in the conjunctive (i.e. glaringly noticeable, flagrant, complete, and unmitigated) or disjunctive (i.e. glaringly noticeable, or flagrant, or complete and unmitigated). Although the court's phrase contains the term "and," this usage is not conclusive, because the court quoted *Webster's Third New International Dictionary* 1002 (1976) for its definition of the term "gross." The fact that the court relied on a dictionary definition supports the argument that the phrase should be read in the disjunctive, since dictionaries often list several synonyms for a word when they define it. We believe there is a large difference between, for example, a price disparity that is "glaringly noticeable" or "flagrant" and one that is "complete and unmitigated." However, because we find that plaintiffs' allegations are sufficient under either construction, we do not decide this issue.

⁷ Determining value is not a simple task. Plaintiffs apparently assume that the wholesale cost per can of the infant formula is the "value" of the formula. Although this may or may not be true, defendants did not present summary judgment evidence to the contrary. Thus, reading the pleadings in the light most favorable to plaintiffs, for purposes of evaluating the pleadings' sufficiency, we assume that the wholesale cost per can is the "value" per can.

⁸ We do not hold that a mere price disparity alone, even a large one, is enough to meet the test of unconscionability. Rather, to be glaringly noticeable, flagrant, complete, and unmitigated, it may well be that there must be a gross price disparity "plus" some type of culpable conduct. See, e.g., [LaChalet Int'l, Inc. v. Nowik, 787 S.W.2d 101, 105-06](#) (Tex. App.--Dallas 1990, no writ) (disparity in price and value received accompanied by several misrepresentations); [Butler v. Joseph's Wine Shop, inc., 633 S.W.2d 926, 931-32](#) (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.) (gross disparity between price paid and value received caused by defendant's selling of goods to someone else and then refusing to return the money). In this case, plaintiffs

[**25] We do not accept defendants' argument that the gross-disparity cases reflect a rule that unconscionability exists *only* where there is a price charged for something of little or no value. See [Wyatt v. Petrilta, 752 S.W.2d 683, 686](#) (Tex. App.--Corpus Christi 1988, writ denied) ("In reviewing other decisions in which the evidence supporting gross disparity was discussed, we find that in each the value received was none or nearly so."). It is important to note that simply because courts have found liability in such cases does not inexorably lead to the conclusion that liability cannot exist in less severe cases, and nothing in the definition of unconscionability supports the "little or no value" test as the exclusive test of gross disparity. For example, the supreme court recently stated that an allegation of unconscionability based on a price paid of \$ 10,000 for equipment worth \$ 2,000 was supportable. See [Kinerd v. Colonial Leasing Co., 800 S.W.2d 187, 191 \(Tex. 1990\)](#); see also [Fort Worth Mortgage Corp. v. Abercrombie, 835 S.W.2d 262, 266](#) (Tex. App.--Houston [14th Dist.] 1992, no writ) (holding that, although "a case of a shockingly high price being paid for something [**26] of little value" did not exist, "it is clear that the jury found a gross disparity between what appellees were led to believe they would receive and the benefits actually paid").

Plaintiffs' pleadings set forth claims of prices up to five times the alleged value of the product purchased. Mindful of our duty to construe the pleadings in the light most favorable to plaintiffs, we hold that plaintiffs have alleged a cognizable gross-disparity claim.

2. Taking Advantage of Plaintiffs to a Grossly Unfair Degree

Plaintiffs also alleged that defendants took advantage of their lack of knowledge and [*408] capacity to a grossly unfair degree. They allege in their petition that defendants, separately and in conspiracy, sought to ban direct advertising of infant formula in order to maintain high prices and prevent market entry; sought to maintain a system in which pediatricians, nurses, and hospitals recommended infant formula with the objective of maintaining high prices; and strove to create the false impression that their products were unique when in fact the contents of infant formula are regulated by the federal government and are essentially identical.

In *Chastain*, [**27] the court stated that although unfairness is a "more nebulous term than disparity, . . . this is not a reason to create a new definition for gross." [700 S.W.2d at 583](#). Thus, [HN12](#)¹ the same standard of "glaringly noticeable, flagrant, complete and unmitigated" applies. Further, there is no requirement that the unconscionable conduct take place at the exact time of the sale of the infant formula; rather, we must examine the entire transaction. See *id. at 583*; [Flenniken, 661 S.W.2d at 707](#).

As already noted, this case is before us on the pleadings and is in an embryonic stage of factual development. Plaintiffs' pleadings are occasionally somewhat conclusory, and the true facts as later developed may or may not bear them out. For example, the success of claims regarding physicians' and hospitals' use of defendants' products in efforts to encourage plaintiffs to buy and use the products may depend a great deal on the degree of influence the physicians had over plaintiffs and the degree of knowledge the average consumer possesses regarding infant formula. Similarly, the viability of claims regarding the generic nature of infant formulas may depend on the factual issues of what the [**28] ingredients were, what specific efforts defendants made to create an "impression of uniqueness," and the plaintiffs' capacity to distinguish among the formulas. However, in light of our obligation to construe the pleadings in the light most favorable to plaintiffs, we hold that the allegations are sufficient to state a claim that defendants took advantage of plaintiffs' lack of knowledge and capacity to a degree that was glaringly noticeable, flagrant, complete and unmitigated. Plaintiffs alleged a course of conduct in which defendants conspired among themselves and with others to keep material information from consumers like plaintiffs by preventing direct advertising, by creating certain misimpressions, and by relying on a network of physicians, nurses, and hospitals to refer plaintiffs to certain infant formula. We hold that these claims are sufficiently alleged, especially in light of the early stage of factual development of this case.

have alleged that defendants conspired to raise prices and to prevent direct advertising and forestall market entry. Such allegations are enough to satisfy a "price disparity plus" standard.

CONCLUSION

There is no clear indication that the legislature intended in any way to limit the DTPA's coverage in the antitrust area. The legislature's failure either to amend the DTPA to exempt antitrust-type claims or to state explicitly [**29] that the Texas Antitrust Act preempts other statutory enactments is significant in light of the legislature's proven ability to express itself clearly. Plaintiffs' pleadings, taken in the light most favorable to them, are sufficient to state causes of action for unconscionable price disparity and taking advantage of plaintiffs' lack of capacity, knowledge, and experience to a grossly unfair degree. We therefore sustain plaintiffs' four points of error. We reverse the trial court's summary judgment and remand the cause for further proceedings.

J. Woodfin Jones, Justice

Before Justices Powers, Jones and Kidd

Reversed and Remanded

Filed: March 23, 1994

End of Document



Caribe Bmw v. Bayerische Motoren Werke Aktiengesellschaft

United States Court of Appeals for the First Circuit

March 25, 1994, Decided

No. 93-1653

Reporter

19 F.3d 745 *; 1994 U.S. App. LEXIS 6057 **; 1994-1 Trade Cas. (CCH) P70,548

CARIBE BMW, INC., Plaintiff, Appellant, v. BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT, ET AL., Defendants, Appellees.

Prior History: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Raymond L. Acosta, U.S. District Judge

Disposition: Vacated and remanded.

Core Terms

retailers, Robinson-Patman Act, prices, district court, resale price, customers, dealers, subsidiary, maximum, antitrust, seller, anti trust law, purposes, selling, sales, wholly owned subsidiary, antitrust claim, competitors, ownership, contracts, terms, Sherman Act, termination, alleges, profits, reasons, forum selection clause, wholly owned, high prices, discriminated

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 [down arrow] **Standards of Review, De Novo Review**

When reviewing the dismissal of the antitrust claims, the court takes the facts basically as stated in the complaint and make reasonable inferences that will help the plaintiff.

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 > Robinson-Patman Act > General Overview

HN2 [down arrow] **Robinson-Patman Act, Claims**

The Robinson-Patman Act forbids "any person" to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be to injure competition with any person who grants the discrimination, or with that granting person's customers. [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[HN3](#) Antitrust & Trade Law, Robinson-Patman Act

Whether or not a firm and its subsidiary amount to a single "person," or a "single seller," is answered by examining the extent of common ownership and the degree of control over pricing and distribution policies that the one exercises over the other.

Antitrust & Trade Law > Sherman Act > General Overview

[HN4](#) Antitrust & Trade Law, Sherman Act

The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Clayton Act > Claims

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

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

[HN5](#) Clayton Act, Claims

Section 1 of the Sherman Act, [15 U.S.C.S. § 1](#), forbids an agreement to fix maximum resale prices.

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

Antitrust & Trade Law > Clayton Act > General Overview

[HN6](#) Private Actions, Standing

The requirement under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), that an injury result from an action that the antitrust laws forbid means the injury itself must be a special "antitrust injury," which is to say that it must amount to the type of harm that the antitrust laws were intended to prevent and must flow from that which makes the defendants' acts unlawful.

Counsel: Anne M. Rodgers with whom William R. Pakalka, Fulbright & Jaworski, L.L.P., Enrique J. Mendoza Mendez, Law Offices of Enrique J. Mendoza Mendez, Randall A. Hopkins, Randall A. Hopkins, P.C., Dahr Jamail, Jamail & Kolius, Thomas R. McDade, and McDade & Fogler, L.L.P., were on brief and reply brief for appellant.

Irving Scher and Manuel A. Guzman with whom Bruce A. Colbath, Weil, Gotshal & Manges and McConnell Valdes were on brief for appellees.

Judges: Before Breyer, Chief Judge, Coffin, Senior Circuit Judge, and Boudin, Circuit Judge.

Opinion by: BREYER

Opinion

[*747] BREYER, Chief Judge. This appeal raises two issues of antitrust law. First, do a firm's wholly owned subsidiary and the firm itself amount to a "single seller" under the Robinson-Patman Act? 15 U.S.C. § 13. Second, can a retailer's lost profit, brought about by a *maximum* resale price fixing agreement between that retailer and its supplier, amount to an "antitrust injury," thereby giving that retailer "standing" to obtain treble damages? *Atlantic Richfield Co. v. USA Petroleum Co.* ("ARCO"), 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990); [**2] *Albrecht v. Herald Co.*, 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968). We answer both these questions in the affirmative. Because the district court's dismissal of the plaintiff's complaint rested upon negative answers to the same questions, we set its dismissal aside.

I

Background

From 1981 through 1990, Caribe BMW, Inc. ("Caribe"), through contracts with the German BMW manufacturer, Bayerische Motoren Werke Aktiengesellschaft ("BMW AG"), bought BMW automobiles from BMW AG in Germany, imported them into Puerto Rico, and sold them at retail. In February 1991, Caribe (the appellant here) brought this lawsuit against (the appellees) BMW AG and BMW's wholly owned North American subsidiary, BMW of North America, Inc. ("BMW NA"). Caribe's complaint (actually, its second amended complaint), with commendable simplicity, listed four counts.

[*748] Count I charged a violation of the Robinson-Patman Act. 15 U.S.C. § 13. It said that BMW AG sold cars to BMW NA, which resold those cars to other retailers who competed with Caribe, at prices lower than, or on terms more favorable than, those [**3] at which BMW AG sold similar cars to Caribe. Count II charged a violation of § 1 of the Sherman Act. 15 U.S.C. § 1. It said that BMW AG had set maximum resale prices for the cars that it sold to Caribe by "threatening to terminate Caribe's contracts" unless Caribe would agree, in effect, to maintain low resale prices. Count III charged "breach of contract." It listed various ways in which BMW AG had allegedly broken its word. Count IV charged that, in terminating its contract with Caribe, BMW AG had violated Puerto Rico's Dealers' Contracts Act, more familiarly known as Act 75. *P.R. Laws Ann. tit. 10, § 278 et seq.*

The district court dismissed the complaint for two related reasons. First, it found that the complaint's two antitrust counts "failed to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Second, it noted that a forum selection clause in the contracts between Caribe and BMW AG provided for "exclusive jurisdiction" in "Germany" to resolve "disputes" about the "termination of" or "rights and duties arising out of" the agreement. It found this clause applicable to the remaining (non-antitrust) claims, and it dismissed [**4] those claims "for improper venue" or, in the alternative, "on grounds of *forum non conveniens*." *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 821 F. Supp. 802 (D.P.R. 1993). Caribe appeals.

HN1 When reviewing the dismissal of the antitrust claims we take the facts basically as stated in the complaint and make reasonable inferences that will help the plaintiff. *Garita Hotel Ltd. Partnership v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 17 (1st Cir. 1992). After examining those facts, in light of the relevant law, we conclude that the district court should not have dismissed the antitrust claims. And, that conclusion requires the district court to reexamine dismissal of the other claims as well.

II

The Robinson-Patman Act Claim

HN2 [↑] The Robinson-Patman Act forbids "any person"

to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be . . . to injure . . . competition with any person who . . . grants . . . the . . . discrimination, or with [that granting person's] customers . . .

15 U.S.C. § 13 [**5] (a). Caribe's complaint alleges most of the essentials of a violation. It says that a "person" has "discriminated in price between different purchasers" (namely, Caribe and other retailers in competition with Caribe) of cars, with the effect that "competition with" that person's "customer" (namely, Caribe) is "injured." See [FTC v. Morton Salt Co., 334 U.S. 37, 45, 92 L. Ed. 1196, 68 S. Ct. 822 \(1948\)](#). But, it embodies an ambiguity in respect to the "person" who did the discriminating. It says that BMW AG sold cars directly to Caribe, which resold them at retail. It then says that BMW NA sold cars to other retailers, who compete with Caribe, at lower prices than BMW AG sold its cars to Caribe. At this point, there appear to be two "persons" selling BMWs to retailers, namely, BMW AG (selling them to Caribe) and BMW NA (selling them to Caribe's competitors). The complaint adds, however, that BMW NA is the wholly owned subsidiary of BMW AG. Thus, we must face the legal question of whether or not this last mentioned fact is sufficient to make of the two separately incorporated companies a single [**6] "person" for Robinson-Patman Act purposes. If so, the complaint properly alleges that a single "person" has sold similar goods at two different prices (allegedly with the required statutory effect) . If not, there may be no "person" who has "discriminated." See *id.* ("discrimination" requires at least two sales by a single person at different prices to different customers in competition with each other); see also Phillip Areeda & Louis Kaplow, *Antitrust Analysis* P 601(c) (4th ed. 1988); 3 Earl W. Kintner & Joseph P. Bauer, *Federal Antitrust Law* § 21.11, at 192-93 (1983).

[*749] So far, when courts have faced this question -- **HN3** [↑] whether or not a firm and its subsidiary amount to a single "person" (or a "single seller") -- they have answered it by examining the extent of common ownership and the degree of control over pricing and distribution policies that the one exercises over the other. See *Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool Corp.*, 785 F.2d 1240, 1243 (5th Cir.) (100% ownership, without control, not enough to create a "single seller"), cert. denied, 479 U.S. 848, 93 L. Ed. 2d 108, 107 S. Ct. 171 (1986); [**7] [Island Tobacco Co. v. R.J. Reynolds Indus., Inc., 513 F. Supp. 726, 734 \(D. Haw. 1981\)](#) (same); [Baim & Blank, Inc., v. Philco Corp., 148 F. Supp. 541, 543-44 \(E.D.N.Y. 1957\)](#) (same); [Massachusetts Brewers Ass'n v. P. Ballantine & Sons Co., 129 F. Supp. 736, 739 \(D. Mass. 1955\)](#) (same); see also Kintner & Bauer, *supra*, § 21.16 at 212. In this case, the extent of ownership is 100%; Caribe's complaint alleges *nothing* about actual control. Thus, we must ask whether 100% ownership, by itself, amounts to a sufficient allegation that the "firm plus subsidiary" are a single Robinson-Patman Act "person." We conclude, for reasons that we shall now explain, that it does.

For purposes of clarity, we shall refer in our explanation to hypothetical entities whom we shall call 1) the Manufacturer (M), 2) its wholly owned Distributor (D), 3) the Retailer (R1) who buys from D, and 4) the Direct Buying Retailer (DBR), who buys directly from M and who resells in competition with R1. The distribution arrangement looks like the following:

[SEE DIAGRAM IN ORIGINAL]

In our case, BMW AG holds [**8] the position of M; BMW NA, the position of D; Caribe, the position of DBR; and Caribe's unspecified retail competitors, the position of R1. The legal question, put in terms of the diagram, is whether or not M's 100% ownership of D makes M and D, together, a "single seller," say "MD." If so, a single "person" (allegedly) "discriminates" in price.

We now return to the reasons for our affirmative answer, which are three. First, in 1984, after many of the above-cited "single seller" cases were decided, the Supreme Court decided [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#). The Court there considered the scope of Sherman Act § 1's word "conspiracy." It held that the word did not cover an agreement between a wholly owned subsidiary and its parent, because a wholly owned subsidiary could not "conspire" with the parent. That, the Court said, is because they have

a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . [And] they share [**9] a common purpose whether or not the parent keeps a tight rein over the subsidiary

Id. at 771. The Court added that a "corporation has complete power to maintain" a portion of the enterprise either in the form of an unincorporated division, or in the form of a separately incorporated subsidiary. But, the economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition.

Id. at 772. For these reasons, the Court held,

HN4[] the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of [§ 1](#) of the Sherman Act.

Id. at 771.

Although the Court spoke of Sherman Act [§ 1](#) and of "coordinated activity," its reasoning applies here. See Areeda & Kaplow, *supra*, P 601(c), at 929. In essence, the Court saw an identity of economic interest between parent and wholly owned subsidiary [*750] that, considered [**10] in terms of the economically oriented antitrust laws, warrants regarding them as one. See generally 7 Phillip E. Areeda, *Antitrust Law* P 1464 (1986). Any claimed instance of truly "independent," owner-hostile, subsidiary decisionmaking would meet with the skeptical question, "But, if the subsidiary acts contrary to its parent's economic interest, why does the parent not replace the subsidiary's management?" Given the strength of that joint economic interest, we do not see how a case-specific judicial examination of "actual" parental control would help achieve any significant antitrust objective. Those instances in which a wholly owned subsidiary would intend to act contrary to the economic interests of its owner are likely few and far between, and, if they ever exist, would seem hard to prove. Cf. Areeda & Kaplow, *supra*, P 215.

Second, there does not seem to be any special Robinson-Patman Act purpose that a case-specific "control" inquiry would further. To the contrary, one would not want a seller to be able to defeat the statute's clear objectives by transforming unlawful, into lawful, price discrimination through the creation of a separately incorporated subsidiary [**11] "distributor" that sells to the disfavored customers, whether or not the parent retained "control" over the pricing decisions of the subsidiary. Suppose, for example, that M violates the Act by selling to one retailer (DBR) at \$ 10 and another competing retailer (R1) at \$ 12. M should not be able to avoid the law simply by creating a wholly owned, but "independent" D, to whom it sells at \$ 10, knowing that "independent" D will (say, for profit-maximizing reasons) "independently" resell to R1 at the same \$ 12 price.

We are aware that this area of the law is filled with difficulty. For example, should Robinson-Patman Act liability attach in the example just given if (contrary to our assumption) the wholly owned distributor, D, really fulfills an important distribution function, necessary to supply R1, but not needed in the case of sales to DBR, such that DBR "ought" to receive a lower price? Or, suppose M (perhaps as here) sets a higher price to direct buyers in order to discourage direct sales and thereby to encourage the creation of an independent distribution network? These problems arise, however, in part, because it is difficult to reconcile the Robinson-Patman Act's strictures [**12] with traditional practices of corporations that seem to make sense from a practical viewpoint. See, e.g., *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 559-62, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990); Kintner & Bauer, *supra*, § 22.14; James F. Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 Antitrust L.J. 929 (1985). And the complexity of Robinson-Patman Act law has increased as courts have tried to introduce a degree of flexibility into the Act as applied. See, e.g., Kintner & Bauer, *supra*, § 25.7, at 454-460 (discussing the availability defense); *Hasbrouck*, 496 U.S. at 561 (discussing functional discounts); [15 U.S.C. § 13\(a\)](#) (cost justification defense); see also Rill, *supra*.

For present purposes, however, we need only note that these same problems exist, in one form or another, regardless of our holding in this case. That is to say, a contrary holding would nonetheless produce the same problems wherever M does "control" the pricing policies [**13] of its wholly-owned subsidiary D (i.e., in most cases). And, in the remaining cases (where wholly-owned D is somehow nonetheless "independent"), various other,

related, Robinson-Patman Act problems would often arise if DBR complained about differences in price between M's price to D and M's price to DBR. See pp. 12-14, *infra*. Thus, we find nothing special in the Robinson-Patman Act context that militates against *Copperweld*'s reasoning or result.

Third, applying *Copperweld* avoids a potential anomaly. A majority of courts, using a *Copperweld*-type analysis, have held that a firm M's sale of a good to a wholly owned subsidiary D is not a "sale" for Robinson-Patman Act purposes; rather, it is simply a transfer; and that is so whether D is, or D is not, somehow "independent" in reality. See *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 278 (8th Cir. 1988); *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 221 (6th Cir. 1985) (per curiam) (quoting *Copperweld*, [**751] 467 U.S. at 772 n.18); *O'Byrne v. Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984); [**14] *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 965-67 (5th Cir.), cert. denied, 444 U.S. 942, 62 L. Ed. 2d 309, 100 S. Ct. 298 (1979). These holdings mean that D, the transferee, is not a "purchaser" from M, and, for that reason, M does not violate the Act even if he sells the same good to a direct buying retailer (DBR), or even a direct competitor of D, at a higher price than the price at which he "transfers" the good to D. Our holding today means that when the wholly-owned subsidiary D resells the good to R1, it must do so at a "nondiscriminatory" price, i.e., at a price that would be permissible under the Act had D's sale to R1 been made by M. Thus, if M sells to DBR at 14, D cannot sell to R1 for less than 14 (assuming, of course, that all other Robinson-Patman Act liability conditions are met and no defenses are available).

But, suppose we were to hold the contrary. Suppose that we were to hold that a wholly-owned subsidiary D and its owner M were *not* a "single seller" where D was somehow nonetheless "independent." Then, an anomalous difficulty might well prevent [**15] DBR from bringing an action where M "transfers" to D at 10, D resells to R1 at 12, but M insists on charging DBR 14 (i.e., approximately the allegations before us). The doctrine just mentioned -- in effect finding that M and D are a single entity for purposes of the transfer between them -- would prevent DBR from complaining about the effect of the M-D "transfer." Cf. *Hasbrouck*, 496 U.S. at 569-71. At the same time, our (imagined) holding (the opposite of our actual holding) that M and D were *not* a single entity for purposes of D's sale to R1 would likely prevent DBR from complaining about the effect of that sale because of its inability to find a single "person" who discriminated (because M does not sell to R1, while D does not sell to DBR, see pp. 12-13, *supra*).

Perhaps one could somehow avoid this anomaly in other ways, but it seems undesirable to invent epicycles in an already too complex area of the law. It is simpler to hold in parallel fashion that ownership alone makes a "single seller" of a firm and its wholly owned distributor, just as ownership alone eliminates the possibility of a Robinson-Patman Act [**16] "sale" between them.

We therefore find it appropriate to apply *Copperweld*'s reasoning outside Sherman Act § 1. See, e.g., *City of Mt. Pleasant*, 838 F.2d at 278; *Russ' Kwik Car Wash*, 772 F.2d at 221; cf. *United States v. Waste Management, Inc.*, 743 F.2d 976, 979 (2d Cir. 1984) (attributing subsidiary's activity to parent for purposes of Clayton Act § 7). We hold that BMW AG's ownership of BMW NA makes of those two entities, for Robinson-Patman Act purposes, a single seller.

We now turn to a second, independent reason the district court gave for concluding that the complaint did not adequately state a Robinson-Patman Act claim. The court correctly noted that if a seller makes its favorable prices and terms available to an otherwise disfavored customer, that customer has no legal right to complain. See, e.g., *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326, 1328-29 (6th Cir. 1983) (discussing availability defenses to §§ 2(a), 2(d), and 2(e)); *Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105-06 (6th [**17] Cir.) (discussing availability under § 2(a)), cert. denied, 454 U.S. 897, 70 L. Ed. 2d 213, 102 S. Ct. 397 (1981); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 120-21 (3d Cir. 1980) (same), cert. denied, 451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981); see also Kintner & Bauer, *supra*, § 25.7. The district court then concluded that Caribe, in a portion of its complaint, in effect conceded that BMW made its favorable prices and terms available to Caribe. That complaint portion says that in 1987

despite Caribe's remarkable success, BMW attempted to convert Caribe from being an importer-retailer purchasing directly from the factory to being a mere retail dealer purchasing from BMW N.A.

We do not believe, however, that one can draw from this statement the "availability" concession that the district court found. The complaint also says that

[*752] *unbeknownst to Caribe*, and beginning by at least 1987, BMW began lowering its prices for BMWs sold to Caribe's competitors and offering those [*18] competitors other economic advantages while maintaining its prices to Caribe at a discriminatorily high level and not making the other economic advantages available to Caribe on proportionately equal terms.

The emphasized language says that Caribe did not know that its competitors were receiving favored treatment. And, we do not see how ordinarily one could say that a seller has made favored treatment "available" to a disfavored customer if the disfavored customer *does not know* about the favored treatment. See, e.g., *Alterman Foods, Inc. v. FTC*, 497 F.2d 993, 1001 (5th Cir. 1974); *Mueller Co. v. FTC*, 323 F.2d 44, 46-47 (7th Cir. 1963), cert. denied, 377 U.S. 923, 12 L. Ed. 2d 215, 84 S. Ct. 1219 (1964); *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350, 355-56 (E.D. Wis. 1979).

Caribe also argues that the favored treatment, as a practical matter, was not "available" because BMW AG insisted that it give up various advantages of its importer's contract in order to obtain it. We cannot tell from the complaint, [*19] however, just what those advantages were and how they related to the practical "availability" of the favorable treatment given other retailers. Thus, we cannot say, at this time, whether or not Caribe will be able to prove that the favorable price and terms, as a practical matter, were not available. At this stage, however, Caribe has sufficiently alleged that they were not.

Our conclusion is that Caribe's complaint states a valid Robinson-Patman Act claim, in respect to price discrimination under Robinson-Patman Act § 2(a), and for similar reasons, under the Robinson-Patman Act sections that deal with payments for services, furnishing services, and brokerage payments. [15 U.S.C. § 13\(b\), \(d\)-\(e\)](#). Although Caribe's pleadings regarding these other Robinson-Patman Act sections are rather sparse, they are sufficient to give BMW AG and BMW NA notice of the substance of Caribe's complaint. Caribe also claimed that BMW NA violated § 2(f), which forbids knowingly inducing or receiving a discrimination in price. [15 U.S.C. § 13\(f\)](#). In light of our holding that BMW NA is not a separate "person," however, that portion of the [*20] complaint must be dismissed.

III

The Sherman Act

Count Two of the Complaint says that

BMW has for years imposed as a secret condition of Caribe's contracts an agreement or understanding that Caribe charge its customers prices set by BMW. . . . More specifically, BMW threatened to terminate Caribe's contracts unless Caribe agreed not to raise its margins (i.e., and thus its retail prices) above levels fixed and set by BMW, and Caribe reluctantly agreed.

This complaint sets forth a claim that BMW and Caribe agreed to fix "maximum" resale prices. The Supreme Court has held that Sherman Act [§ 1 HN5](#) forbids this kind of agreement. See *Albrecht v. Herald Co.*, 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968). The complaint also alleges that the "agreement caused Caribe to lose additional profits." And, Clayton Act § 4 permits any "person" whose "business" is injured by "reason of anything forbidden in the antitrust laws" to recover treble damages. [15 U.S.C. § 15](#).

The district court nonetheless dismissed the complaint in light of Clayton Act § 4's requirement that the injury must [*21] result from an action that the antitrust laws forbid. The courts have held that [HN6](#) this requirement means the injury itself must be a special "antitrust injury," which is to say that it must amount to "the type" of harm "the antitrust laws were intended to prevent," and it must flow "from *that which* makes [the] defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) (emphasis added). The district court thought that Caribe's lost profits were not the "type" of harm that the anti-

maximum-resale-price-fixing rule seeks to prevent. And, it rested that conclusion upon its reading of a Supreme Court case, *Atlantic Richfield Co. v. [*753] USA Petroleum Co.* ("ARCO"), [495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#).

As the district court pointed out, in ARCO the Supreme Court considered the anticompetitive possibilities that had earlier led the Court to find maximum resale price agreements unlawful. The Supreme Court referred to three. First, the "maximum" resale price agreement [\[**22\]](#) might be, in reality, a disguised "minimum" resale price agreement, in which case the agreement would threaten the very kinds of harm that led the Court, in [Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 \(1911\)](#), to find minimum resale price agreements unlawful *per se*. ARCO, 495 U.S. at 336. Second, a maximum resale price agreement might prevent a dealer from providing "services and conveniences" that customers would want to the point that the customers would accept (if necessary) the price increases needed to provide them. [Id. at 335-36](#). If so, a supplier's judgment about the proper resale price (imposed through the supplier's maximum resale price agreement) would prevent consumers from obtaining what they want (higher quality product) from retailers who would like to supply it. *Id.* Third, a "maximum resale price agreement" might "channel distribution through a few large or specifically advantaged dealers," the only ones able to earn a profit at [\[**23\]](#) the mandated, low resale price. [Id. at 336](#) (quoting [Albrecht, 390 U.S. at 153](#)).

The Supreme Court went on to hold that the ARCO plaintiffs had not suffered "antitrust injury." But it noted, and we note, that, unlike Caribe, the ARCO plaintiffs were not dealers who themselves had entered into (or been forced to enter into) such agreements; rather they were the *competitors* of those dealers. They had claimed that the agreements had helped the ARCO dealers (who entered into the agreements) obtain more sales, thereby leaving them, the competitors of the ARCO dealers, with fewer sales for themselves. The Supreme Court held that, whatever else might be wrong with the plaintiffs' assertion, it did not allege harm of the *type* that *Albrecht* sought to prevent. *That kind of harm would have taken the form of fewer ARCO dealers, or fewer sales for the dealers who had entered into the agreements (because those customers wanting higher prices and extra services could not get them), not more ARCO dealer sales.* The Supreme Court then wrote that [\[**24\]](#) the plaintiffs, being *rival* dealers, were

benefited rather than harmed if [ARCO's] pricing policies restricted ARCO sales to a few large dealers or prevented [ARCO's] dealers from offering services desired by consumers such as credit card sales.

[Id. at 336-37](#). The Court added that if an agreement

lowers prices but maintains them above predatory levels, the business lost by *rivals* cannot be viewed as an "anticompetitive" consequence of the claimed violation.

[Id. at 337](#) (emphasis added).

In this case, Caribe is not in the same position as the ARCO plaintiffs, for Caribe is the very firm that the alleged maximum resale price fixing agreement forced to keep its price below the level it preferred to set. At least in theory, if customers would have preferred a higher price and consequently better product quality or greater service, the agreement forced Caribe to provide less of what they wanted; the agreement thereby might have led to lower Caribe profits. And, at least in theory, if the agreement helped other, larger *BMW* dealers, Caribe is the firm that would have suffered. Thus, Caribe's complaint here alleges antitrust harm of the "type" that [\[**25\]](#) Clayton Act § 4 authorizes it to assert. ARCO supports, it does not deny, Caribe's standing.

We recognize that *Albrecht* has proved a controversial case. That is, in part, because it seems to outlaw not only anticompetitive uses of maximum price fixing, but also procompetitive uses as well, namely, use of a *maximum* resale price agreement that protects consumers from the exercise of a retailer's monopoly power. See, e.g., 8 Phillip E. Areeda [Antitrust Law](#) § 1636 (1989). And insofar as Caribe's claim of "lost profits" refers to "losses" that occurred because the agreement prevented Caribe from raising prices above the competitive level, it is at [\[*754\]](#) least arguable that no "antitrust injury" occurred. See *id.* § 1640; Phillip E. Areeda, [Antitrust Law](#) § 340.3b, at 509-510 (Supp. 1993). But, at this stage of the proceeding, we must view Caribe's complaint in a favorable, not an

unfavorable, light. We therefore read the complaint as implying that the agreement cost Caribe profits because it inhibited Caribe from selling to those potential BMW customers who would have preferred higher quality service, even if that meant somewhat higher Caribe prices.

We recognize that [**26] one might also wonder, as did the district court, how Caribe could have been injured *both* by a Robinson-Patman Act violation and by a maximum resale price agreement. How could it have suffered lost customers attracted by the *lower* prices of retailers who bought cheaply from BMW NA and also have suffered lost profits because it could not *increase* its prices? One might answer this question, however, by inferring from the complaint that Caribe has two different kinds of customers. Some want to pay the lowest possible prices; others would pay more to receive special services that Caribe would offer only if it could charge higher prices. At least in principle, possibilities of this sort are not outlandish. And, it seems to us that Caribe is entitled to have a court draw these inferences at this complaint stage of the proceeding. Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976); Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073, 1081 (1st Cir. 1993). [**27]

We conclude that the district court should not have dismissed count II of the complaint.

IV

Puerto Rico Antitrust Claims

Caribe asserted claims under Puerto Rico's **antitrust law** that parallel its federal antitrust claims. As the parties seem to agree, courts interpret Puerto Rico's laws as essentially embodying the jurisprudence relevant to the parallel federal law. For that reason we reinstate the Commonwealth antitrust claims to the same extent that we have reinstated the federal claims. Cf. *R.W. Int'l Corp. v. Welch Food, Inc.*, No. 93-1704, slip op. at 19-25 (1st Cir. Jan. 20, 1994); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 723 F.2d 155, 161 (1st Cir. 1983), aff'd in part and rev'd in part, on other grounds, 473 U.S. 614 (1985).

V

The Contract Claims and the Act 75 Claim

Our antitrust count decisions require the district court to reconsider its remaining dismissals, of Caribe's breach of contact claims and its Act 75 claim. The district court dismissed those counts because of a forum selection clause in the Caribe contracts, which says

the exclusive jurisdiction for disputes concerning [**28] the . . . termination of this agreement as well as all and any rights and duties arising out of this agreement is . . . Germany.

The court did not decide, however, whether or not this clause covers antitrust counts (for it had dismissed those counts for failure to state a valid claim). We cannot tell from the wording of the clause alone whether it does, or does not, cover antitrust claims -- whether such claims "concern" the "termination" of, or "rights and duties arising out of," the "agreement." And, it seems to us that the parties should have an opportunity to pursue that question further in the district court. Compare Mitsubishi Motors, 723 F.2d at 159-61 (analyzing numerous provisions in contract to determine intended scope of a forum selection clause) with Bense v. Interstate Battery Sys. of Am., Inc., 683 F.2d 718, 720 (2d Cir. 1982) (broadly worded forum selection clause includes antitrust claims).

The answer to this question, depending upon what it is, might add strength to (or weaken) plaintiff's argument that the forum selection clause cannot apply to the Act 75 claim. It also could affect the arguments [**29] about the comparative "convenience" of Puerto Rico for a trial on the contract and Act 75 claims. Were it to turn out, for example, that an antitrust trial had to take place anyway in Puerto Rico, the comparative [*755] balance of conveniences might well change.

We do not mean to express any view, however, on the merits of these or other arguments (such as jurisdictional arguments) that the parties may make as the case proceeds further. We simply hold that the district court should not have dismissed the antitrust claims in the complaint. And, that holding, in turn, requires the court to reconsider its other dismissals.

The judgment of the district court is vacated and the case is remanded for further proceedings.

So ordered.

End of Document



Bell Atl. Business Sys. Servs. v. Hitachi Data Sys. Corp.

United States District Court for the Northern District of California

March 29, 1994, Decided ; March 29, 1994, Filed

Case No. C 93-20079 JW

Reporter

849 F. Supp. 702 *; 1994 U.S. Dist. LEXIS 5302 **; 1994-1 Trade Cas. (CCH) P70,580; 94 Daily Journal DAR 6711

BELL ATLANTIC BUSINESS SYSTEMS SERVICES, Plaintiff, v. HITACHI DATA SYSTEMS CORPORATION, HITACHI AMERICA, LTD., and HITACHI LTD., Defendants.

Core Terms

subsidiary, conspire, wholly-owned, ego, summary judgment motion, antitrust, Sherman Act, conspiracy, allegations, purposes, restraint of trade, pleadings, reasons, parent corporation, unity of interest, legal incapacity, matter of law, entities

LexisNexis® Headnotes

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1 [Motion Practice, Content & Form]

Courts generally may not consider matters outside the pleadings to decide a motion to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). If parties present matters outside the pleadings, and the court is willing to consider those matters, the court should convert the motion to a motion for summary judgment. This standard also applies to motions for judgment on the pleadings.

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

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

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

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

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

849 F. Supp. 702, *702L^A1994 U.S. Dist. LEXIS 5302, **5302

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 there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). To survive a motion for summary judgment, the non-moving party must show that the fact in contention is material and that it might affect the outcome of the suit under governing law. The non-moving party must also demonstrate that the factual dispute is genuine, or that the evidence is such that a reasonable jury could not find for the moving party.

Antitrust & Trade Law > Sherman Act > General Overview

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

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > Penalties

Mergers & Acquisitions Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4 **Sherman Act, Penalties**

Under the Copperweld rule, a parent and its wholly-owned subsidiary are legally incapable of conspiring with each other for purposes of [§ 1](#) of the Sherman Act (Act), codified at [15 U.S.C.S. § 1](#). A parent corporation and a wholly-owned subsidiary have a complete unity of interest because their acts do not bring together economic power that previously pursued divergent goals or separate interests. A parent corporation and its wholly-owned subsidiaries are the same entities for antitrust purposes and their coordinated activity must be viewed as that of a single enterprise for the purposes of [§ 1](#) of the Act.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > General Overview

HN5 **Antitrust & Trade Law, Sherman Act**

The Copperweld rationale applies in situations between a parent corporation and a less than wholly-owned subsidiary. Parent corporations and wholly-owned subsidiaries share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests. The entity with legal control effectively dictates the policies and direction of its subsidiary. Anytime the subsidiary ceases to act in the best interest of the parent, the parent can assert full control over the subsidiary. In this respect, the parent and subsidiary act with a unity of interest.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Corporate Finance > Initial Capitalization & Stock Subscriptions > Classes of Stock

Mergers & Acquisitions Law > General Overview

HN6 [down] Antitrust & Trade Law, Sherman Act

A parent and a wholly-owned subsidiary are considered the "same entity" for antitrust purposes because the parent has the power to exercise full control over its subsidiary. For the same reasons, a parent and a subsidiary over which the parent has legal control cannot conspire to restrain trade. They share a unity of interest and common corporate consciousness because they work toward the same goal.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > General Overview

HN7 [down] Antitrust & Trade Law, Sherman Act

Two wholly-owned subsidiaries of the same parent are legally incapable of conspiring with each other in violation of [§ 1](#) of the Sherman Act, codified at [15 U.S.C.S. § 1](#).

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Torts > Vicarious Liability > Corporations > General Overview

HN8 [down] Shareholder Duties & Liabilities, Piercing the Corporate Veil

Courts will "pierce the corporate veil" in situations where evidence exists that the subsidiary corporation is a "mere instrumentality" of the parent corporation, or when a parent corporation creates the subsidiary to shield it from liability rather than for reasons of business efficiency.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Torts > Vicarious Liability > Corporations > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

HN9 [down] Piercing the Corporate Veil, Alter Ego

In California, the necessary elements of an alter ego claim are: 1) unity of interest and ownership such that the separate personalities of the two corporations no longer exist; and 2) that an inequitable result will occur if the corporate veil is not pierced and the challenged conduct is treated as that of the subsidiary alone. A parent is not liable for the wrongful acts of its subsidiary simply because the parent wholly-owns the subsidiary.

Counsel: [\[**1\]](#) For Plaintiff: Ronald S. Katz, Janet S. Arnold, COUDERT BROTHERS, San Francisco, CA.

For Defendants: Andrew E. Paris, KIRKLAND & ELLIS, Los Angeles, CA. Nathan Lane III, GRAHAM & JAMES, San Francisco, CA.

Judges: WARE

Opinion by: JAMES WARE

Opinion

[*704] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Defendants Hitachi America Ltd. ("Hitachi America") and Hitachi, Ltd. ("Hitachi") move to dismiss Plaintiff's, Bell Atlantic Business Systems Services ("Bell Atlantic"), First Amended Complaint ("Complaint") pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). Defendant Hitachi Data Systems ("Hitachi Data") moves for judgment on the pleadings pursuant to [Federal Rule Civil Procedure 12\(c\)](#) on Count I of the Complaint, which alleges conspiracy under [§ 1](#) of the Sherman Antitrust Act. [15 U.S.C. § 1](#).

HN1 [↑] Courts generally may not consider matters outside the pleadings to decide a motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). If parties present matters outside the pleadings, and the court is willing to consider those matters, the court should convert the motion to a motion for summary judgment. [Bonilla v. Oakland Scavenger Co.](#), 697 F.2d 1297 (9th Cir. 1982). [**2] Similarly, the above standard applies to motions for judgment on the pleadings. [Slevin v. Pedersen Assoc., Inc.](#), 540 F. Supp. 437 (S.D.N.Y. 1982). The parties before the Court have gone beyond the "four corners" of the pleadings by submitting declarations and additional facts.

Accordingly, the Court will consider Defendants' motions as motions for summary judgment. For the reasons set forth below, the Court hereby GRANTS Defendants' motions for summary judgment with respect to the Count I conspiracy charge. Additionally, the Court DENIES Defendants Hitachi's and Hitachi America's motions for summary judgment with respect to Plaintiff's remaining claims, including Plaintiff's alter ego allegations.

BACKGROUND

Bell Atlantic is an independent service organization ("ISO") that services high technology computer equipment manufactured by other companies. Bell Atlantic claims that Hitachi, Hitachi Data and Hitachi America ("Defendants") conspired and engaged in anticompetitive conduct to keep Bell Atlantic out of the market of servicing equipment manufactured and sold by Defendants.

Hitachi, a Japanese corporation, manufactures direct access storage devices [**3] ("Product") and exports them to Hitachi America. Hitachi America sells Product to Hitachi [*705] Data. Hitachi Data sells Product and competes with Bell Atlantic in the Hitachi Product service market. Although not directly pleaded in the complaint, it is undisputed that Hitachi America is a wholly-owned subsidiary of Hitachi and Hitachi Data is a wholly-owned subsidiary of Hitachi Data Holding Company, which is 80% owned by Hitachi. Def. Hitachi America's P. & A. at 2.

Bell Atlantic alleges that Hitachi, Hitachi America and Hitachi Data contracted with one another to unreasonably restrain trade and prevent competition with respect to servicing older Hitachi Product in the United States. Moreover, Defendants' conduct allegedly prevents companies such as Bell Atlantic from entering the market to service new Hitachi Product. Bell Atlantic claims that Defendants' agreements violate antitrust laws because they provide that certain products not be sold and certain information not be disclosed to third parties. Bell Atlantic alleges these restrictions prevent it from obtaining parts and materials necessary to service the Product.

LEGAL STANDARD

HN2[] Summary judgment is appropriate where there is [**4] no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). To survive a motion for summary judgment, the non-moving party must show that the fact in contention is material and that it might affect the outcome of the suit under governing law. [Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248-49, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). Additionally, the non-moving party must demonstrate that the factual dispute is genuine, i.e., the evidence is such that a reasonable jury could not find for the moving party. *Id.*

DISCUSSION

I. Count I: Conspiracy To Restrain Trade in Violation of Sherman Act [§ 1](#)

A. Hitachi-parent and Hitachi America-wholly-owned subsidiary

HN3[] [Section 1](#) of the Sherman Antitrust Act provides that "every contract, combination . . . or conspiracy, in restraint of trade . . . is hereby declared to be illegal." [15 U.S.C. § 1](#). In [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#), the United [**5] States Supreme Court noted that [§ 1](#) targets concerted activity as opposed to unilateral activity because, "concerted activity is inherently fraught with anticompetitive risk. It deprives the marketplace of the independent center of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit."

Moreover, the Court held that **HN4**[] a parent and its wholly-owned subsidiary are legally incapable of conspiring with each other for purposes of [§ 1](#) of the Sherman Act. [Copperweld, 467 U.S. at 779](#). The rationale behind this rule is that a parent corporation and a wholly-owned subsidiary have a "complete unity of interest" because their acts do not bring together economic power that previously pursued divergent goals or separate interests. [Id. at 771](#). Consequently, a parent corporation and its wholly-owned subsidiaries are the same entities for antitrust purposes and their coordinated activity "must be viewed as that of a single enterprise for [**6] the purposes of [§ 1](#) of the Sherman Act." *Id.* To hold otherwise, reasoned the Court, would penalize corporations for choosing to organize their operations into subsidiaries which creates efficiency and benefits customers. [Id. at 773-74](#).

It is undisputed that Hitachi wholly-owns Hitachi America. Accordingly, as a matter of law, Hitachi and Hitachi America cannot conspire in violation of [§ 1](#) of the Sherman Act.

B. Hitachi-parent and Hitachi Data-80% owned subsidiary

[Copperweld](#) dealt directly with the relationship between a parent corporation and a wholly-owned subsidiary. Courts have found that **HN5**[] the [Copperweld](#) rationale also applies in situations between a parent corporation and a less than wholly-owned subsidiary. The [*706] Court in [Copperweld](#) reasoned that parent corporations and wholly-owned subsidiaries "share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests." [Copperweld, 467 U.S. at 771-72](#). In other words, [**7] the entity with legal control effectively dictates the policies and direction of its subsidiary. Anytime the subsidiary ceases to act in the best interest of the parent, the parent can assert full control over the subsidiary. In this respect, the parent and subsidiary act with a unity of interest. *Id.*

Based on this reasoning, one court held that a corporation holding 51% ownership of a subsidiary, could not conspire with that subsidiary for antitrust purposes. [Novatel Communications v. Cellular Tel. Supply, Inc., 1986-2 Trade Cas. \(CCH\) 67,412 \(N.D. Ga. 1986\)](#). Similarly, General Electric could not conspire with its Canadian subsidiary since General Electric had a 91.9% ownership interest in the subsidiary. [Leaco Enter., Inc. v. General Elec. Co., 737 F. Supp. 605, 608-09 \(D. Ore. 1990\)](#). The court in [Leaco](#) relied on the reasoning that where the parent owns enough stock in the subsidiary to cause a merger, the subsidiary should be treated as a wholly-owned subsidiary with the same unity of interest to determine [§ 1](#) liability for conspiracy. [Leaco, at 608-09](#), relying on [Sonitrol of Fresno v. AT&T, 1986 Trade Cas. \(CCH\) 67,080 \(1986\)](#).

Plaintiff urges [**8] that a factual inquiry is necessary to assess whether Defendants can conspire in violation of federal **antitrust law** because *Copperweld* only extends to corporations "owned 100% in common, or a *de minimis* amount less than 100%." *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987). The Court disagrees.

Under the reasoning of *Copperweld* and its progeny, it is not necessary to conduct a factual inquiry to determine whether a parent and a subsidiary over which the parent has legal control can conspire in violation of § 1 of the Sherman Act. *Copperweld* found that HN6[¹] a parent and a wholly-owned subsidiary are considered the 'same entity' for antitrust purposes because the parent has the power to exercise full control over its subsidiary. For the same reasons, a parent and a subsidiary over which the parent has legal control cannot conspire to restrain trade. They share a unity of interest and common corporate consciousness because they work toward the same goal. It is undisputed that Hitachi owns 80% of Hitachi Data Holding Company, which owns 100% of Hitachi Data. Accordingly, the Court finds that as a matter of [**9] law, Hitachi could not conspire with Hitachi Data to restrain trade in violation of § 1 of the Sherman Act.

C. Conspiracy between sister subsidiaries of the same parent - Hitachi Data and Hitachi America

Courts since *Copperweld* have found that HN7[¹] two wholly-owned subsidiaries of the same parent were legally incapable of conspiring with each other in violation of § 1 of the Sherman Act. *Advanced Health-Care Serv., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990); *Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987); *Hood v. Tenneco Texas Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984); *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984). Plaintiff cites one case, *In re Ray Dobbins Lincoln-Mercury v. Ford Motor Co.*, 604 F. Supp. 203, 205 (W.D. Va. 1984), which held that sister corporations could conspire. However, as Defendants emphasize, the Fourth Circuit subsequently disapproved this decision with its decision in *Advanced Health-Care Serv., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990). [**10]

Moreover, Plaintiff attempts to distinguish the cases cited above which extended *Copperweld* to sister corporations. Those cases found that two *wholly-owned* subsidiaries of the same parent could not conspire for the same reasons the parent and its wholly-owned subsidiary could not conspire. Plaintiff argues that the Court should not rely on these cases because the instant case does not involve two wholly-owned sister corporations since Hitachi America is 100% owned by Hitachi and Hitachi Data is 80% owned.

[*707] The Court disagrees with Plaintiff's distinction. As shown above, Hitachi and Hitachi America cannot conspire as a matter of law. Moreover, Hitachi and Hitachi Data cannot conspire as a matter of law. For the same reasons these companies cannot conspire, Hitachi Data and Hitachi America, sister subsidiaries of Hitachi, cannot conspire to restrain trade. They all act pursuant to the same interests and goals: the distribution of Hitachi products. Two sister subsidiaries of the same parent over which the parent has legal control are legally incapable of conspiring in violation of § 1 for the same reasons *Copperweld* found that a parent and its wholly-owned subsidiary could [**11] not conspire. Accordingly, the Court hereby GRANTS Defendants' motions for summary judgment with respect to Count I which alleges conspiracy in violation of § 1 of the Sherman Act.

II. Allegations of Alter-Ego Relationship between Hitachi, Hitachi America and Hitachi Data as basis for liability of Hitachi and Hitachi America

Bell Atlantic alleges Hitachi and Hitachi America are the alter egos of Hitachi Data and therefore, Hitachi and Hitachi America are legally responsible for Hitachi Data's wrongdoing.

A. Conspiracy under the Sherman Act and Alter Ego Theory

Bell Atlantic asserts that Defendants are attempting to "have it both ways." On the one hand, Hitachi and Hitachi America claim that they cannot be liable under § 1 of the Sherman Act because they are too closely related. On the other hand, Hitachi and Hitachi America claim that they cannot be liable under an alter ego theory because the corporations are separate entities engaging in separate activities.

Plaintiff's attempt to equate [§ 1](#) conspiracy liability with alter ego liability fails because [§ 1](#) deals with federal antitrust policies and the alter ego doctrine is governed by California corporation law. The [\[**12\]](#) two legal principles have different purposes and policy considerations. It does not follow that because Hitachi, Hitachi America and Hitachi Data are legally incapable of conspiring in violation of federal antitrust laws, that Hitachi, the parent, is the alter ego of its subsidiaries. In [United National Records, Inc. v. MCA, Inc., 616 F. Supp. 1429 \(N.D. Ill. 1985\)](#) the court discredited an attempt to find an alter ego relationship between companies simply because they are legally incapable of conspiring for antitrust purposes. [Id. at 1433.](#)

B. Alter Ego Liability

[HN8](#) Courts will "pierce the corporate veil" in situations where evidence exists that the subsidiary is a "mere instrumentality" of the parent. In other words, a parent creates the subsidiary to shield it from liability rather than for reasons of business efficiency. [HN9](#) In California, the necessary elements of alter ego claim are 1) unity of interest and ownership such that the separate personalities of the two corporations no longer exist and 2) that an inequitable result will occur if the corporate veil is not pierced and the challenged conduct is treated as that of [\[**13\]](#) the subsidiary alone. [Mesler v. Bragg Management Co., 39 Cal. 3d 290, 300, 216 Cal. Rptr. 443, 702 P.2d 601](#). However, a parent is not liable for the wrongful acts of its subsidiary simply because the parent wholly-owns the subsidiary. [United Nat'l Records, Inc. v. MCA, Inc., 616 F. Supp. 1429, 1432 \(N.D. Ill. 1985\).](#)

Whether Hitachi America and Hitachi Data are "mere instrumentalities" of Hitachi and each other is a factual issue. Bell Atlantic is entitled to discovery on the alter ego issue. Genuine issues of material fact remain regarding its claim that the subsidiaries are "mere instrumentalities" of Hitachi. Accordingly, without further discovery on this issue, summary judgment is inappropriate at this stage. The Court will reserve ruling on the disposition of Plaintiff's remaining claims ¹ until the resolution of the alter ego issue because Bell Atlantic has not accused [\[*708\]](#) Hitachi America or Hitachi of any direct antitrust violations. The whole basis of Hitachi's and Hitachi America's liability is their connection to Hitachi Data.

[\[**14\]](#) Accordingly, the Court hereby DENIES without prejudice Defendants Hitachi's and Hitachi America's motions for summary judgment on Plaintiff's remaining claims, including Plaintiff's alter ego allegations.

CONCLUSION

1. Defendants Hitachi's, Hitachi America's and Hitachi Data's motions for summary judgment are GRANTED on Count I of the Complaint.
2. Defendants Hitachi's and Hitachi America's motions for summary judgment with respect to Plaintiff's remaining claims, including Plaintiff's alter ego allegations, are DENIED without prejudice. Defendants are directed to renew their motion for summary judgment after Plaintiff has had a reasonable opportunity to conduct discovery with respect to its alter ego allegations.

IT IS SO ORDERED.

DATE: March 29, 1994

HONORABLE JAMES WARE

United States District Judge

¹ Plaintiff has also alleged the following claims: 1) Counts II - XI: Illegal Tying Arrangements; 2) Count XII: Monopolization - Sherman Act § 2; 3) Count XIII: Unfair Competition - [Cal. Bus. & Prof. Code § 17200](#); and 4) Count XIV: Tortious Interference with Prospective Economic Advantage - California Common Law.

End of Document

Bieter Co. v. Blomquist

United States District Court for the District of Minnesota, Third Division

March 29, 1994, Decided

3-89 CIV 759

Reporter

848 F. Supp. 1446 *; 1994 U.S. Dist. LEXIS 4952 **

BIETER COMPANY, Plaintiff, v. BEATTA BLOMQUIST; FEDERAL LAND COMPANY; EAGAN TOWER OFFICE BUILDING PARTNERSHIP; EAGAN HEIGHTS COMMERCIAL PARK; ADVANCE DEVELOPERS, INC.; CLIFF ROAD PROPERTIES; HOFFMAN DEVELOPMENT GROUP, INC; HDG ASSOCIATES LIMITED PARTNERSHIP; EAGAN ASSOCIATES LIMITED PARTNERSHIP; CRP OF EAGAN, INC.; ROBERT L. HOFFMAN; PATRICK C. HOFFMAN; and JACK F. DALY, JR., Defendants, and CLIFF ROAD PROPERTIES; HOFFMAN DEVELOPMENT GROUP, INC.; ADVANCE DEVELOPERS, INC.; HDG ASSOCIATES LIMITED PARTNERSHIP; EAGAN ASSOCIATES LIMITED PARTNERSHIP; CRP OF EAGAN, INC.; ROBERT L. HOFFMAN; PATRICK C. HOFFMAN; and JACK F. DALY, JR., Third-Party Plaintiffs, v. DORSEY & WHITNEY, a Minnesota partnership; and RYAN CONSTRUCTION COMPANY OF MINNESOTA, Inc., a Minnesota corporation, Third-Party Defendants.

Core Terms

unclean hands, pari delicto, damages, affirmative defense, tortious interference, summary judgment, anti trust law, valid defense, defenses, Partial, courts, equitable defense, antitrust action, involvement, equitable, argues, antitrust, genuine

LexisNexis® Headnotes

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

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

HN1[] Entitlement as Matter of Law, Appropriateness

Summary judgment is to be used as a tool to isolate and dispose of claims or defenses that are either factually unsupported or are based on undisputed facts. Summary judgment is proper, however, only if examination of the evidence in a light most favorable to the non-moving party reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The test for whether there is a genuine issue of material fact is two-

fold. First, the materiality of a fact is determined from the substantive law governing the claim. Only disputes over facts that might affect the outcome of the suit are relevant on summary judgment. Second, any dispute of material fact must be "genuine." A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. It is the non-moving party's burden to demonstrate that there is evidence to support each essential element of his claim.

Antitrust & Trade Law > Clayton Act > Defenses

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > Unclean Hands

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

[**HN2**](#) Clayton Act, Defenses

The general rule is that the defenses of unclean hands and in pari delicto are not available in antitrust cases.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

[**HN3**](#) Private Actions, Racketeer Influenced & Corrupt Organizations

In pari delicto asserts that a plaintiff who participated in the wrongdoing cannot recover when he suffers injury as a result of that wrongdoing. The doctrine of in pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

Antitrust & Trade Law > Sherman Act > Defenses

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Clayton Act > Penalties

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > Unclean Hands

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Penalties

[**HN4**](#) Sherman Act, Defenses

The antitrust laws, like the Racketeer Influence and Corrupt Organizations Act (RICO), provide for criminal penalties. [15 U.S.C.S. §§ 3, 24](#). And RICO, like the antitrust laws, was designed at least partially to promote competition, in RICO's case through stemming the infiltration into legitimate businesses by organized crime and by outlawing certain predatory business practices.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

[**HN5**](#) Private Actions, Racketeer Influenced & Corrupt Organizations

A private action for damages may be barred on the grounds of plaintiff's own culpability only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the in vesting public.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > Unclean Hands

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

[**HN6**](#) Affirmative Defenses, Unclean Hands

The equitable "clean hands" doctrine is not applicable to an action for damages.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > Unclean Hands

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

[**HN7**](#) Affirmative Defenses, Unclean Hands

Equitable proceedings are to be governed by equitable principles. Under Minnesota law, the doctrine of unclean hands will be invoked only to deny equitable relief to a party whose conduct has been unconscionable by reason of a bad motive or where the result induced by that party's conduct will be unconscionable either in the benefit to that party or in the injury to others.

Counsel: [\[**1\]](#) Lindquist & Vennum by JAMES McCARTHY and MICHAEL OLAFSON of Minneapolis, Minnesota appeared for Plaintiff Bieter Company.

Fruth & Anthony by JOSEPH W. ANTHONY and NORMAN J. BAER of Minneapolis, Minnesota appeared for Advance Developers, Inc., Cliff Road Properties, Hoffman Development Group, Inc., HDG Associates Limited Partnership, Eagan Associates Limited Partnership, CRP of Eagan Inc., Robert L. Hoffman, Patrick C. Hoffman, and Jack F. Daly, Jr.

Hoff & Allen by GEORGE C. HOFF of Eden Prairie, Minnesota appeared for Defendant Beatta Blomquist.

Peterson, Bell, Converse & Jensen by ROBERT C. BELL and WILLARD CONVERSE of Minneapolis, Minnesota appeared for Defendant Federal Land Company.

Fredrikson & Byron by THOMAS S. FRASER and TODD A. WIND of Minneapolis, Minnesota appeared for Third-Party Defendant Ryan Construction Company of Minnesota, Inc.

Fabyanske, Svoboda, Westra & Davis by RICHARD G. JENSEN of Minneapolis, Minnesota appeared for Third-Party Defendant Dorsey & Whitney.

Judges: Alsop

Opinion by: DONALD D. ALSOP

Opinion

[*1447] ORDER

The above-entitled matter came on for hearing before this Court upon various motions by the parties in this case and upon the motions of the parties in several related [***2] cases. Among the motions heard by the Court was the Motion of Plaintiff Bieter Company for Partial Summary Judgment striking Defendants' affirmative defenses of *in pari delicto* and unclean hands. The other motions heard are addressed in two separate Orders.

I. BACKGROUND

On April 15, 1993, Bieter filed a Third Amended Complaint against Defendants seeking damages pursuant to the Racketeer Influence and Corrupt Organizations Act ("RICO"). The Complaint also contained a state law claim for tortious interference with business relations. In their answers, various Defendants raised the affirmative defenses of unclean hands and *in pari delicto*. Bieter now argues that these defenses "must be stricken as a matter of law." (Pl's. Mem. Supp. Mot. for Partial Summ. J. at 2.)

Specifically, Defendants Advance Developers, Inc., Cliff Road Properties, Hoffman Development Group, Inc., HDG Associates Limited Partnership, Eagan Associates Limited Partnership, CRP of Eagan, Inc., Robert L. Hoffman, Patrick C. Hoffman, and Jack F. Daly, Jr. (the "Cliff Road Defendants") have raised unclean hands and *in pari delicto* as affirmative defenses to Bieter's RICO and tortious interference [***3] claims. Defendants Federal Land Company, Eagan Tower Office Building Partnership, and Eagan Heights Commercial Park (the "Federal Defendants") have asserted unclean hands and *in pari delicto* as affirmative defenses to Bieter's RICO claim.¹ Defendant Beatta Blomquist ("Blomquist") has asserted unclean hands as a defense to Bieter's RICO and tortious interference claims.

[*1448] II. DISCUSSION

A. THE SUMMARY JUDGMENT STANDARD

The Supreme Court has held that [HN1](#) summary judgment is to be used as a tool to isolate and dispose of claims or defenses that are either factually unsupported or are based on undisputed facts. [*Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#); [*Hegg v. United States*, 817 F.2d 1328, 1331 \(8th Cir. 1987\)](#). [***4] Summary judgment is proper, however, only if examination of the evidence in a light most favorable to the non-moving party reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [*Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#).

The test for whether there is a genuine issue of material fact is two-fold. First, the materiality of a fact is determined from the substantive law governing the claim. Only disputes over facts that might affect the outcome of the suit are relevant on summary judgment. [*Liberty Lobby*, 477 U.S. at 252](#); [*Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 \(8th Cir. 1987\)](#), cert. denied, 484 U.S. 1010, 98 L. Ed. 2d 658, 108 S. Ct. 707 (1988). Second, any dispute of material fact must be "genuine." A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. [*Liberty Lobby*, 477 U.S. at 252](#). [***5] It is the non-

¹ The Federal Defendants' assertion of these defenses only applies to the RICO claim because this Court dismissed Bieter's tortious interference claim as it applied to the Federal Defendants in its June 14, 1991 Order.

moving party's burden to demonstrate that there is evidence to support each essential element of his claim. *Celotex*, 477 U.S. at 324.

B. RICO Claims

Plaintiff Bieter Company argues in support of its motion for partial summary judgment that the defenses of unclean hands and *in pari delicto* are not available, as a matter of law, in RICO actions. Because few courts have addressed this issue, Bieter contends that the Court should refer to the Clayton Act and antitrust law to determine whether *in pari delicto* and unclean hands are valid defenses to a RICO action. See [15 U.S.C. § 15](#). Defendants argue in response that such an analogy is improper and that these are appropriate affirmative defenses to a RICO action.

HN2[] The general rule is that the defenses of unclean hands and *in pari delicto* are not available in antitrust cases. As the court noted in [*Memorex Corp. v. International Business Machs. Corp.*, 555 F.2d 1379, 1381 \(9th Cir. 1977\)](#):

"Unclean hands" is said to show that the plaintiff is in some way morally reprehensible [**6] with respect to the subject matter of the action. The plaintiff therefore is not permitted to recover despite the wrongfulness of the defendant's action. "Unclean hands" has not been recognized as a defense to an antitrust action for many years.

[*Memorex*, 555 F.2d at 1381](#). Regarding *in pari delicto*, the court stated:

HN3[] *In pari delicto*. . . . asserts that a plaintiff who participated in the wrongdoing cannot recover when he suffers injury as a result of that wrongdoing. As held in [*Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140, 20 L. Ed. 2d 982, 88 S. Ct. 1981](#) . . . (1968), "the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."

Id. These defenses are not available in antitrust actions because "the purposes of antitrust laws are best served by insuring that the private action will be an ever present threat to deter anyone contemplating business behavior in violation of the antitrust laws." [*Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, 20 L. Ed. 2d 982, 88 S. Ct. 1981 \(1968\)](#), [**7] overruled on other grounds by [*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#). Furthermore, "the plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition." Id.

[*1449] Defendants argue that, "while the public interest in competition is implicated in every antitrust action, a similar public interest is not implicated in every private RICO action." (Cliff Road Def's. Mem. Opp. Pl's. Mot. for Partial Summ. J. at 12.) Several other courts, however, have looked to antitrust law to determine the availability of these defenses under RICO. In *In re National Mortgage Equity Corp. Mortgage Pool Certificates Secs. Litig.*, 636 F. Supp. 1138, 1153 n.21 (C.D. Cal. 1986), the court rejected the defendant's argument that antitrust principles should not be applied to RICO. It stated:

HN4[] The antitrust laws, like RICO, provide for criminal penalties. [15 U.S.C. §§ 3, 24](#). And RICO, like the [**8] antitrust laws, was designed at least partially to Promote competition, in RICO's case through stemming the infiltration into legitimate businesses by organized crime and by outlawing certain predatory business practices.

National Mortgage, 636 F. Supp. at 1153 n.21. The court noted that the logic underlying the unavailability of the defenses of unclean hands and *in pari delicto* in antitrust law, such as advancing the predominate public policy in

favor of competition, is equally applicable to RICO actions. *Id.* at 1156. It therefore held that "unclean hands should not by itself prohibit . . . an action that otherwise advances RICO's broad anti-racketeering policies." *Id.* This Court agrees with the *National Mortgage* court that **antitrust law** is relevant to the determination of whether unclean hands and *in pari delicto* are valid defenses in a RICO action. The Court finds that unclean hands is not a valid defense to Bieter's RICO claims.

The availability of *in pari delicto* as a defense requires additional consideration. While the traditional *in pari delicto* defense is not available in antitrust suits, in **[**9] *Perma Life***, the Supreme Court left open the question of whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action." *Perma Life*, 392 U.S. at 140. Several circuits subsequently determined that "complete involvement" does, in fact, constitute a defense to a treble damages claim in an antitrust action. See, e.g., *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985) (recognizing the "complete involvement" test, but finding it inapplicable to the facts of the case), cert denied, 475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1198 (1986); *Thi-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991, 995 (9th Cir. 1980) (holding that the plaintiff's recovery is not barred unless the defendant establishes that the illegal conspiracy would not have been formed but-for the plaintiff's participation); *Wilson P. Abraham Const. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 902 (5th Cir. 1979) **[**10]** (holding that *Perma Life* did not endorse a "wholesale rejection of the *in pari delicto* doctrine in an antitrust treble damages action" and recognizing "complete involvement" as a valid defense in an antitrust action), aff'd, 451 U.S. 630 (1981).

The Supreme Court again addressed the availability of the "complete involvement" defense in the antitrust context in *Bateman Eichler, Hill Richards, Inc. v. Berner* 472 U.S. 299, 310, 86 L. Ed. 2d 215, 105 S. Ct. 2622 (1985). The Court set forth the test as follows:

HN5 [↑] [A] private action for damages . . . may be barred on the grounds of plaintiff's own culpability only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public.

Bateman Eichler 472 U.S. at 310-11.

The few courts that have addressed whether *in pari delicto* is applicable **[**11]** as a defense to a RICO claim have applied the *Bateman Eichler* test. See, e.g., *Cohen v. Wolgin*, No. 87-2007, 1988 WL 65970, at *6-7 (E.D. Pa. 1988) (applying *Bateman Eichler* analysis to an *in pari delicto* affirmative defense raised against a RICO claim); *Shulton, Inc. v. Optel Corp.*, No. 85-2925, 1986 WL 15167, at *25 (D. N.J. 1986) (finding the *Bateman Eichler* analysis appropriate for RICO claims); cf. **[*1450] *National Mortgage***, 636 F. Supp. at 1156 n.25 (noting that the "extent and nature of the [defendant's] participation in the alleged RICO violations may be relevant, assuming it turns out that defendants are entitled to raise the defense of 'complete involvement'").

Defendants in the instant case argue that application of *Bateman Eichler*, at the very least, raises a genuine issue of material fact and that summary judgment is therefore inappropriate. The Cliff Road Defendants argue that "once Bieter realized it could not obtain approval for its proposed Regional Shopping Center, through lawful means, it engaged in conduct that eliminated the possibility that its shopping center would ever be approved." (Defs'. Mem. Opp. Pl's. **[**12]** Mot. Partial Summ. J. at 14.)² Thus, according to the Defendants, Plaintiff participated in the violation for which it now seeks relief.

² Specifically, Cliff Road Defendants argue the following regarding Bieter's RICO claim:

[Bieter] . . . deliberately refused to reapply even though it was urged to do so by the City Council and even though after the November 1987 elections the candidates who were beholden to Bieter controlled the City Council.

The first element of the *Bateman Eichler* test is not met in the instant case. [**13] The violation Bieter seeks to redress under RICO is Defendants' alleged bribery of city officials in furtherance of competing developments. *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1328 (8th Cir. 1993). Bieter argues that the bribery was intended to prevent its proposed development from receiving the necessary approvals and to assure approval of the competing Cliff Lake Centre. Bieter further argues that it was injured as a result of Defendants' conduct. *Id.*

Defendants do not claim that Bieter was involved in the same alleged bribery for which Bieter now seeks relief. Bieter and Defendants were competitors, not conspirators. Nor do they allege that Bieter was somehow working with Defendants during that time to achieve Bieter's own downfall. Even if, after it realized that all legitimate means of achieving its goals had failed, Bieter encouraged Defendants' success so that it could sue them, Bieter does not bear "at least substantially equal responsibility for the violations it seeks to redress." *Bateman Eichler*, 472 U.S. at 310. Assuming that all of Defendants' allegations are true, the Court nonetheless [**14] finds that Defendants' *in pari delicto* defense must be dismissed as a matter of law.

This Court's holding is consistent with the second element of *Bateman Eichler* because it serves the policies underlying RICO and the public interest. This holding is also consistent with the Eighth Circuit's holding in *Bieter*, 987 F.2d at 1319. In that opinion, the Court explained that one purpose of RICO is to "root out public corruption." *Id.* at 1329. A rule that the affirmative defenses of unclean hands and *in pari delicto* are not valid in a RICO action, except as consistent with *Bateman Eichler*, will encourage competition and enable plaintiffs to root out public corruption.

C. TORTIOUS INTERFERENCE CLAIMS

(i) Unclean Hands

Bieter's claim for tortious interference is brought under Minnesota common-law. Bieter argues that unclean hands, which is an equitable defense, is not a valid defense to a claim for damages in Minnesota.³ Minnesota courts have not directly addressed this issue. The few Minnesota cases that have indirectly addressed this issue, interpreted together, lead the Court to the conclusion that unclean [**15] hands is not a valid defense to a claim for damages in Minnesota.

[*1451] In *Thorem v. Thorem*, 188 Minn. 153, 155, 246 N.W. 674, 675 (1933), Chief Justice Wilson, concurring, stated that because a "divorce court is not a court of equity . . . Plaintiff should not have been turned away for want of clean hands." Similarly, in *Hagberg v. Colonial & Pacific Frigidways Inc.*, 279 Minn. 396, 397, 157 N.W.2d 33, 35 (1968), the court explained in its syllabus that HN6[] "the equitable 'clean hands' doctrine is not applicable to an action for damages." *Id.* Another case indicating that Minnesota courts do not recognize equitable defenses in actions for damages is *LaValle v. Kulkay*, 277 N.W.2d 400, 403 n.3 (Minn. 1979). In that case, [**16] the court stated, "Laches is an equitable defense and is not relevant to this action because defendants are requesting damages and not an injunction." *Id.* at 403 n.3. See also *Fred. O. Watson Co. v. United States Life Ins. Co.*, 258 N.W.2d 776, 778 (Minn. 1977); *Creative Communications Consultants, Inc. v. Gaylord*, 403 N.W.2d 654, 657 (Minn. Ct. App. 1987).

The Eighth Circuit has, on several occasions, addressed the availability of equitable relief under Minnesota law. In *Foy v. Klapmeier*, 992 F.2d 774, 779 (8th Cir. 1993), the court stated, HN7[] "Equitable proceedings are to be

(Cliff Road Defs'. Mem. Opp. Pl's. Mot. for Partial Summ. J. at 14-15.) In addition, regarding Bieter's RICO and tortious interference claims, they argue:

Once Bieter realized it could not obtain Target through legitimate means . . . it conspired with Dorsey to aid Cliff Road Properties in their solicitation and acquisition of Target as a tenant for [Cliff Lake Centre]. That way, Bieter could sue them for allegedly interfering with their relationship with Target.

(*Id.* at 17.)

³ In its Memorandum in Support of Motion for Partial Summary Judgment, Bieter states that it "does not seek equitable relief, but rather seeks damages." (Pl's. Mem. Supp. Mot. for Summ. J. at 7.)

848 F. Supp. 1446, *1451-994 U.S. Dist. LEXIS 4952, **16

governed by equitable principles. Under Minnesota law, the doctrine of unclean hands will be invoked only to deny equitable relief to a party whose conduct has been unconscionable by reason of a bad motive or where the result induced by that party's conduct will be unconscionable either in the benefit to that party or in the injury to others." [Foy, 992 F.2d at 779](#). While the Foy court was not directly faced with the question now before this Court, the language in Foy is consistent [**17] with this Court's interpretation of applicable Minnesota law. The court did not indicate that the defense of unclean hands was available in Minnesota, except in the context of equitable proceedings. See also [Holmberg v. Morrisette, 800 F.2d 205, 211 \(8th Cir. 1986\)](#), cert. denied, 481 U.S. 1028, 95 L. Ed. 2d 526, 107 S. Ct. 1953 (1987) (finding it unnecessary to decide whether Minnesota law "permits application of the clean hands doctrine, traditionally an equitable defense, in an action at law for money damages"); [Earle R. Hanson & Assoc. v. Farmers Co-op. Creamery Co., 403 F.2d 65, 70 \(8th Cir. 1968\)](#).

Defendants correctly state in their memoranda that some courts, federal and state, permit equitable defenses to claims for damages. See, e.g., [Associated Business Tel. Sys. Corp. v. Greater Capital Corp., 729 F. Supp. 1488, 1496](#) (D. N.J.) (holding that defense of unclean hands is not limited to suits in equity), aff'd, 919 F.2d 133 (3d Cir. 1990); [Unilogic, Inc. v. Burroughs Corp., 10 Cal. App. 4th 612, 619-20, 12 Cal. Rptr. 2d 741, 744 \(Cal. Ct. App. 1993\)](#), [**18] rev. denied, Jan. 14, 1993 (holding that unclean hands is a valid defense to an action at law for damages). [Contra Marvin E. Nieberg Real Estate Co. v. Taylor-Morley-Simon, 867 S.W.2d 618, 626 \(Mo. Ct. App. 1993\)](#) (holding that application of defenses of unclean hands and laches is erroneous in an action at law for damages); [General Dev. Corp. v. Binstein, 743 F. Supp. 1115, 1133-34 \(D. N.J. 1990\)](#) (holding that unclean hands is available as a defense to the plaintiff's claim for injunctive relief, but not to its claim for tortious interference). Because the Court finds no indication that Minnesota courts have expanded the availability of equitable defenses to actions for damages, it concludes that unclean hands is not a valid defense to Bieter's claim for tortious interference.

(ii) *In Pari Delicto*

Bieter argues that "for the same reasons that the *in pari delicto* defense does not apply to [its] RICO claims, the defense . . . does not apply to [its] tortious interference claims." (Pl's. Mem. Supp. Partial Mot. for Summ. J. at 10.) The Court agrees. See [Brubaker v. Hi-Banks Resort Corp., 415 N.W.2d 680 \(Minn. Ct. App. 1987\)](#). [**19] Bieter claims that Third-Party Plaintiffs lured Target away from Bieter, causing Bieter injury. Bieter could not have participated in the same scheme that it now claims caused its injury.

Accordingly, based upon careful review of the record, files, and the proceedings herein,

IT IS HEREBY ORDERED That:

1. Plaintiffs' Motion for Partial Summary Judgment Striking Defendants' Affirmative [*1452] Defenses of Unclean Hands and *In Pari Delicto* is GRANTED; and
2. Defendants' affirmative defenses of unclean hands and *in pari delicto* are dismissed.

DATED: March 29, 1994

DONALD D. ALSOP, Senior Judge

United States District Court

Automotive Prods. PLC v. Tilton Eng'g, Inc.

United States District Court for the Central District of California

March 30, 1994, Decided ; March 30, 1994, Filed

CV 90-5500 KN (Ex)

Reporter

855 F. Supp. 1101 *; 1994 U.S. Dist. LEXIS 13419 **; 33 U.S.P.Q.2D (BNA) 1065 ***; 1994-1 Trade Cas. (CCH) P70,656

AUTOMOTIVE PRODUCTS plc, Plaintiff and Counterdefendant, v. TILTON ENGINEERING, INC., Defendant and Counterplaintiff.

Subsequent History: Reported at: 33 U.S.P.Q.2d (BNA) 1065 at 1095.

Dismissed by Automotive Prods. plc v. *Tilton Eng'g*, 36 F.3d 1109, 1994 U.S. App. LEXIS 16851 (Fed. Cir., 1994)

Prior History: Automotive Prods. plc v. *Tilton Eng'g*, 1994 U.S. Dist. LEXIS 20128, 33 U.S.P.Q.2d (BNA) 1065 (C.D. Cal., Mar. 1, 1994)

Core Terms

expenses, patent, antitrust, costs, attorney's fees, expert witness fees, fee request, charges, antitrust claim, billed, prevailing party, documentation, prevailing, awards, expended, damages, motions, reasonable attorney's fees, fee award, lawsuit, reasons

LexisNexis® Headnotes

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

[HN1](#) [down arrow] Remedies, Costs & Attorney Fees

Where a plaintiff has obtained excellent results, his attorney should normally recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success, an enhanced award may be justified. In these circumstances, the fee award should not be reduced simply because the plaintiff failed to prevail of every contention raised in the lawsuit.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

[HN2](#) [down arrow] Attorney Fees & Expenses, Reasonable Fees

The trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities.

855 F. Supp. 1101, *1101A1994 U.S. Dist. LEXIS 13419, **13419A83 U.S.P.Q.2D (BNA) 1065, ***1065

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

[HN3](#) Privileged Communications, Work Product Doctrine

The trial judge should closely observe the attorney's work product, his preparation, and general ability before the court.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

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

[HN4](#) Remedies, Costs & Attorney Fees

Where a prevailing party has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Antitrust & Trade Law > Clayton Act > General Overview

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

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

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

[HN5](#) Costs & Attorney Fees, Clayton Act

Section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), allows recovery of reasonable attorney's fees as costs. Furthermore, a prevailing antitrust plaintiff is entitled to recover a reasonable attorney's fee for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit of a successful recovery of anti-trust damages.

Judges: [\[**1\]](#) KENYON

Opinion by: DAVID V. KENYON

Opinion

[1095] [*1102] ORDER RE: TILTON'S MOTIONS FOR ATTORNEY'S FEES, COSTS, EXPENSES AND INTEREST**

I. Introduction

In the partial judgment entered on November 3, 1993, this Court awarded Tilton its reasonable attorney's fees, costs, expenses, and prejudgment and postjudgment interest incurred in connection with its patent, antitrust, and

intentional interference with prospective economic advantage claims. However, the Court did not set forth specific dollar amounts for these awards. See *11/3/93 Judgment*.

Since the signing of the judgment, the Court has awarded Tilton its reasonable costs¹ [**2] and has clarified the means of calculating its prejudgment interest on its patent claim.² This leaves only the attorney's fees, expenses,³ and postjudgment interest for the Court to consider. But because it cannot accurately calculate Tilton's postjudgment interest herein,⁴ the Court will only discuss and award Tilton its reasonable attorney's fees and expenses in this order as set forth below.

II. The Court's September 22, 1993 Order on Fees, Costs, and Expenses

Tilton first applied for reimbursement of its attorney's fees, costs, and expenses in July 1993. After a review of its submission and AP's objections thereto, the Court ordered that Tilton submit a more detailed bill of costs, carefully allocating its claimed costs between its patent and antitrust claims; the Court noted, however, that it did not expect Tilton to be perfectly accurate in its [**3] accounting. See *9/22/93 Order*, at 24 n.6. The Court also noted that Tilton could not recover its costs for any time expended purely attributable to the prosecution of its state law claims. *Id.* at 14.

In October 1993, in response to the Court's order, Tilton submitted over 1,700 [***1096] pages of detailed invoices and timesheets documenting its bills for the period from October 1990 to September 1993. In November 1993, Tilton submitted a supplemental bill of costs for September and October 1993.

III. Attorney's Fees

A. AP's General Objections

AP challenges Tilton's attorney's fee submissions, asking this Court to deny or reduce Tilton's fee request for the three reasons discussed below.

1. Tilton's Allocation of Fees

First, AP claims that Tilton's bill makes no attempt to segregate out the time spent on the claims for which it is not entitled to attorney's fees. Specifically, AP claims that several of Tilton's time entries apply to all of Tilton's claims, and not just its patent and antitrust causes of action. Because of this, AP contends that Tilton's fee request should be reduced by 20 percent. See, e.g., *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260-61 (8th Cir. 1991) [**4] (affirming district court's percentage reduction).

Tilton responds that it complied with the Court's order by specifically indicating which fees were attributable to its patent versus its [*1103] antitrust claims, and that it did not include in its fee request any entries that were purely attributable to its state law claims.

The Court agrees with Tilton. Tilton has satisfied the Court's September 22, 1993 order by producing extensive and detailed documentation to support its fee request. Moreover, Tilton has adequately divided its time entries between

¹ In its March 1, 1994 order, the Court awarded Tilton costs in the amount of \$ 119,316.46. See *3/1/94 Order on Motions to Re-tax Costs*.

² See *11/2/93 Order Clarifying Judgment*, at 2.

³ See *11/18/93 Order Re: Motion for Reconsideration on Clayton Costs*, at 3-5 (distinguishing between "costs" and "out-of-pocket" expenses).

⁴ Postjudgment interest is not calculable at this time because it covers the period from the date of entry of judgment "until payment of the money judgment pursuant to *28 U.S.C. § 1961*"; in this case, payment of money judgment has been stayed pending appeal. See *11/3/93 Judgment*; *12/7/93 Stipulation and Order Re: Stay of Execution of Money Judgment Pending Post-trial Motions and Appeal*.

the antitrust and patent claims. Also, Tilton has segregated out the time purely attributable to its state law claims. Accordingly, the Court believes that it would be improper to reduce Tilton's fee award by 20%.

2. *Tilton's Award Reflecting Its Success*

Second, AP contends that Tilton's fee request should be reduced by an additional 50% (over the 20% discussed above) because Tilton lost most of its claims and because the jury awarded Tilton only 16.5% of its requested patent damages and less than 40% of its requested antitrust damages.

In response, Tilton claims that because it was the prevailing party in this litigation, it is irrelevant [**5] that it did not prevail on its other claims, many of which were alternative theories of recovery.

Again, the Court agrees with Tilton. In its March 1, 1994 order, the Court clearly declared that Tilton was the prevailing party for purposes of awarding Tilton its costs in this case; thus, Tilton is properly the prevailing party for purposes of its fee recovery as well. See *3/1/94 Order on Motions to Re-tax Costs*, at 3. Indeed, the Supreme Court's statement regarding fee awards in the patent context in *Hensley v. Eckerhart*, 461 U.S. 424, 435, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983), supports such a holding:

HN1 [↑] "Where a plaintiff has obtained excellent results, his attorney should normally recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success, an enhanced award may be justified. In these circumstances, the fee award should not be reduced simply because the plaintiff failed to prevail of every contention raised in the lawsuit."

Accordingly, the Court rejects AP's argument and refuses to reduce Tilton's fee as AP [**6] requests.

3. *Tilton's Exercise of Billing Judgment*

And third, AP asserts that Tilton failed to exercise billing judgment by overstaffing this case, thereby warranting a further 10% reduction (following the already rejected 20% and 50% reduction requests) in Tilton's fees. Specifically, AP claims that Tilton cannot justify its use of 25 attorneys, 4 law clerks, and 8 paralegals on this one case.

Tilton replies that AP overstates the staffing done by Tilton on this case: "Although 25 attorneys billed time to this case, eight of those attorneys, William Poms, Gary Lande, Bernard Gans, Edward O'Connor, Richard Campbell, Jan Weir, Alan Block, and Steven Smyrski billed 97% of all the time on the case. The other 17 attorneys represented only 3% of the hours billed and were attorneys brought in only occasionally for additional support when needed." *Tilton's 10/26/93 Reply Memo*, at 6. Moreover, Tilton clarifies that the four law clerks accounted for only 85.5 hours and that one paralegal, Nanette S. Footlick, accounted for over 70% of the total time expended, with additional paralegal support as needed.

The Court sides with Tilton once more. Tilton adequately explains the reasons behind [**7] AP's perception that overstaffing occurred here; indeed, Tilton very reasonably prepared and staffed this case given its length and complexity. The reasonableness of Tilton's staffing is even more apparent ***1097 when compared to AP's staffing of this case: for example, AP employed two law firms as compared to Tilton's one here. The Court therefore declines to reduce Tilton's fee request due to any perceived overstaffing by AP.

4. Conclusion

For all of the foregoing reasons, the Court rejects AP's general arguments for percentage reductions of Tilton's fee award. The only remaining issue is whether Tilton's fee requests are reasonable given the circumstances. The Court shall address that issue in detail below.

[*1104] B. Reasonableness of Tilton's Fee Request

1. The Kerr Factors

The Ninth Circuit has specifically stated that a Court must consider the various factors enumerated in *Kerr v. Screen Extras Guild*, 526 F.2d 67, 69-70 (9th Cir. 1975), cert. denied, 425 U.S. 951, 48 L. Ed. 2d 195, 96 S. Ct. 1726 (1976) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)), [**8] in determining whether a party's attorney's fees were reasonably incurred. Accordingly, the Court shall discuss each factor in turn:

a. *Time and Labor Required*

HN2[] "The trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities." *Johnson*, 488 F.2d at 717. Upon reviewing the detailed timesheets submitted by Tilton's counsel, the Court finds that the time expended by the attorneys, law clerks, and paralegals on this case compare favorably, in this Court's experience, with the time other professionals would spend in this case. Moreover, as discussed above, the Court believes that Tilton did not overstaff this case, but rather properly exercised sound billing judgment in litigating its claims here.

b. *Novelty and Difficulty of the Questions Involved*

Patent and **antitrust law** are not new or novel, but often involve factually difficult issues. Such was the case here. In the patent phase of the case, for example, Tilton had to analyze the myriad of patent defenses raised by AP, including obviousness, best mode, indefiniteness, public use, inequitable conduct, and noninfringement. [**9] As a direct result, Tilton was required to expend many hours on legal research and in drafting memoranda and briefs on these issues.

c. *Customary Fee/Experience & Ability of Attorneys*

In support of its fee request, Tilton presents detailed profiles on the attorneys at Poms, Smith, Lande & Rose ("PSLR"), a well-respected intellectual property firm in the Los Angeles area. All the PSLR attorneys have substantial patent and engineering backgrounds, with some having experience in antitrust lawsuits. The billing rates presented by PSLR are reasonable and in conformity with the rates charged by other intellectual property law firms in California. See *Report of Economic Survey* (1993), Exh. C to Tilton's 7/12/93 memo.

d. *Skill Requisite to Perform Legal Service Properly*

HN3[] "The trial judge should closely observe the attorney's work product, his preparation, and general ability before the court." *Johnson*, 488 F.2d at 718. Tilton's counsel, PSLR, demonstrated to this Court time and again that they had the requisite skill and ability to handle this complex lawsuit. Their written work product and performance before this Court have been uniformly good.

e. [**10] *Preclusion of Other Employment by Attorney Due to Acceptance of the Case*

Tilton claims that some of its attorneys were precluded from accepting other legal work because of this case. They also claim that 97% of the work was performed by only eight of the twenty-five attorneys at PSLR. This factor does not weigh particularly heavily in Tilton's favor.

f. *Time Limitations Imposed by Client or Circumstances*

The time limitations in this case were substantial. As Tilton correctly points out, much of the billing in this case was driven by AP. AP filed many of its discovery motions *ex parte*, rather than on regular notice. Indeed, AP filed over twenty pre-trial motions, including many summary judgment motions on various issues. Moreover, Tilton had to review thousands of relevant documents in preparation for trial. Finally, during trial itself, Tilton often had to submit responsive briefs in very short time periods due to motions made by AP. In sum, Tilton was under considerable time pressure throughout the [***1098] lawsuit, much of which was prompted by AP's consistently aggressive posture.

g. *Amount Involved and Results Obtained*

Tilton's potential liability in this case was extremely [**11] large and if it had lost, it could [*1105] have very well ended up in bankruptcy. The fact that Tilton successfully defended against AP's suit and recovered a multimillion dollar verdict on its patent and antitrust counterclaims is particularly impressive given Tilton's large loss potential in this case.

h. Fee Arrangement/Undesirability of the Case

To a certain extent, this case was undesirable because of Tilton's difficult financial situation. It became readily apparent to PSLR that Tilton would be unable to pay PSLR's fees through the duration of this complex case. As such, Tilton negotiated a fee arrangement with PSLR whereby PSLR would not receive payments for fees and costs prior to the case's termination, although Tilton was ultimately responsible for these fees and costs. Both Tilton and PSLR therefore had every incentive to minimize PSLR's fees and costs wherever possible.

i. Nature and Length of Professional Relationship with Client

PSLR has been Tilton's counsel throughout the duration of this suit, and represents Tilton in other related patent matters.

j. Awards in Similar Cases

Attorney fee awards to prevailing parties in patent and antitrust cases are oftentimes [**12] substantial. See, e.g., *Mathis v. Spears*, 857 F.2d 749, 752 (Fed. Cir. 1988) (in patent defense case: attorney's fee award: \$ 580,183.50; expenses award: \$ 83,421.91); *Howes v. Medical Components, Inc.*, 761 F. Supp. 1193, 1202 (E.D. Pa. 1990) (\$ 1.95 million in attorney's fees, costs, and expenses awarded in patent case); *Seven Gables Corp. v. Sterling Recreation Organization Co.*, 686 F. Supp. 1418, 1428 (W.D. Wash. 1988) (\$ 2.9 million in attorney's fees awarded in antitrust case). Therefore, Tilton's request for over \$ 2.8 million in attorney's fees is not *per se* unreasonable.

The Court will examine the patent and antitrust requests separately below:

(1) Patent

The Court noted in its September 22, 1993 order that Tilton was entitled to its reasonable attorney's fees as the prevailing party in an "exceptional case" under 35 U.S.C. § 285. See *9/22/93 Order*, at 22-23. The Court noted at that time that the only remaining question was whether Tilton's fee request was reasonable. HN4[ "Where, as here, a prevailing party 'has obtained excellent results, [**13] his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation" *Mathis*, 857 F.2d at 755 (citing the Supreme Court in *Hensley*, 461 U.S. at 435).

Here, Tilton obtained excellent results in a very factually difficult, hard fought, and legally complicated case. Tilton obtained a jury verdict of \$ 545,000 which was later trebled by this Court based on the jury's finding that AP willfully infringed Tilton's patent. Tilton's success is particularly impressive given that it apparently endured AP's "evasive and dilatory tactics during the prosecution of this case -- including its apparent withholding of certain key documents from Tilton during discovery." *9/22/93 Order*, at 23.

(2) Antitrust

HN5[ Section 4 of the Clayton Act, 15 U.S.C. § 15, allows Tilton to recover its reasonable attorney's fees as costs. See also *9/22/93 Order*, at 13. Furthermore, "a prevailing antitrust plaintiff is entitled to recover a reasonable attorney's fee for every item of service which, at the time rendered, [**14] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit of a successful recovery of anti-trust damages." *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1313 (9th Cir. 1982).

Tilton's attorney's fee request on its antitrust claims seems reasonable here. This was a complex case requiring that Tilton prove to the jury that AP had intentionally attempted to prevent Tilton from entering the carbon-to-carbon

clutch market. Tilton's counsel was required to present extensive documentary and testimonial evidence regarding this claim; thus, the amount of time spent on such an arduous task appears reasonable.

[*1106] 2. Conclusion

After reviewing the *Kerr* factors and Tilton's documentation, and after rejecting AP's arguments to deny or reduce Tilton's request, the Court finds that Tilton's attorney's fee requests for both its patent and antitrust claims are reasonable. AP initiated **[***1099]** this lawsuit, aggressively prosecuted this case, and in large part, caused Tilton to incur the attorney's fees it now claims in this case. Tilton achieved remarkable results in its defense of its **[**15]** patent claim and its prosecution of its own antitrust action. Tilton should not be denied its reasonable fees here.

Accordingly, the Court GRANTS Tilton's motion for \$ 1,841,906.00 in attorney's fees on its patent claim, and its request of \$ 1,036,918.25 in attorney's fees on its antitrust claim.

IV. Expenses

In its September 22, 1993 and November 18, 1993 orders, the Court held that Tilton was entitled to the following "out-of-pocket" expenses aside from its reasonable costs: facsimile expenses, Lexis charges, long distance telephone charges, Federal Express charges, secretarial overtime charges, trial supply expenses, postage, messenger fees, hotel and travel expenses, parking expenses, teleconference expenses, and mock trial expenses. However, the Court specifically found that Tilton was not entitled to its air conditioning expenses because these are not of the type normally billed to clients. The Court then concluded that the only remaining issue with respect to these expenses was whether the specific amounts claimed by Tilton are reasonable.

A second issue the Court must resolve involves whether Tilton, as a prevailing antitrust plaintiff, is entitled to its actual expert **[**16]** witness fees over the statutory maximum. In its September 22, 1993 order, the Court requested further briefing on this issue. The Court has reviewed the supplemental briefs and will set forth its ruling in its discussion of Tilton's antitrust expense award below.

A. AP's Objections to Expenses Request

In its opposition papers, AP contends that Tilton cannot recover any of its "out-of-pocket" expenses because it is only entitled to its statutory costs under 28 U.S.C. § 1920; alternatively, AP argues that Tilton's expenses request should be reduced because: (1) Tilton fails to show that such expenses were only incurred with respect to Tilton's patent and antitrust claims, and (2) that such expenses were reasonably incurred.⁵

The Court has already rejected AP's contention that Tilton may only recover **[**17]** its Section 1920 costs. See *11/18/93 Order*. As to AP's alternative arguments, the Court finds that Tilton has properly marked and segregated its expenses to include only those recoverable under its patent and antitrust claims for the same reasons discussed in Section III.A.1. & 2. above. However, the Court does believe that it must resolve the issue of the reasonableness of Tilton's expenses, and it does so below.

B. Reasonableness of Tilton's Expenses Request

1. Expenses Previously Approved by Court

In determining a "reasonable" award, the Court must balance a conservative approach towards Tilton's award against the fact that Tilton should be fully compensated for having to litigate this action against a willful infringer and antitrust violator such as AP. See *Mathis, 857 F.2d at 757-58* ("Nothing in the [American] Rule or statutes impedes or precludes a district court from exercising its inherent equitable power to make whole a party injured by an egregious abuse of the judicial process.").

⁵ AP's argument that Tilton's requested expenses are not of the type normally billed to fee-paying clients was rejected previously by this Court. See *11/18/93 Order*, at 4.

A review of the voluminous records submitted by Tilton in July and November 1993 reveals that Tilton has properly supported and documented its out-of-court [**18] expenses, and such expenses appear to be reasonable given the exceptional circumstances of this case. See discussion of *Kerr* factors above. Specifically, the Court awards Tilton these expenses in the following amounts: [*107]

(1) facsimile expenses:	\$ 5,471.50
(2) Lexis charges:	\$ 35,120.50
(3) long dist. tel. charges:	\$ 1,336.25
⁶ (4) Federal Express charges:	\$ 2,242.18
(5) secretarial overtime:	\$ 36,527.75
(6) trial supply expenses	\$ 20,958.64
(7) postage:	\$ 542.19
(8) messenger fees:	\$ 14,642.93
(9) hotel and travel charges:	\$ 58,487.17
(10) parking charges:	\$ 3,626.16
(11) teleconference charges:	\$ 12,720.61
(12) mock trial expenses:	\$ 143.32
TOTAL AWARD	\$ 191,819.20

2. Recoverability [**19] of Expert Witness Fees in Patent Case

The Court held that, given the jury's finding of willfulness, "Tilton should be awarded [**1100] its reasonable costs" with respect to its patent case. 9/22/93 Order, at 24-25. This included all of Tilton's reasonable expert witness fees except for the fees of Michael Burroughs. *Id.* at 25. Tilton resubmitted receipts for its patent experts in its October 1993 submission.

Upon reviewing the July and October 1993 documentation supporting its claim, the Court finds Tilton's expert witness fees to have been reasonably incurred given the factual and legal intricacy of Tilton's patent claim, which was further complicated by AP's having raised the many defenses discussed above. Moreover, the Court finds that the amounts charged by these experts are likewise reasonable. The Court therefore awards Tilton its expert witness fees as follows:

(1) Edward Brenner	\$ 3,300.00
(2) Robert Tarroffi	\$ 19,658.08

⁶ AP argues that Tilton should not recover these expenses because it could have used the regular mail instead. However, because of the numerous *ex parte* and emergency applications submitted in this case, the Court finds that Tilton's expenses on this item are reasonable.

(3) Carroll Smith	7 \$ 0.00
(4) Donald Peterson	\$ 62,787.74
(5) David Nolte	\$ 116,069.50
GRAND TOTAL	\$ 201,815.32

[**20] 3. Recoverability of Expert Witness Fees in Antitrust Case

As the prevailing plaintiff in an antitrust case, Tilton argues that it is entitled to expert witness fees above and beyond the statutory limit of \$ 40 per day. In support, Tilton cites *Hasbrouck v. Texaco, Inc.*, 631 F. Supp. 258 (E.D. Wash. 1986), aff'd in relevant part and rev'd in part, 879 F.2d 632 (9th Cir. 1989). In *Hasbrouck*, the district court, having reviewed plaintiffs' expert witness fees, concluded that "the retention by plaintiffs of the experts . . . was necessary due to the defenses interposed by [defendant]. The court further finds the fees of these experts are reasonable." *Id. at 268*. Accordingly, the court awarded plaintiffs all their requested expert witness fees. *Id.*

In response, AP maintains that the Supreme Court in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442, 96 L. Ed. 2d 385, 107 S. Ct. 2494 (1987), determined that 28 U.S.C. § 1821 and § 1920 statutorily limit the witness fees to be paid to a prevailing party. [**21] AP next relies on a Tenth Circuit case, *Reazin v. Blue Cross and Blue Shield of Kansas*, 899 F.2d 951, 981 (10th Cir.), cert. denied, 497 U.S. 1005, 111 L. Ed. 2d 752, 110 S. Ct. 3241 (1990), which held that, citing *Crawford*, a prevailing antitrust plaintiff may not be awarded expert witness fees beyond the \$ 40 per day limit.

The Court agrees with Tilton on this issue. Tilton has cited Ninth Circuit authority providing for the award of expert witness fees if the expert was necessary to the litigation and if the expert's fees are reasonable. See *Hasbrouck*, 631 F. Supp. at 268. AP cites no contradictory Ninth Circuit cases limiting such an award to statutory damages only, and the Court has already held that *Crawford* does not specifically limit a prevailing antitrust plaintiff to statutory damages only. See 9/22/93 Order, at 16-17.

Applying *Hasbrouck*, the Court finds that Tilton's request for \$ 90,123.50 in fees for David Nolte's services is reasonable in light of the fact that Nolte's testimony, as Tilton's only antitrust expert, was necessary [**22] to provide the jury with a factual basis from which to ascertain the damages to Tilton from AP's anticompetitive conduct. Further, having previously found Nolte's billing rate to be [*1108] reasonable, the Court awards Tilton \$ 90,123.50 in expert witness fees for the services of Nolte.

V. Conclusion

For all of the foregoing reasons, the Court AWARDS Tilton the following:

- (1) \$ 1,841,906.00 in attorney's fees on its patent claim;
- (2) \$ 1,036,918.25 in attorney's fees on its antitrust claim;
- (3) \$ 191,819.20 in expenses previously awarded;
- (4) \$ 201,815.32 in expert witness fees on its patent claim; and

⁷ Tilton submits documentation supporting the fact that it deposed Carroll Smith on October 23, 1992, but the Court has not been able to locate any separate document setting forth Smith's expert witness fee. Accordingly, the Court does not award Tilton any such fee.

855 F. Supp. 1101, *1108LÁ994 U.S. Dist. LEXIS 13419, **22LÁ3 U.S.P.Q.2D (BNA) 1065, ***1100

(5) \$ 90,123.50 in expert witness fees on its antitrust claim.

IT IS SO ORDERED.

DATED: March 30, 1994

DAVID V. KENYON

UNITED STATES DISTRICT JUDGE

End of Document

Blackburn v. Sweeney

United States District Court for the Northern District of Indiana, Hammond Division

March 31, 1994, Decided

Civil No. 4:93cv0050AS

Reporter

850 F. Supp. 758 *; 1994 U.S. Dist. LEXIS 5382 **; 1994-2 Trade Cas. (CCH) P70,744

THOMAS BLACKBURN and RAYMOND T. GREEN, Plaintiffs, v. CHARLES SWEENEY, JR., and DANIEL PFEIFER, Defendants.

Core Terms

advertising, partnership, parties, lawyers, discovery, motion to dismiss, Partner, rule of reason, magistrate judge, yellow pages, television, coverage, summary judgment, antitrust, damages, cases, attorney's fees, allegations, arbitrator, settlement, pleadings, commerce, rights

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Motions to Dismiss

HN1 [down arrow] **Motions to Dismiss, Failure to State Claim**

By moving under [Fed. R. Civ. P. 12\(b\)\(6\)](#) for dismissal, a defendant asserts that even assuming a plaintiff's allegations are true, the complaint fails to state a claim upon which relief can be granted.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Motions to Dismiss

HN2 [down arrow] **Motions to Dismiss, Failure to State Claim**

A federal district court must be especially careful when faced with a motion for dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#). A court should accord the plaintiff's complaint a reasonably tolerant reading, because the dismissal of the suit under [Rule 12\(b\)\(6\)](#) could preclude another suit based on any theory that the plaintiff might have advanced on the basis of the facts giving rise to the first action. A complaint almost barren of facts may comprise claims of a specific category if read liberally.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN3 Motions to Dismiss, Failure to State Claim

Dismissal of a complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A federal district court deciding whether to grant dismissal under [Rule 12\(b\)\(6\)](#) must accept the well-pleaded factual allegations of the complaint as true and construe such allegations in favor of the plaintiff. As a point of clarification, a federal district court is required to accept only factual allegations; it is not required to accept legal conclusions that may be alleged or that may be drawn from the pleaded facts.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN4 Motions to Dismiss, Failure to State Claim

To escape dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a plaintiff need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of action. The complaint cannot be amended by the briefs filed by the plaintiff in opposition to a motion to dismiss.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN5 Motions to Dismiss, Failure to State Claim

A defendant may not attempt to refute the complaint or to present a different set of allegations in a [Fed. R. Civ. P. 12\(b\)\(6\)](#) challenge. The defendant's attack must be against the sufficiency of the complaint; it must demonstrate that the plaintiff's claim, as set forth by the complaint, is without legal consequence.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Civil Procedure > Judgments > Summary Judgment > General Overview

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

HN6 Motions to Dismiss, Failure to State Claim

Where a motion to dismiss is filed pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) and materials outside the motion to dismiss are presented to and not excluded by the court, then the motion to dismiss may be treated as a motion for summary judgment pursuant to [Fed. R. Civ. P. 56](#). Thus, where a party moves for dismissal upon the pleadings alone, it will be considered a [Rule 12\(b\)\(6\)](#) motion for dismissal. However, where a party files a [Rule 12\(b\)\(6\)](#) motion for dismissal and the court relies on materials outside the pleadings, it will be considered a [Rule 56](#) motion for summary judgment.

850 F. Supp. 758, *7581994 U.S. Dist. LEXIS 5382, **5382

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

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

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

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

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

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

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

HN7 Discovery, Methods of Discovery

Summary judgment under [Fed. R. Civ. P. 56](#) is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

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

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

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

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

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN8 Summary Judgment, Supporting Materials

In a [Fed. R. Civ. P. 56](#) summary judgment motion, the initial burden is on the moving party to demonstrate, with or without supporting affidavits, the absence of a genuine issue of material fact and that judgment as a matter of law should be granted in the moving party's favor. A material question of fact is a question which will be outcome determinative of an issue in the case. The facts material in a specific case are determined by the substantive law controlling the given case or issue.

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

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

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

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

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

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

850 F. Supp. 758, *7581994 U.S. Dist. LEXIS 5382, **5382

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

HN9 [blue download icon] **Summary Judgment, Opposing Materials**

Once the moving party has met its initial burden in its [Fed. R. Civ. P. 56](#) summary judgment motion, the opposing party must go beyond the pleadings and designate specific facts showing that there is a genuine material issue for trial. The nonmoving party cannot rest on its pleadings or upon conclusory allegations in affidavits.

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

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

HN10 [blue download icon] **Summary Judgment, Entitlement as Matter of Law**

During its analysis of a [Fed. R. Civ. P. 56](#) summary judgment motion, the federal district court deciding the motion must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party. Furthermore, it is required to analyze summary judgment motions under the standard of proof relevant to the case or issue.

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN11 [blue download icon] **Private Actions, Costs & Attorney Fees**

Section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), specifies that any person who is in his business by reason of anything forbidden in the antitrust laws may sue therefor in the 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 may recover three-fold the damages by him sustained, and the costs of suit including a reasonable attorney's fee.

Counsel: [**1] For Plaintiff: Philip A. Whistler.

For Defendant: Ronald E. Elberger, George E. Purdy, Robert J. Konopa and Ann-Carol Simons.

Judges: Sharp

Opinion by: ALLEN SHARP

Opinion

[*759] MEMORANDUM AND ORDER

On or about July 15, 1993, the plaintiffs, Thomas Blackburn and Raymond T. Green, filed this complaint invoking this court's federal question jurisdiction under Title [15 U.S.C. § 1](#), commonly known as the Sherman Antitrust Act. The plaintiffs are lawyers, as are the defendants, Charles Sweeney Jr. and Daniel H. Pfeifer, and once upon a time, they were all in the same law firm with offices in South Bend, Indiana, Fort Wayne, Indiana, and elsewhere, which engaged extensively in television advertising focused principally on the solicitation of personal injury litigation.

On or about October 6, 1993, the defendants filed a motion to dismiss under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#) (Fed.R.Civ.P.). Later, on February 24, 1994, the defendants filed a further motion to dismiss, or, in the alternative, for summary judgment, invoking both [Rules 12\(b\)\(6\)](#) and [56, Fed.R.Civ.P.](#) The record in this case, while sounding in the high level concepts of [antitrust law](#), has all of the [**2] earmarks of a domestic relations dispute, since it involves the break-up of a small, tightly-compact law firm and the professional and personal relationships that inhere therein.

One of the principal responses by the plaintiffs to the dispositive motions filed by the defendants is to launch major discovery warfare, in which neither of these parties are wearing secular halos. It is somewhat amusing that a part of this discovery dispute involves an argument about where.

This court has very serious reservations as to the need for any further discovery in this case to deal with these pending motions. However, in the interest of the greatest caution, all of these parties, namely, Thomas Blackburn, Raymond T. Green, Charles Sweeney, Jr. and Daniel Pfeifer, are now **ORDERED** to appear personally in Fort Wayne, Indiana, before the Honorable Roger B. Cosby, United States Magistrate Judge, and all disputed discovery materials are to be presented to Magistrate Judge Cosby in camera, so that he can determine and file a Report and Recommendation as to what further discovery is relevant to the issues in this case as framed by the pending motions. It is the expressed desire of this court [**3] that such proceeding go forward as soon as possible. This court expects these lawyer parties to fully comply with this Order and will accept nothing less than same. This court will use its full authority to see that both the letter and the spirit of this Order is fully complied with. **IT IS SO ORDERED.**

This record literally reeks with revenge, retaliation and retribution. To be sure these four lawyers, with the advice of other lawyers, negotiated vigorously and extensively [*760] to agree upon a final version of a written agreement with reference to the mutual withdrawal from partnerships. After elaborate and extensive negotiations, a final version was agreed upon and signed. See Appendix "A". This record is absolutely silent as to any improper coercion applied to these plaintiffs before they signed this agreement. The ink was hardly dry on this highly relevant written document until these plaintiffs were attempting to undermine it on the basis of federal [antitrust law](#). The question to be answered in this case is whether there is a possible basis for them to do so under the so-called rule of reason. More on that later.

This court has read with some considerable interest the massive [**4] discovery that has already taken place in this case, and realizing that especially in the area of economic proof, there are a vast number of details that might arguably be relevant. This court has read and examined the elaborate paper chase in this case, and the conduct of some counsel in some of the deposition transcripts stops just short of being oppressive harassment. There appears to be a propensity on the part of some simply to want to prolong the process and make it as agonizing for the adversary as possible.

Because of what has already happened in this case, this court intends to run a very tight rein on any further discovery and it is for that reason, among others, that these four lawyer parties, as well as their counsel, will appear at one time and personally before United States Magistrate Judge Roger B. Cosby, who will take a very firm hand in dealing with any further discovery in this case.

This court now takes up both the motions to dismiss filed by the defendants on October 6, 1993, and the motion to dismiss and in the alternative, for summary judgment, filed on February 24, 1994.

When this apparently lucrative lawyer partnership broke up, a written agreement was entered [**5] into which was attached to the original complaint, and is now attached as Appendix "A" to this Memorandum and Order. After having signed this agreement, these plaintiffs now contend that it violates [Section 1 of the Sherman Act, 15 U.S.C. § 1. HN1](#) By moving under [Fed.R.Civ.P. 12\(b\)\(6\)](#) for dismissal, the defendant asserts that even assuming the plaintiff's allegations are true, the complaint fails to state a claim upon which relief can be granted. This rule contains only one of several "filters" used by the courts to separate "those suits that should receive plenary consideration from those that should not." [Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1039 \(7th Cir. 1987\)](#). The rule's capacity to save the parties' and the court's resources is obvious.

HN2 However, this court must be especially careful when faced with a motion for dismissal. The court should accord the plaintiff's complaint a reasonably tolerant reading, because

the dismissal of the suit under 12(b)(6) could preclude another suit based on any theory that the plaintiff might have advanced on the basis of the facts giving rise to the first action.

[**6] *Id.* (citing, *American Nurses' Association v. State of Illinois*, 783 F.2d 716, 726-27 (7th Cir. 1986)). See also, *Wright v. Bosch Trucking Co.*, 804 F. Supp. 1069, 1071 (C.D.Ill. 1992); *Stewart v. RCA Corp.*, 790 F.2d 624, 632 (7th Cir. 1986). As stated by the *Stewart* court, a complaint "almost barren of facts" may comprise claims of a specific category if read liberally. *Stewart*, 790 F.2d at 632.

HN3 Dismissal of a complaint is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). See also, *Dawson v. General Motors Corp.*, 977 F.2d 369, 372 (7th Cir. 1992). This court must accept the well-pleaded factual allegations of the complaint as true and "construe [**7] such allegations in favor of the plaintiff." *Roots Partnership v. Land's End, Inc.*, 965 F.2d 1411, 1416 (7th Cir. 1992). As a point of clarification, the court notes that it is required to accept only factual allegations; "it is not required to accept legal conclusions that may be alleged or that may be drawn from the pleaded facts." *Milwaukee v. I*7611 Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976); see also, *Reichenberger v. Pritchard*, 660 F.2d 280, 282 (1981).

HN4 To escape dismissal " [a] plaintiff need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of action." *Marmon Group, Inc. v. Rexnord, Inc.*, 822 F.2d 31, 34 (7th Cir. 1987) (citations omitted). "The complaint cannot be amended by the briefs filed by the plaintiff in opposition to a motion to dismiss." *Gomez*, 811 F.2d at 1039.

HN5 Likewise, the defendant may not "attempt to refute the complaint or to present a different set of allegations" in its 12(b)(6) challenge. *Id.* The defendant's attack must be against the sufficiency [**8] of the complaint; it "must demonstrate that the plaintiff's claim, as set forth by the complaint, is without legal consequence." *Id.*

HN6 Where a motion to dismiss is filed pursuant to *Rule 12(b)(6)* of the *Federal Rules of Civil Procedure* (Fed.R.Civ.P.) and materials outside the motion to dismiss are presented to and not excluded by the court, then the motion to dismiss may be treated as a motion for summary judgment pursuant to *Rule 56*, Fed.R.Civ.P. See, *First Interstate Bank, N.A. v. Chapman & Cutler*, 837 F.2d 775, 776-777 (7th Cir. 1988); *Cange & Stotler and Co., Inc.*, 826 F.2d 581, 583 (7th Cir. 1987); and *Winslow v. Walters*, 815 F.2d 1114, 1116 (7th Cir. 1987). Thus, where a party moves for dismissal upon the pleadings alone, it will be considered a *Rule 12(b)(6)* motion for dismissal. However, where a party files a *Rule 12(b)(6)* motion for dismissal and the court relies on materials outside the pleadings, it will be considered a *Rule 56* motion for summary judgment.

HN7 Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with [**9] any affidavits, show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56*; *Russo v. Health, Welfare & Pension Fund, Local 705*, 984 F.2d 762 (7th Cir. 1993).

A thorough discussion of *Rule 56* by the Supreme Court of the United States can be found in a trilogy of cases decided in 1986. See, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986);¹ and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). *Celotex* addressed the

¹ For the judicial epilogue of *Celotex*, see *Catrett v. Johns-Manville Sales Corp.*, 263 U.S. App. D.C. 399, 826 F.2d 33 (D.C. Cir. 1987), cert. denied, 484 U.S. 1066, 98 L. Ed. 2d 992, 108 S. Ct. 1028 (1988).

initial burdens of the parties under [Rule 56](#), and [Anderson](#) addressed the standards under which the record is to be analyzed within the structure of [Rule 56](#).

[**10] [HN8](#)[↑]

The initial burden is on the moving party to demonstrate, "with or without supporting affidavits," the absence of a genuine issue of material fact and that judgment as a matter of law should be granted in the moving party's favor. [Celotex, 477 U.S. at 324](#) (quoting [Fed.R.Civ.P. 56](#)). A material question of fact is a question which will be outcome determinative of an issue in the case. The Supreme Court has instructed that the facts material in a specific case shall be determined by the substantive law controlling the given case or issue. [Anderson, 477 U.S. at 248](#).

[HN9](#)[↑] Once the moving party has met the initial burden, the opposing party must "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine [material] issue for trial.'" *Id.* The nonmoving party cannot rest on its pleadings, [Hughes v. Joliet Correctional Center, 931 F.2d 425, 428 \(7th Cir. 1991\)](#), or upon conclusory allegations in affidavits. [Cusson-Cobb v. O'Lessker, 953 F.2d 1079, 1081 \(7th Cir. 1992\)](#). "The days are [**11] gone, if they ever existed, when the nonmoving party could sit back and simply poke holes in the moving party's summary judgment motion." [Fitzpatrick v. Catholic Bishop of Chicago, 916 F.2d 1254, 1256 \(7th Cir. 1990\)](#).

[HN10](#)[↑] During its analysis, this court must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party. [Brennan v. Daley, 929 F.2d 346, 348 \(7th Cir. 1991\)](#) Furthermore, it is required to analyze summary judgment motions [*762] under the standard of proof relevant to the case or issue. [Anderson, 477 U.S. at 252-255](#).

The 1986 Supreme Court trilogy was recently re-examined in [Eastman Kodak v. Image Technical Services, U.S., 112 S. Ct. 2072, 119 L. Ed. 2d 265 \(1992\)](#), a case born in the context of [antitrust law](#). The most that can be said for [Kodak](#) is that it did not tinker with [Celotex](#) and [Anderson](#), and possibly involves an attempt to clarify [Matsushita](#). This view is well supported by an in-depth academic analysis in Schwarzer, Hirsch, and Barrans, [**12] [The Analysis and Decision of Summary Judgment Motions, 139 F.R.D. 441 \(1992\)](#).

At the outset of his administration, the number one item on President Woodrow Wilson's agenda was the Clayton Act, now found at [15 U.S.C. 15](#). [HN11](#)[↑] Section 4 of that Act provides as follows:

Any person who shall be injured in his business by reason of anything forbidden in the antitrust laws may sue therefor in the district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit including a reasonable attorney's fee.

To be sure the 62nd Congress painted with a very broad legislative brush in what was considered to be remedial and reform legislation. However, the Supreme Court has not read the statute so generously. For example, in [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#), holding that the injury involved in an antitrust case should reflect the anti-competitive [**13] effect either of the violations or of the anti-competitive acts made possible by the violation. There are serious causation problems of both kind and quality involved. More than a mere injury in fact is required. See [Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#).

One of the areas in which attempts are made by private individuals to invoke the blessings of § 4 of the Clayton Act involves staff physicians in disputes with hospitals about their staff privileges. An illustrative case in point is found in [Robles v. Humana Hospital Cartersville, 785 F. Supp. 989 \(N.D. Ga. 1992\)](#). [Robles](#) does not make it easy for plaintiffs in this regard, and the magic words seem to be wound up in the concept of "antitrust injury." See also [Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 31, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1983\)](#).

The centerpiece of this agreement that is here disputed appears to relate to agreed restrictions on advertising in three described [**14] television marketing areas, namely, South Bend, Fort Wayne and Lafayette, Indiana. It needs to be emphasized that this agreement does not forbid any of the parties from engaging in the practice of law

in South Bend, Indiana or any place where such is authorized. It only relates to an agreement with regard to advertising.

The parties in this case and their counsel would do well to revisit the landmark case decided by Judge Learned Hand a long time ago in [United States v. Aluminum Co. of America, 148 F.2d 416 \(2d Cir. 1945\)](#), dealing with relevant market. See also [Abadir & Co. v. First Mississippi Corp., 651 F.2d 422 \(5th Cir. 1981\)](#). This court can know judicially and from this record that in the entirety of the Northern District of Indiana, consisting approximately of the north third of the State of Indiana, drawing an east-west line through Lafayette, Indiana, and dealing with the territory in Indiana north of that line, there is widespread competition for plaintiffs' personal injury litigation involving lawyers and law who advertise on television, other electronic media, and by elaborate Yellow Page advertisements, as well [**15] as roadside billboard advertisements. This court can and does take note of the number of pages given over to that kind of advertisements in the telephone directories which cover a large part of the territory of this district. There is a substantial television market emanating from within Indiana in South Bend, Elkhart, Fort Wayne, and Lafayette.

The plaintiffs here assert that paragraphs seven, nine and eleven are an agreement to allocate markets among horizontal competitors, [*763] and as such is subject to the *per se* rule rather than the rule of reason, as found in [Standard Oil v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 \(1911\)](#). A facial examination of this agreement on its face fails to disclose any price fixing agreement among horizontal competitors. It takes an extremely large jump in logic, as well as in law, to conclude from the agreed restrictions on advertisements to an agreement to allocate market territory. That is the heart of the dispute in this case. These provisions fall far short of the requirements of [Northern Pacific Railway Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). [**16] See also [Consultants and Designers v. Butler Service Group, 720 F.2d 1553 \(11th Cir. 1983\)](#).

As strange as it might seem to someone who would have dropped on this planet recently, the phenomenon of television advertising lawyers is a relatively new one, made possible by a generous reading of the [First Amendment of the Constitution of the United States](#) by the Supreme Court in [Bates v. State Bar of Arizona, 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 \(1977\)](#). See also [Shapero v. Kentucky Bar Assn., 486 U.S. 466, 100 L. Ed. 2d 475, 108 S. Ct. 1916 \(1988\)](#). Although certainly lawyers such as Abraham Lincoln placed small ads in local newspapers in a day before mass media and mass markets, television advertising and indeed elaborate Yellow Page advertising is not the only way, nor even the primary way, by which most personal injury lawyers acquire clients. Traditionally, it was on the basis of such esoteric things as professional competence and reputation. But we live in a new world, and those of us who have lived long in the profession [*17] must understand the dynamic of change, and in the fashion of Henry Adams in his [Education of Henry Adams](#), we have to understand that the society in which we live is not static. Neither is the legal profession, nor the means by which lawyers acquire clients.

Specifically, there is absolutely nothing in this agreement to prohibit any of the lawyers who are parties in this case from appearing in any state or federal court in which they are entitled to practice anywhere in the United States of America. Just because able and experienced plaintiffs' counsel calls this a market allocation agreement, invoking the *per se* rule of [§ 1](#) of the Sherman Act, [15 U.S.C. § 1](#), does not make it so. [Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#), does not enure to the benefit of these plaintiffs.

This court has no difficulty whatsoever in holding that this agreement with reference to advertising restrictions is not a so-called *per se* agreement. See the reasoning and result in [Abadir](#). That to this court is a fairly easy decision.

The more difficult [**18] decision has to do with whether this record examined under [Rule 12\(b\)\(6\)](#) or [56, Fed.R.Civ.P.](#) would permit a trial on the merits under the rule of reason. [Standard Oil v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 \(1911\)](#). [Abadir, supra](#).

This court is all too aware of [Doe v. St. Joseph Hospital, 788 F.2d 411 \(7th Cir. 1986\)](#), since it fell the task of this Judge to try this case on remand and notes that the plaintiff was unsuccessful in a trial before a jury, and that result was affirmed on appeal.

In examining the rule of reason claims, this court has been directed to the deposition of both plaintiff lawyers, which alone throws very serious doubts as to whether even under a generous reading of the rule of reason these two plaintiff lawyers can succeed at all.

The plaintiffs have also engaged in a frontal assault by filing their own motion for summary judgment on March 25, 1994. Their opening shot is that this agreement between competing advertising personal injury lawyers not to advertise in certain areas is per se illegal, and support the argument [**19] that such is an allocation of territories in order to minimize competition, creating per se illegality. Easy to say. The cases cited are light years away from this factual setting. Compare [Palmer v. BRG of Georgia Inc., 498 U.S. 46, 112 L. Ed. 2d 349, 111 S. Ct. 401 \(1990\)](#), and [United States v. Topco Assoc. Inc., 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 \(1972\)](#).

With all due deference, this court is very familiar and has read with historic interest [United States v. Gasoline Retailers Assoc. \[*764\] Inc., 285 F.2d 688 \(7th Cir. 1961\)](#), and the situation here is vastly different. This case does not involve in any way the advertising or restrictions of advertising on prices, since prices are not in any way the subject of the advertisements here involved. With all deference to the plaintiffs, the circumstances in this case do not even closely relate to those in [Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 \(1975\)](#). Goldfarb is authority [**20] on the scope of the [Commerce Clause](#) here; it most certainly is not about bar association fee schedules and their enforcement.

The doctrine of ancillary restraint referred to by the plaintiffs in their March 25, 1994, brief is a most difficult concept. See [Polk Bros. Inc. v. Forest City Enterprises, Inc., 776 F.2d 185 \(7th Cir. 1985\)](#). But the real problem is to find whether it has anything to do with this case. There is something of a tacit admission by the plaintiffs that even if the ancillary restraint doctrine is not applicable to the per se claims but under a rule of reason analysis, there might still be a basis for the plaintiffs to recover, citing [Sound Ship Building Corp. v. Bethlehem Steel Corp., 387 F. Supp. 252 \(Dist.N.J. 1975\), aff'd, 533 F.2d 96 \(3d Cir.\), cert. denied, 429 U.S. 860, 50 L. Ed. 2d 137, 97 S. Ct. 161 \(1976\)](#).

The [Contract Clause](#) in Article I of the Constitution of the United States has gone through much judicial recycling since [Dartmouth College v. Woodward, 17 U.S. 518, 4 Wheat. 518, 4 L. Ed. 629 \(1989\)](#), [**21] and the liberty of contract theory found in [Allgeyer v. Louisiana, 165 U.S. 578, 41 L. Ed. 832, 17 S. Ct. 427 \(1897\)](#), has likewise been through the judicial shredder, there still remains perhaps, a very narrow slice of economic privacy by which persons, which includes lawyers, can engage in arms-length contractual agreements that do not fall afoul of either the Sherman or the Clayton Act.

This limited and narrow arrangement with regard to advertising just may fall within that narrow legal path through or around the thrust of the Sherman and Clayton Acts.

This court is totally confident that this case is not a per se violation case. This court is somewhat less confident in this proceeding under [Rule 12\(b\)\(6\)](#) and [Rule 56](#) (Fed.R.Civ.P.), as to whether it is possible for these plaintiffs to make out a rule of reason case. One of the principal hang-ups of this court is the concept of relevant market so well defined 50 years ago by Judge Learned Hand in [United States v. Aluminum Co. of America](#). It may well be that when the concept of relevant market is carefully dissected, all of these lawyers are truly bit players in [**22] the relevant market, in spite of all of their advertising efforts. Notwithstanding the enormous problems, possibly insurmountable, that these plaintiffs must solve in presenting a rule of reason claim here, this court is constrained to let the case go forward, let the relevant discovery take place, permit the parties to again address the rule of reason issue under [Rule 56, Fed.R.Civ.P.](#), and then to proceed on to trial, if necessary.

In 1990, the Congress of the United States enacted the Civil Justice Reform Act of 1990, [28 U.S.C. §§ 471-482](#). Literally hundreds, if not thousands, hours involving judges, lawyers and academics are involved in adopting a so-called plan, the focus of which was to expedite the trial and disposition of civil cases at a minimal cost. It has never been the view of this Judge that the principal villain in the cost of litigation is at the doorstep to the federal judiciary. It is rather at the doorsteps of litigants and the legal profession. Nonetheless, this court did what it was required to do, and continues to have an ongoing concern in regard to the cost as well as to the promptness of disposition of civil cases.

This case **[**23]** is going to be enormously costly and time-consuming to the parties and counsel. It may well drain time as well as fiscal resources to the breaking point for all concerned. Since these parties are lawyers, they, along with their respective counsel, all of whom are experienced and talented litigators, should be prepared to meet with Magistrate Judge Robin D. Pierce, in order to engage in in-depth, extensive settlement negotiations. This court should also state that its dividing certain functions between two of the magistrate judges in this district is quite intentional. It is the intent to have these parties and their counsel deal with Magistrate **[*765]** Judge Roger B. Cosbey, in regard to the discovery problems in the case, and to deal with Magistrate Judge Pierce in regard to settlement discussions, and to keep those two functions separate with two separate magistrate judges.

This court now **GRANTS** summary judgment and dismissal as to all of the plaintiffs' claims under the so-called per se doctrine. The motions to dismiss and for summary judgment as to the rule of reason claims are now **DENIED** with leave to renew the same after discovery has been completed. It is the hope, sans a settlement, **[**24]** that the discovery process will be completed at an early time, since this case can be set for trial possibly as early as August this year in Lafayette, Indiana.

To the extent that these parties and counsel are quibbling over the existence or non-existence of interstate commerce, they should save their voices and paper. There can be no doubt that both the Sherman Act and the Clayton Act are based on the commerce authority of Congress in Article I of the Constitution of the United States. There also is no doubt that the *Commerce Clause* has been given a generous interpretation from the time of Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824). There was a brief glitch in that ongoing process in *United States v. E.C. Knight*, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895), but that was only a brief detour from an ongoing and expansive view of interstate commerce. For example, see *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515 (1945), **[**25]** and *Kassel v. Consolidated Freightways Corp. Delaware*, 450 U.S. 662, 67 L. Ed. 2d 580, 101 S. Ct. 1309 (1981). So, given the present expansive view of the commerce power, there is absolutely no question that these defendant lawyers are engaged in interstate commerce activities. So, it is not necessary for the plaintiffs to go through the client records of the defendants just to find out where these clients live. No further discovery of that nature should be allowed by the magistrate judge.

If it is necessary for this case to go to trial on the rule of reason claims, it will be the intent of this court to bifurcate the issues of liability and try those issues first to verdict, and then and only if the plaintiffs prevail will the trier of fact be submitted relevant evidence on the issue of damages. If the only reason for requesting the income tax information from the defendants is on these damage issues, such will be stayed until a determination of liability has been made.

All of which is now **ORDERED**.

DATED: March 31, 1994

Allen Sharp, CHIEF JUDGE

UNITED STATES DISTRICT COURT

APPENDIX "A"

AGREEMENT TO WITHDRAW FROM PARTNERSHIPS

[26]** This Agreement made this 3 day of September, 1992, between Charles A. Sweeney (hereinafter "Sweeney"), Daniel H. Pfeifer (hereinafter "Pfeifer"), Thomas D. Blackburn (hereinafter "Blackburn"), and Raymond T. Green (hereinafter "Green"), witness that:

WHEREAS, Sweeney, Pfeifer and Blackburn are partners in the South Bend, partnership of Sweeney, Pfeifer and Blackburn (hereinafter "SPB"), the Fort Wayne partnership of SPB and the Lafayette partnership of SPB, and;

WHEREAS, Green is a partner in the Fort Wayne and Lafayette partnerships of SPB, and;

WHEREAS, the parties to this Agreement wish to settle certain disputes among them, and to restructure the three (3) partnerships;

NOW, THEREFORE, in consideration of the premises and the mutual agreements herein contained, the parties hereby agree as follows:

1. Blackburn hereby withdraws from the South Bend partnership of SPB and shall have no further rights in its business affairs or decisions. Blackburn will forego any rights he may have to any buy-out under the existing partnership agreement or to an accounting under common law or the Indiana Uniform Partnership Act.
2. Sweeney and Pfeifer hereby withdraw from the Fort Wayne and Lafayette **[**27]** partnerships of SPB and shall have no further rights in its business affairs or decisions. They will forego any rights they may have to any buy-out **[*766]** under the existing partnership agreement or to an accounting under common law or the Indiana Uniform Partnership Act.
3. The lawsuit between the parties to this Agreement, now pending in the Allen Superior Court, will be dismissed with prejudice, and a stipulation made of record indicating that the conduct, actions and complaints involved private partnership matters involving contractual partnership issues only. This settlement shall be kept confidential among the parties and no disclosure of the terms hereof shall be made.
4. Blackburn and Green shall, within thirty (30) days of the date of signing of this agreement, pay attorney fees to Robert J. Konopa in the amount of \$ 10,888.95 and to Leonard Eilbacher in the amount of \$ 3,690.50 for representing Sweeney and Pfeifer in the litigation referenced in paragraph 3 above and for their work in restructuring the partnership.
5. Blackburn and Green will pay \$ 37,856.50 each to Sweeney and Pfeifer as their share of monies spent for advertising pursuant to the accounting already provided relating **[**28]** to the litigation referenced in paragraph 3. Payment shall be made no later than 12/31/92.
6. Blackburn and Green will pay any accounting fees for amending the 1990 and 1991 Fort Wayne partnership income tax returns, if they are amended. Blackburn and Green will indemnify Sweeney and Pfeifer for any penalties, interest, and additional taxes incurred, if any, for these amended returns.
7. Sweeney and Pfeifer shall not directly or indirectly, within the areas described on Exhibit "A" attached hereto, do any advertising, including but not limited to, television, radio, newspapers, billboards, direct mail or yellow pages. In consideration of the agreement contained in paragraph 2 herein, Blackburn and Green shall not directly or indirectly, within the areas described on Exhibit "B" attached hereto, do any advertising, including but not limited to, television, radio, newspapers, billboards, direct mail or yellow pages.
8. Sweeney and Pfeifer for their agreement not to advertise as set forth in paragraph 7 above will each be entitled to receive 25% of the net annual profits of the Fort Wayne and Lafayette offices through the remainder of 1992 as well as for an additional period of five **[**29]** (5) calendar years. The final payment shall be made on or before the closing of books on December 31, 1997, an amount equal to 25% of the then existing amounts transferred into the advance account from the professional account. Sweeney and Pfeifer shall have the right to receive monthly and annual income statements through December 31, 1997. Sweeney and Pfeifer shall have the rights to an accounting of cases settled and monies disbursed during the period of January through April, 1998. The following information shall be provided, upon request:

Client Name, Insurer, Dates of offer, Dates of Acceptance, Amount of Settlement, Dates of Disbursement

9. The annual advertising budgets for television, radio and newspaper for the Fort Wayne and Lafayette offices for the years 1993 - 1997 shall not exceed:

Fort Wayne/Warsaw - \$ 125,000

Lafayette/Kokomo - \$ 45,000 (TV) and \$ 12,000 (Radio and other media)

10. Blackburn and Green shall retain yellow page advertising in all TV coverage areas in the Fort Wayne and Lafayette markets that are currently in place i.e., all yellow pages in the TV coverage areas of such markets.

11. Blackburn and Green shall retain yellow page advertising **[**30]** currently in place in the Marion, Indiana/Grant County areas even though it is partially outside of the Fort Wayne or Lafayette TV coverage areas.

12. Blackburn and Green shall retain the office located in Warsaw, Indiana, which is a part of the Fort Wayne partnership.

13. Sweeney and Pfeifer will receive an amount equal to their initial investment of approximately \$ 8,000.00 each, in the building located at 3344 Mallard Cove Lane. Such amounts shall be due and payable on or before December 31, 1992. Sweeney and **[*767]** Pfeifer will quitclaim their interest in said building to Blackburn and Green and their spouses, upon receipt of said payment.

14. Blackburn and Green will assume and hold harmless Sweeney and Pfeifer on the following indebtedness:

- (a) The commercial line of credit at Summit Bank which has an approximate balance of \$ 80,000.00.
- (b) The mortgage on the Mallard Cove property at Valley Bank.

15. The Fort Wayne and Lafayette offices will be allowed to advertise in the ordinary course of business as SPB at least until such time as the next edition of the yellow pages for the primary Lafayette and Fort Wayne areas are published. Such advertising shall be done in compliance **[**31]** with all ethical requirements set forth in the Code of Professional Responsibility for the State of Indiana.

16. There are no pending malpractice claims against Blackburn or Green and there are pending malpractice claims against Sweeney and Pfeifer. Each partnership shall maintain until December 31, 1997 professional liability insurance coverage on a claims made basis insuring each partnership and the individual partners in an amount not less than current coverage. Proof of coverage shall be provided to any party to this agreement upon request.

Sweeney and Pfeifer shall be liable for all costs and damages on their pending claims as well as any future claims naming them or the South Bend Partnership. They shall indemnify the other parties from and against any and all claims, expenses (including any deductible payments required by the professional liability policies) or damages of any nature, related to any such claim.

Blackburn and Green shall be liable for all costs and damages on any future claims naming them or the Fort Wayne or Lafayette Partnership. They shall indemnify the other parties from and against any and all claims, expenses (including any deductible payments required **[**32]** by the professional liability policies) or damages of any nature, related to any such claim.

17. All clients' files on pending matters have been transferred to the appropriate partnership. Blackburn will forego any interest in attorney fees to be received on the Saunders and Kunz cases, now pending. These cases will be handled by the South Bend office upon consent of the clients.

18. The financial books, records and accounts of the Fort Wayne and Lafayette partnerships of SPB shall be delivered to the office of the Fort Wayne partnership by September 4, 1992. All advertising files and personal checking account records shall be returned to Blackburn and neither Sweeney nor Pfeifer shall retain copies.

19. Except for a violation of paragraph 7, above any dispute arising from this agreement shall be resolved with the use of an arbitrator, to be agreed upon among the parties. If the parties are unable to agree to a single arbitrator, each side of the dispute shall chose one arbitrator and they shall choose a third whose decision shall be final. All arbitrators shall be affiliated with the American Arbitration Association or a similar organization. The parties to this agreement agree that **[**33]** a violation of paragraph 7 above would create immediate and irreparable harm with no adequate remedy at law. Accordingly, all parties shall retain the right to seek a Temporary Restraining Order and Permanent Injunction with damages and attorney fees for any violation of paragraph 7. The prevailing party to any action under this paragraph shall be entitled to payment to attorney fees and litigation expenses incurred.

20. all parties release, acquit and forever discharge the other parties for any and all claims, charges, rights, demands, costs, pecuniary loss, damage (direct or consequential) actions or causes of action arising before the date of this agreement and not set out above.

21. This agreement constitutes the entire agreement between the parties concerning the subject matter expressed herein and any other communications, whether written or verbal, shall not be binding.

22. This agreement may be signed in counterparts, all of which shall have the effect of being an original.

[*768] 23. This agreement shall be governed by the laws of the State of Indiana.

24. This agreement shall be binding on any successors of any partnership, and where there are multiple parties incurring responsibilities [**34] in any paragraph herein those responsibilities shall be joint and several.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed.

SOUTH BEND PARTNERSHIP OF SWEENEY, PFEIFER AND BLACKBURN

Charles A. Sweeney, Partner

Daniel H. Pfeifer, Partner

Thomas D. Blackburn, Partner

LAFAYETTE PARTNERSHIP OF SWEENEY, PFEIFER AND BLACKBURN

Charles A. Sweeney, Partner

Daniel H. Pfeifer, Partner

Thomas D. Blackburn, Partner

Raymond T. Greene, Partner

Charles A. Sweeney, Individually

Daniel H. Pfeifer, Individually

Thomas D. Blackburn, Individually

Raymond T. Greene, Individually

FORT WAYNE PARTNERSHIP OF SWEENEY, PFEIFER AND BLACKBURN

Charles A. Sweeney, Partner

Daniel H. Pfeifer, Partner

Thomas D. Blackburn, Partner

Raymond T. Greene, Partner

EXHIBIT A

The T.V. coverage area of Fort Wayne shall include the following counties:

Adams

Allen

Huntington

Jay
Kosciusko
*La Grange
*Miami
*Noble
Steuben
Wabash
Wells
Whitley
Grant

*Exception: [***769**] Sweeney and Pfeifer may place yellow page advertising in LaGrange and Miami counties and in the city of Ligonier in Noble County

The T.V. coverage area of Lafayette shall include the following counties: [****35**]

Benton
Boone
Carrol
Cass
Clinton
Fountain
Howard
*Miami
Montgomery
Tippecanoe
Warren
White

EXHIBIT B

The T.V. coverage area of South Bend shall include the following counties:

St. Joseph
Elkhart
Marshall
La Porte
Fulton
Starke
Porter

End of Document

Mfrs. Life Ins. Co. v. Superior Court

Court of Appeal of California, First Appellate District, Division Two

April 4, 1994, Decided

No. A052795, No. A055038.

Reporter

23 Cal. App. 4th 1629 *; 1994 Cal. App. LEXIS 294 **; 94 Cal. Daily Op. Service 2415; 94 Daily Journal DAR 4577; 1994-1 Trade Cas. (CCH) P70,659

MANUFACTURERS LIFE INSURANCE COMPANY et al., Petitioners, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; WEIL INSURANCE AGENCY, INC., Real Party in Interest. WEIL INSURANCE AGENCY, INC., Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; MANUFACTURERS LIFE INSURANCE COMPANY et al., Real Parties in Interest.

Notice: **1 NOT CITABLE - SUPERSEDED BY GRANT OF REVIEW

Subsequent History: Rehearing Granted May 2, 1994, Reported at: [1994 Cal. App. LEXIS 457](#).

Prior History: Superior Court of the City and County of San Francisco, No. 920327, Alex J. Saldamando, Judge.

Disposition: In number A052795, let a peremptory writ of mandate issue directing the superior court to set aside its order of January 25, 1991, insofar as that order overruled defendants' demurrers to the Third Cause of Action (Unruh Act), the Fourth Cause of Action ([Ins. Code, § 790.03, subd. \(c\)](#)), and the Fifth Cause of Action ([Bus. & Prof. Code, §§ 17200 et seq.](#)), and to sustain those demurrers to said causes of action without leave to amend. The alternative writ is otherwise discharged.

In number A055038, let a peremptory writ of mandate issue directing the superior court to set aside its order of July 23, 1991, insofar as that order sustained defendants' demurrers to the First and Second Causes of Action (Cartwright Act), and to overrule the demurrers to those causes of action. The alternative writ is otherwise discharged.

Core Terms

Cartwright Act, cause of action, superseded, remedies, counts, annuities, demurrers, review den, defendants', settlement, dictum, Practices, implied repeal, provisions, regulation, preserves, repeal, right of action, anti trust law, violations, displace, italics, Unfair, courts, antitrust, exemption, appears, Amend, cases, insurance industry

LexisNexis® Headnotes

Torts > ... > Settlements > Structured Settlements > General Overview

Torts > Procedural Matters > Settlements > General Overview

[**HN1**](#) [] Settlements, Structured Settlements

A settlement annuity is an annuity purchased by a liability carrier to fund a structured settlement in a personal injury action. A structured settlement is one in which the injury claimant agrees to accept periodic payments (i.e., the proceeds of an annuity) rather than a single lump sum. An annuity is classified in this state as a form of life insurance, pursuant to [Cal. Ins. Code § 101](#).

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

[HN2](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The Cartwright Act, [Cal. Bus. & Prof. Code §§ 16720](#) and [16721.5](#), states a general prohibition against conduct effecting a combination in restraint of trade, i.e., a trust. One common species of a trust is a concerted refusal to deal with other traders, or, as it is often called, the group boycott. The prohibition on such conduct extends to every type of business, including insurance.

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

[HN3](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The Unfair Insurance Practices Act, [Cal. Ins. Code §§ 790 through 790.10](#), prohibits acts of boycott, coercion, or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance, pursuant to [Cal. Ins. Code § 790.03\(c\)](#).

Governments > Legislation > Interpretation

[HN4](#) Legislation, Interpretation

In dealing with any problem of statutory effect, the appellate court begins and often ends with the words of the statute. Courts are not at liberty to impute a particular intention to the legislature when nothing in the language of the statute implies such intention. The statute must be construed with reference to the whole system of law of which it is a part, so that each part may be harmonized and have effect. The different codes blend into each other and constitute a single statute for the purposes of statutory construction and legislative intent may be determined not only from an individual code but the whole body of law.

Governments > Legislation > Interpretation

[HN5](#) Legislation, Interpretation

The Unfair Insurance Practices Act (UIPA), [Cal. Ins. Code §§ 790 through 790.10](#), itself expresses an affirmative intention and expectation that it will preserve intact existing remedies for insurance industry misconduct. [Cal. Ins. Code § 790.09](#) states that the commissioner's issuance of a cease-and-desist order shall not obstruct or impede the imposition of civil liability or criminal penalty under the laws of California arising from the same conduct.

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

23 Cal. App. 4th 1629, *1629L 1994 Cal. App. LEXIS 294, **1

Governments > Legislation > Statutory Remedies & Rights

HN6 Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

See [Cal. Ins. Code § 790.09](#).

Governments > Legislation > Interpretation

Insurance Law > Industry Practices > Unfair Business Practices > General Overview

HN7 Legislation, Interpretation

The Unfair Insurance Practices Act, [Cal. Ins. Code § 790.09](#), can only be given meaning by acknowledging a subsisting civil liability under the laws of California to which violators are already subject when the commissioner issues a cease-and-desist order, and from which no such order shall in any way relieve or absolve them.

Governments > Legislation > Interpretation

Insurance Law > Industry Practices > Unfair Business Practices > General Overview

HN8 Legislation, Interpretation

The Unfair Insurance Practices Act, [Cal. Ins. Code §§ 790 through 790.10](#), does not supplant other remedies available under state law.

Evidence > Inferences & Presumptions > Presumptions > Conflicting Presumptions

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Interpretation

HN9 Presumptions, Conflicting Presumptions

An implied repeal occurs when a later statute supersedes or substantially modifies an earlier law but without expressly referring to it. The law shuns repeals by implication. They are recognized only when there is no rational basis for harmonizing two potentially conflicting laws. The presumption against implied repeal is so strong that, to overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together. There must be no possibility of concurrent operation. Implied repeal should not be found unless the later provision gives undebatable evidence of an intent to supersede the earlier.

Governments > Legislation > Interpretation

HN10 Legislation, Interpretation

Statutes are presumed to be consistent with the common law.

Governments > Legislation > Expiration, Repeal & Suspension

HN11[] Legislation, Expiration, Repeal & Suspension

The mere presence of administrative regulation, no matter how broad the regulatory authority, does not in itself create an irreconcilable conflict or otherwise warrant an inference of intent to repeal.

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Interpretation

HN12[] Legislation, Expiration, Repeal & Suspension

Repeal by any other name is still repeal, and a claim of implied repeal is viewed with skepticism no matter how it is characterized.

Governments > Legislation > Statutory Remedies & Rights

Insurance Law > Industry Practices > Unfair Business Practices > General Overview

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN13[] Legislation, Statutory Remedies & Rights

Nothing in the Unfair Insurance Practices Act, [Cal. Ins. Code §§ 790 through 790.10](#), suggests a purpose, unmistakable or otherwise, to displace existing state-law remedies. Rather the avowed purpose of the act was to displace federal law to the maximum extent possible in accordance with the offer of federal abstention embodied in the McCarran-Ferguson Act (McCarran), [15 U.S.C.S. §§ 1011-1015](#). Under McCarran, federal law is inapplicable to insurance insofar as the state generally proscribes (or permits) certain conduct. The condition of state regulation is satisfied by a state regulatory scheme possessing jurisdiction over the challenged practice. In other words, the mere assertion of state jurisdiction is sufficient to preclude the application of federal [antitrust law](#) under McCarran.

Governments > Legislation > Interpretation

Insurance Law > Industry Practices > Unfair Business Practices > General Overview

HN14[] Legislation, Interpretation

See [Cal. Ins. Code § 790](#).

Governments > Legislation > Interpretation

Insurance Law > Industry Practices > Unfair Business Practices > General Overview

Insurance Law > Contract Formation > Offer & Acceptance

[HN15](#) [blue document icon] Legislation, Interpretation

By enacting the Unfair Insurance Practices Act, [*Cal. Ins. Code §§ 790 through 790.10*](#), the legislature explicitly accepted the federal offer of abstention on the broadest possible terms, using language designed to ensure that the entire insurance industry was brought under the state's jurisdiction. Nothing in the statute suggests an intent to shelter the insurance industry from state laws.

Governments > Courts > Judicial Precedent

[HN16](#) [blue document icon] Courts, Judicial Precedent

Dictum is the statement of a principle not necessary to the decision.

Governments > Courts > Judicial Precedent

[HN17](#) [blue document icon] Courts, Judicial Precedent

Dictum, of course, is not controlling authority even when it emanates from a supreme court. Nonetheless it carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic.

Governments > Legislation > Interpretation

Governments > Legislation > Statutory Remedies & Rights

[HN18](#) [blue document icon] Legislation, Interpretation

The Unfair Insurance Practices Act, [*Cal. Ins. Code §§ 790 through 790.10*](#), like all statutes, is to be applied according to its terms. Its language neither creates new private rights nor destroys old ones.

Governments > Legislation > Interpretation

[HN19](#) [blue document icon] Legislation, Interpretation

The rule of subsequent ratification applies to statutes which have previously been judicially construed.

Governments > Legislation > Interpretation

[HN20](#) [blue document icon] Legislation, Interpretation

Courts are never bound by a legislative statement concerning the intent of a prior enactment.

Governments > Legislation > Statutory Remedies & Rights

[HN21](#) [blue document icon] Legislation, Statutory Remedies & Rights

Before a court may imply a right of action based on violations of a substantive statute it must appear that (1) the plaintiff belongs to the class of persons the statute is intended to protect, (2) a private remedy will appropriately further the purpose of the legislation, and (3) such a remedy appears to be needed to assure the effectiveness of the statute.

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

Governments > Legislation > Statutory Remedies & Rights

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Standing

Governments > Legislation > Effect & Operation > General Overview

[HN22](#) [blue icon] Justiciability, Standing

The Unfair Competition Act (UCA), [Cal. Bus. & Prof. Code §§ 17200 through 17208](#), contains broad standing provisions, [Cal. Bus. & Prof. Code §§ 17203](#) and [17204](#), and a declaration that its remedies are cumulative, [Cal. Bus. & Prof. Code § 17205](#). Moreover, it has been applied to permit private actions based on violations of other statutes which did not themselves confer standing. However, the UCA cannot be utilized to plead around absolute barriers to relief by re-labeling the nature of the action as one brought under the unfair competition statute. The purpose of the UCA is to permit private enforcement of statutory prohibitions where to do so would not interfere with legislative objectives and limitations otherwise prescribed.

Governments > Legislation > Effect & Operation > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > Standing

Governments > Legislation > Statutory Remedies & Rights

[HN23](#) [blue icon] Legislation, Effect & Operation

It is settled that the Unfair Competition Act, [Cal. Bus. & Prof. Code §§ 17200 through 17208](#), cannot be utilized to confer private standing to enforce the Unfair Insurance Practices Act, [Cal. Ins. Code §§ 790 through 790.10](#).

Counsel: Howard, Rice, Nemerovski, Canady, Robertson & Falk, Jerome B. Falk, Jr., [**2](#) H. Joseph Escher III, Pauline E. Calande and Theresa M. Beiner for Petitioners and Real Parties in Interest.

No appearance for Respondent.

Khourie, Crew & Jaeger, Eugene Crew and Timothy F. Perry for Petitioner and Real Party in Interest.

Judges: Opinion by Benson, J., * with Smith, Acting P. J., and Phelan, J., concurring.

Opinion by: BENSON, J.

Opinion

* Retired Associate Justice of the Court of Appeal, First District, sitting under assignment by the Chairperson of the Judicial Council.

[*1634] Plaintiff Weil Insurance Agency, Inc. (Weil) brought this action for damages alleging primarily an unlawful boycott in the sale of annuities used to fund structured settlements of personal injury claims. Various defendants successfully demurred to the complaint, insofar as it asserted statutory causes of action, mainly on the ground that such causes of action are superseded by provisions of the Insurance Code. We have concluded that this contention is unsound and that plaintiff can state a cause of action under the [*3] Cartwright Act, [Business and Professions Code sections 16720](#) and [16721.5](#). We have also concluded that plaintiff cannot state a private cause of action under the Unfair Insurance Practices Act or the Unfair Competition Act. We will direct the trial court to overrule the demurrers as to the Cartwright Act claims but to sustain the demurrers to the remaining counts at issue in this proceeding.

BACKGROUND

The action concerns plaintiff's attempt to engage in business as a broker of, and consultant in connection with, settlement annuities. [HN1](#)¹ A settlement annuity is an annuity purchased by a liability carrier to fund a structured settlement in a personal injury action. A structured settlement is one in which the injury claimant agrees to accept periodic payments (i.e., the [*1635] proceeds of an annuity) rather than a single lump sum. It appears to be conceded by all concerned that such an annuity is classified in this state as a form of life insurance. (See [Ins. Code, § 101](#).)

The gist of the complaint's allegations contained in the four statutory counts with which we are now concerned is that defendants boycotted plaintiff's brokerage business because of opposition to plaintiff's [*4] conduct in providing injury claimants and their attorneys with information concerning the underlying features of settlement annuities, in particular their actual costs. Such disclosures were inimical to a plan defendants had formed to market settlement annuities as a way for liability carriers to settle injury claims below their cash settlement value. Therefore defendants schemed to prevent claimants from acquiring such information. They pursued this scheme, in part, by boycotting and disparaging plaintiff, as a broker and consultant supplying such information to injury claimants.

Plaintiff alleges it built a successful brokerage and consulting business based upon advising and educating claimants and their attorneys in connection with various aspects of settlement annuities including those which concerned defendants. This conduct, however, interfered with defendants' marketing scheme. Accordingly, defendants coerced or induced suppliers of annuities to stop doing business with plaintiff. As a result, plaintiff's settlement annuities business was destroyed.

The first four surviving counts ¹ allege violations of (1) [Business and Professions Code section 16720](#), part of the Cartwright [*5] Act; (2) [Business and Professions Code section 16721.5](#), also part of that act; (3) [Insurance Code section 790.03, subdivision \(c\)](#), part of the Unfair Insurance Practices Act; and (4) [Business and Professions Code section 17200 et seq.](#), the Unfair Competition Act. ² Three other counts sound in tort, and are not at issue in these writ proceedings.

¹ At oral argument plaintiff expressly abandoned a fifth statutory cause of action, based on the Unruh Civil Rights Act ([Civ. Code, § 51.5](#)). Our discussion of the complaint will, naturally, disregard this count. In light of plaintiff's abandonment, however, we will direct the trial court to sustain the demurrer to this court.

² [Insurance Code sections 790-790.10](#) are often referred to as the "Unfair Practices Act." (See [Moradi-Shalal v. Fireman's Fund Ins. Companies](#) (1988) 46 Cal.3d 287, 292 [250 Cal.Rptr. 116, 758 P.2d 58]; [Royal Globe Ins. Co. v. Superior Court](#) (1979) 23 Cal.3d 880, 883 [153 Cal.Rptr. 842, 592 P.2d 329], overruled in [Moradi-Shalal, supra](#), 46 Cal.3d at pp. 292, 304.) The Legislature, however, has mysteriously labeled this portion of the Insurance Code the "Unfair Trade Practices Act." ([Ins. Code, § 1620.2, subd. \(a\)](#), italics added.) It has given the name "Unfair Practices Act" to [sections 17000 through 17101 of the Business and Professions Code](#). ([Bus. & Prof. Code, § 17000](#).) The Supreme Court has used that name to refer not only to those sections but also to [section 17200 et seq.](#) ([Farmers Ins. Exchange v. Superior Court](#) (1992) 2 Cal.4th 377, 395 [6 Cal.Rptr.2d 487, 826 P.2d 730]; [State of California ex rel. Van de Kamp v. Texaco, Inc.](#) (1988) 46 Cal.3d 1147, 1169 [252 Cal.Rptr. 221, 762 P.2d 385]; cf. [Bank of the West v. Superior Court](#) (1992) 2 Cal.4th 1254, 1260 [10 Cal.Rptr.2d 538, 833 P.2d 545] [describing [section 17200](#) as part of "Unfair Business Practices Act"].).

[**6] [*1636] In the earliest ruling before us, the trial court sustained demurrers to the Cartwright Act claims (counts 1 and 2) with leave to amend. However, it concluded that plaintiff had stated causes of action under the UIPA and the UCA (counts 4 and 5). Defendants filed petition No. A052795 seeking a writ of mandate directing the trial court to sustain the demurrers to these counts. We issued an alternative writ.

While that matter was pending, plaintiff amended the complaint and various defendants again demurred to the Cartwright Act counts. The trial court sustained those demurrers without leave to amend. Plaintiff filed petition No. A055038, seeking a writ which would direct the trial court to overrule the demurrers to those counts. We initially denied plaintiff's petition. Plaintiff sought review in the Supreme Court. That court granted the petition and retransferred the matter to us with directions to issue an alternative writ. We have done so.

I. CARTWRIGHT ACT

A. INTRODUCTION

HN2 [↑] The Cartwright Act states a general prohibition against conduct effecting a combination in restraint of trade, i.e., a "trust." ([Bus. & Prof. Code, § 16720, 16721.5.](#)) One common species [**7] of a trust is a "concerted refusal to deal with other traders, or, as it is often called, the group boycott." ([Marin County Bd. of Realtors, Inc. v. Palsson \(1976\) 16 Cal.3d 920, 931 \[130 Cal.Rptr. 1, 549 P.2d 833\].](#)) The prohibition on such conduct extends to "every type of business," including insurance. ([Speegle v. Board of Fire Underwriters \(1946\) 29 Cal.2d 34, 43, 44, 46 \[172 P.2d 867\].](#) see [Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d at pp. 927-928.](#))

At the same time, **HN3** [↑] the UIPA prohibits acts of "boycott, coercion, or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance." ([Ins. Code, § 790.03, subd. \(c\) \[section 790.03\(c\)\].](#)) The major issue before us is whether the UIPA supplants the Cartwright Act so as to provide the sole basis by which unlawful [*1637] conduct of the type alleged here may be subjected to legal restraint or may otherwise produce legal consequences.

HN4 [↑] In dealing with any problem of statutory effect, we begin and often end with the words of the statute. "[C]ourts are not at liberty to impute a particular intention to the Legislature when nothing [**8] in the language of the statute implies such intention." ([Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist. \(1992\) 9 Cal.App.4th 644, 658 \[11 Cal.Rptr.2d 850\].](#) review den. [rejecting claim of implied exemption from general statute]; see [Code Civ. Proc., § 1858.](#)) The statute "must be construed with reference to the whole system of law of which it is a part, so that each part may be harmonized and have effect." ([Yoffie v. Marin Hospital Dist. \(1987\) 193 Cal.App.3d 743, 748 \[238 Cal.Rptr. 502\].](#) review den.; see [Code Civ. Proc., § 1858.](#)) "This rule applies even if the statutes to be harmonized appear in different codes." ([193 Cal.App.3d 743, 748.](#)) "[T]he different codes blend into each other and constitute a single statute for the purposes of statutory construction and . . . legislative intent may be determined not only from an individual code but the whole body of law. ([Pesce v. Dept. Alcoholic Bev. Control \(1958\) 51 Cal.2d 310, 312 \[333 P.2d 15\].](#) [American Friends Service Committee v. Procurier \(1973\) 33 Cal.App.3d 252, 260 \[109 Cal.Rptr. 22\].](#))" ([Winzler & Kelly v. Department of Industrial Relations \(1981\) 121 Cal.App.3d 120, 125 \[174 \[**9\] Cal.Rptr. 744\].](#))

As explained in the following discussion, we have concluded that the UIPA expressly preserves existing remedies for unlawful conduct in the business of insurance. Such preservation is consistent with the history of the UIPA and with the interpretational presumption against the implied repeal of statutory remedies. A contrary holding is not warranted by case law or by any claimed legislative ratification. Accordingly, the demurrers to the Cartwright Act claims should have been overruled.

B. EXPRESS PRESERVATION OF EXISTING REMEDIES

To avoid this confusion of terms we will adopt our own nomenclature for the affected statutes. Thus we refer to [Insurance Code sections 790 through 790.10](#) as the Unfair Insurance Practices Act (UIPA), [Business and Professions Code sections 17000 through 17101](#) as the Unfair Business Practices Act (UBPA), and [Business and Professions Code sections 17200 through 17208](#) as the Unfair Competition Act (UCA).

[HN5] The UIPA itself expresses an affirmative intention and expectation that it will preserve intact existing remedies for insurance industry misconduct. [Insurance Code section 790.09](#) states that the commissioner's issuance of a cease-and-desist order shall not obstruct or impede the imposition of "civil liability or criminal penalty under the laws of this State" arising from the same conduct.³

[**10] Defendants have never offered a plausible interpretation of this statute consistent with the view that the UIPA supersedes the Cartwright Act. To be [*1638] sure, the statute only refers to situations in which the commissioner issues a cease and desist order. Numerous absurdities would arise, however, if we concluded that the UIPA supersedes other laws in most cases, but preserves existing remedies when the commissioner issues such an order. This would make the commissioner's jurisdiction exclusive *only so long as it is not exercised*--a result which would appear to maximize the potential for jurisdictional conflict without creating any discernible benefit. Under such a regime, *mere administrative inaction* would cloak all manner of insurance misconduct with immunity. Furthermore, there would be no textual basis for withholding this immunity from criminal prosecutions as well, since [Insurance Code section 790.09](#) mentions criminal penalties in tandem with civil remedies.

At oral argument defendants' counsel appeared to agree that a cease and desist order could not have the effect of restoring liability from which an insurer had otherwise become immune. Yet if [Insurance Code section 790.09](#) does not have that effect it becomes meaningless under defendants' regime, for there is no "civil remedy" for the statute to preserve; any such remedy has been superseded by the UIPA as a whole. **[HN7]** [Section 790.09](#) can only be given meaning by acknowledging a *subsisting* "civil liability . . . under the laws of this State," to which violators are already subject when the commissioner issues a cease-and-desist order, and from which no such order "shall in any way relieve or absolve" them.

The history of the UIPA indicates that the original bill did not contain a provision preserving civil remedies, but only a section preserving the *commissioner's powers* under existing law.⁴ The first amended version of the bill, and each successive version, contained what is now [Insurance Code section 790.09](#). (Assem. Amend. to Assem. Bill No. 1530 (1959 Gen. Sess.) Apr. 8, 1959; see Assem. Amend. to *id.*, May 6, 1959; Sen. Amend. to Assem. Bill No. 1530 (1959 Gen. Sess.) June 11, 1959; Stats. 1959, ch. 1737, § 1, p. 4191.) This provision originated even earlier, however, in the 1947 "Chicago Draft" of the Model Unfair Insurance Practices Act proposed by the National Association [**12] of Insurance Commissioners (NAIC).⁵ Its pointed adoption in California may have emphasized a legislative perception that the UIPA affected little if any change in existing law. Indeed, at the time [*1639] of the enactment of the UIPA the Legislative Analyst wrote that the bill would "make[] no substantive change in existing law." (Opn. of Legis. Analyst, "Analysis of Assembly Bill No. 1530" (May 20, 1959), p. 1; exhibit 1 to request for judicial notice filed Sept. 20, 1991, in A055038.) (Italics added.)

[**13] If the Legislature wished to exempt the insurance industry from the Cartwright Act, it knew full well how to do so. The Insurance Code contains no fewer than four express exemptions of specified classes of insurance from other laws. ([Ins. Code, § 795.7](#) [senior citizens' health insurance]; 1860.1 [casualty insurance]; 11758 [workers' compensation]; 12414.26 [title insurance].) All of these statutes would be superfluous if defendants' view of the

³ **[HN6]** [Insurance Code section 790.09](#) provides: "No order to cease and desist issued under this article directed to any person or subsequent administrative or judicial proceeding to enforce the same shall in any way relieve or absolve such person from any administrative action against the license or certificate of such person, civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive."

⁴ "§ 790.11. The powers vested in the commissioner in this article shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive." (Assem. Bill No. 1530 (1959 Reg. Sess.), § 1; see now [Ins. Code, § 790.08](#).)

⁵ "No order of the Commissioner under this Act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state." (Exhibit B to Rep. of Joint Com. on Fed. Legislation etc. (Jan. 24, 1947), § 8(d); Proceedings, 78th Ann. Sess., NAIC (1947), p. 398.)

UIPA were correct. Yet two of them were enacted well after the effective date of that Act. (Stats. 1973, ch. 1130, § 15, p. 2314 [[§ 12414.26](#)]; Stats. 1963, ch. 2055, § 1, p. 4301 [[§ 795.7](#)].)

Our view that the UIPA effects no displacement of general laws is consistent with the commissioner's interpretation of the UIPA, not only as amicus curiae in this proceeding but as adviser to the Governor and litigant in other proceedings. Beginning when the UIPA was initially adopted, the department repeatedly expressed the view that the act would have little or no effect on California law, but was enacted primarily, if not entirely, to conform to the actions of other states.⁶ Somewhat later, in [Royal Globe Ins. Co. v. Superior](#) [**14] Court, [supra](#), 23 Cal.3d at [page 897](#) (dis. opn.), Justice Richardson quoted the commissioner as flatly asserting that [HN8](#)⁷ the UIPA "does not supplant other remedies available under state law."

[**15] Defendants assert that we should give no particular weight to the commissioner's interpretation. But the department's long-standing interpretation, first conveyed to the Governor at the time of the act's adoption and espoused [*1640] with apparently perfect consistency since, reinforces our view that the statute simply cannot support the interpretation defendants urge upon us. (See [Truta v. Avis Rent A Car Systems, Inc.](#) (1987) 193 Cal.App.3d 802, 814 [238 Cal.Rptr. 806], review den.; [Gay Law Students Assn. v. Pacific Tel. & Tel. Co.](#) (1979) 24 Cal.3d 458, 491 [156 Cal.Rptr. 14, 595 P.2d 592].)

Defendants' claim of implied supersession also runs afoul of the interpretational presumption against implied repeal. [HN9](#)⁸ An "implied repeal" occurs "[w]hen a later statute supersedes or substantially modifies an earlier law but without expressly referring to it." ([Department of Personnel Administration v. Superior Court](#) (1992) 5 Cal.App.4th 155, 191 [6 Cal.Rptr.2d 714], review den., quoting [Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.](#) (1968) 263 Cal.App.2d 41, 54 [69 Cal.Rptr. 480].) Under this definition, defendants' argument must be viewed [**16] as relying on an implied partial repeal of the Cartwright Act, i.e., a repeal insofar as that act would otherwise apply to the business of insurance.

"[T]he law shuns repeals by implication." ([Board of Supervisors v. Lonergan](#) (1980) 27 Cal.3d 855, 868 [167 Cal.Rptr. 820, 616 P.2d 802]; [Kennedy Wholesale, Inc. v. State Bd. of Equalization](#) (1991) 53 Cal.3d 245, 249 [279 Cal.Rptr. 325, 806 P.2d 1360].) They "are recognized only when there is no rational basis for harmonizing two potentially conflicting laws." ([Fuentes v. Workers' Comp. Appeals Bd.](#) (1976) 16 Cal.3d 1, 7 [279 Cal.Rptr. 325, 806 P.2d 1360], italics added.) "The presumption against implied repeal is so strong that, 'To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.' ([Penziner v. West American Finance Co.](#) [(1937)] 10 Cal.2d 160, 176 [74 P.2d 252].) There must be 'no possibility of concurrent operation.' ([Hays v. Wood](#) (1979) 25 Cal.3d 772, 784 [160 Cal.Rptr. 102, 603 P.2d **171, 19] . . .) . . . [I]mplied repeal should not be found unless ' . . . the later provision gives undebatable evidence of an intent to supersede the earlier . . .' (*Ibid.* . . .)" ([Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.](#) (1989) 49 Cal.3d 408, 419-420 [261 Cal.Rptr. 384, 777 P.2d 157], first and second italics added; see [Roberts v. City of Palmdale](#) (1993) 5 Cal.4th 363, 379 [20 Cal.Rptr.2d 330, 853 P.2d 496].)⁹

⁶ In a memorandum to the Governor, the Chief Assistant Insurance Commissioner indicated that the UIPA had been enacted in all but one other state and that it was expected to add little if anything to California law. He concluded, "The Department is neither opposed to nor an advocate for this Bill. We know of nothing in the Bill which is detrimental to the public interest." (J. Thomas, Mem. from Dept. of Ins. to Hon. Edmund G. Brown (Jun. 30, 1959), pp. 1-2; exhibit 1 to request for judicial notice filed Sept. 20, 1991, in A055038.)

A few years later, the same author wrote that the Model Act "had only a psychological application to states, such as New York and California[,] which already had extensive laws regulating practically every phase of the business . . . [P] California and some of the other active states hesitated [to adopt the act] because it was difficult to justify the expense and time expenditure of enacting and having in the books an Act which, for all practical purposes, was unnecessary." (J. Thomas, Interdepartmental Mem. (May 17, 1960), pp. 1-2; exhibit 3 to request for judicial notice filed Sept. 20, 1991, in A055038.)

⁷ [HN10](#)¹⁰ Statutes are also presumed to be consistent with the common law. ([Dry Creek Valley Assn., Inc. v. Board of Supervisors](#) (1977) 67 Cal.App.3d 839, 844 [135 Cal.Rptr. 726]; see [Rojo v. Kliger](#) (1990) 52 Cal.3d 65, 75 [276 Cal.Rptr. 130,

[**18] Amici California Chamber of Commerce et al. suggest that the presumption against implied repeal does not fully apply where a general statute [*1641] overlaps an "administrative regulatory scheme." We find no support for this assertion in the case cited by amici ([Gordon v. New York Stock Exchange \(1975\) 422 U.S. 659 \[45 L.Ed.2d 463, 95 S.Ct. 2598\]](#)), or in any other authority. At most, schemes regulating in minute detail may produce such pervasive conflicts with preexisting laws that the two cannot coexist and are, for that reason, mutually repugnant. (See [I.E. Associates v. Safeco Title Ins. Co., supra, 39 Cal.3d at p. 285](#).) **HN11**[↑] The mere presence of administrative regulation, no matter how broad the regulatory authority, does not in itself create an irreconcilable conflict or otherwise warrant an inference of intent to repeal.

Nor may defendants avoid the presumption against implied repeal by relying on different terminology. In particular we reject the claim that the UIPA presumptively provides an "exclusive remedy" for conduct covered by its terms. **HN12**[↑] Repeal by any other name is still repeal, and a claim of implied repeal is viewed with skepticism no matter how it [**19] is characterized. (See [Physicians & Surgeons Laboratories, Inc. v. Department of Health Services \(1992\) 6 Cal.App.4th 968, 985-986 \[8 Cal.Rptr.2d 565\]](#), review den. [applying presumption against implied repeal in rejecting claim that new regulation superseded existing ones]; see [Rojo v. Kliger, supra, 52 Cal.3d at p. 80](#) [new statutory remedy deemed exclusive only if it exhibits "a legislative intent to displace all preexisting or alternative remedies"]; [McKee v. Bell-Carter Olive Co. \(1986\) 186 Cal.App.3d 1230, 1244-1245 \[231 Cal.Rptr. 304\]](#), review den. [new statutory remedy generally regarded as cumulative, not exclusive]; [Hentzel v. Singer Co. \(1982\) 138 Cal.App.3d 290, 301 \[188 Cal.Rptr. 159\]](#); [Glaser v. Meyers \(1982\) 137 Cal.App.3d 770, 774 \[187 Cal.Rptr. 242\]](#); 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 8, p. 39.)

We also observe a certain illogic in referring to the UIPA as providing an "exclusive remedy" when, as we conclude in the following section, it provides no private remedy at all. Nor does it empower the commissioner to redress private injuries. (See [Shernoff v. Superior Court \(1975\) 44 Cal.App.3d 406, 409 \[118 Cal.Rptr. 1**201 680\]](#) [commissioner's authority "is limited to restraint of future illegal conduct . . . , and he possesses no authority to enter money judgments for past injuries"]; [Greenberg v. Equitable Life Assur. Society \(1973\) 34 Cal.App.3d 994, 1001 \[110 Cal.Rptr. 470\]](#) [. . . "the sole disciplinary authority of the commissioner would be to issue a cease and desist order or obtain an injunction to restrain the illegal conduct".] Courts are particularly reluctant to view a statute as affording an exclusive remedy when it appears inadequate to redress the wrong toward which it is directed. (3 Witkin, Cal. Procedure, Actions, op. cit. *supra*, § 9, at [*1642] p. 40; [Orloff v. Los Angeles Turf Club \(1947\) 30 Cal.2d 110, 113 \[180 P.2d 321, 171 A.L.R. 913\]](#); see [Rojo v. Kliger, supra, 52 Cal.3d at pp. 80-82](#) [given various limitations, Fair Employment and Housing Act did not displace other remedies]; see [Farmers Ins. Exchange v. Superior Court, supra, 2 Cal.4th 377, 391-392, fn. 9](#) [discretionary relief from "primary jurisdiction" doctrine where administrative remedy inadequate].) Here, the denial of a Cartwright Act claim would deprive plaintiffs, and others [**21] in their position, of any remedy whatsoever for substantial damages resulting from concededly unlawful conduct. No justification for such a regime has been proposed and we discern none.

HN13[↑] Nothing in the UIPA suggests a purpose, unmistakable or otherwise, to displace existing state-law remedies. Rather the avowed purpose of the act was to displace federal law to the maximum extent possible in accordance with the offer of federal abstention embodied in the McCarran-Ferguson Act, [15 United States Code Annotated sections 1011-1015](#) (hereafter McCarran). ⁸ (See [Karlin v. Zalta \(1984\) 154 Cal.App.3d 953, 966 \[201 Cal.Rptr. 379\]](#); [American Internat. Group, Inc. v. Superior Court \(1991\) 234 Cal.App.3d 749, 756-758 \[285 Cal.Rptr. 765\]](#), review den.) Under McCarran, federal law is inapplicable to insurance insofar as the state "generally proscribes" (or permits) certain conduct. ([Ohio AFL-CIO v. Insurance Rating Board \(6th Cir. 1971\) 451 F.2d 1178, 1181, 1184](#), cert. den. [\(1972\) 409 U.S. 917 \[34 L.Ed.2d 180, 93 S.Ct. 215\]](#); [California League of Ind. Ins. Pro. v.](#)

[801 P.2d 373](#); [Lacher v. Superior Court \(1991\) 230 Cal.App.3d 1038, 1050 \[281 Cal.Rptr. 640\]](#), review den.; cf. [I.E. Associates v. Safeco Title Ins. Co. \(1985\) 39 Cal.3d 281, 285 \[216 Cal.Rptr. 438, 702 P.2d 596\]](#).) In this regard, we observe that plaintiff's antitrust claims have their roots in common law. (See [Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d at pp. 44, 45, 46](#).)

⁸ **HN14**[↑] The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, Seventy-ninth Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." ([Ins. Code, § 790](#).)

Aetna Cas. & S. Co. (N.D.Cal. 1959) 175 F.Supp. 857, 860.) "The condition of state regulation is satisfied by [**22] 'a state regulatory scheme possess[ing] jurisdiction over the challenged practice.' " (In re Insurance Antitrust Litigation (N.D.Cal. 1989) 723 F.Supp. 464, 474, revd. on other grounds (9th Cir. 1991) 938 F.2d 919; quoting Feinstein v. Nettleship Co. of Los Angeles (9th Cir. 1983) 714 F.2d 928, 933, cert. den. (1984) 466 U.S. 972 [80 L.Ed.2d 820, 104 S.Ct. 2346]; brackets in *Antitrust*.) In other words, the mere assertion of state jurisdiction is sufficient to preclude the application of federal antitrust law under McCarran.

[**23] HN15 

By enacting the UIPA, the Legislature explicitly accepted the federal offer of abstention on the broadest possible terms, using language designed to ensure that the entire insurance industry was brought under the state's jurisdiction. Nothing in the statute suggests an intent to shelter the insurance [*1643] industry from state laws.⁹ (See Rojo v. Kliger, supra, 52 Cal.3d at p. 81 [statute expressing intent to "occupy the field" displaced local regulation, not other state legislation].)

[**24] C. CASELAW

Defendants' challenge to the Cartwright Act claims ultimately rests on a single sentence in Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 322 [70 Cal.Rptr. 849, 444 P.2d 481]: "These statutes and the common law which once constituted 'the protection of the public against combinations in restraint of the insurance trade' (Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 45 [172 P.2d 867]) are now expressly superseded and contravened by the specific provisions of the Insurance Code." After scrutinizing this statement in context, we have concluded that *Chicago Title* is neither compelling nor persuasive authority for a rule holding the Cartwright Act superseded by the UIPA.

The quoted statement is dictum. HN16  Dictum is the "statement of a principle not necessary to the decision." (People v. Squier (1993) 15 Cal.App.4th 235, 240 [18 Cal.Rptr.2d 536], internal quotation marks omitted.) The holding of *Chicago Title* is that the complaint failed to adequately plead the elements of a Cartwright Act cause of action, or any other claim. The court undertook a painstaking count-by-count analysis of the complaint, [**25] identifying numerous factual and legal deficiencies.¹⁰ [*26] If the Supreme Court had believed that the statutes cited by the plaintiffs (including the Cartwright Act) were superseded by the Insurance Code, there would [*1644] have been no occasion for this discussion. But the court explicitly identified factual insufficiency as the "determinative" issue.¹¹

⁹ Amici California Chamber of Commerce et al., describe the UIPA as "answer[ing] a concern expressed by the California Supreme Court" in Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d 34, 45. It is true that the court noted the absence of "special legislation" in this state against combinations in restraint of the insurance trade. But the only "concern" expressed in the cited passage is the potential effect of *denying enforcement of the Cartwright Act* in the insurance business. Certainly the court had no intention of prognosticating upon the hypothetical preemptive effect of statutes which did not then exist.

¹⁰ For example: "We are persuaded . . . that appellants' vague and conclusionary pleadings fail to allege facts which might reasonably be construed to reveal a wrongful combination." (Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at p. 315.)

"[T]he factual allegations, as illustrated, fail in each instance to support the charge. Just as the earlier counts state facts insufficient to establish proscribed conduct on the parts of the alleged actors and thus cannot reach their purported conspirators, so the final counts charging antitrust infringements fall for similar reasons." (69 Cal.2d at p. 323, brackets original.)

"The allegation of boycott cannot be supported in this instance because everyone has the unrestricted right to select customers and sources of supply." (69 Cal.2d at p. 324.)

¹¹ "We must determine . . . whether the superior court has jurisdiction to entertain an action based upon appellants' theories, or any of them, and, if so, whether appellants have stated a cause of action against any of the various named defendants. *The*

HN17 [↑] Dictum, of course, is not controlling authority even when it emanates from the Supreme Court. ([Grange Debris Box & Wrecking Co. v. Superior Court \(1993\) 16 Cal.App.4th 1349, 1358 \[20 Cal.Rptr.2d 515\]](#); cf. [Auto Equity Sales, Inc. v. Superior Court \(1962\) 57 Cal.2d 450, 455 \[20 Cal.Rptr. 321, 369 P.2d 937\]](#); [Brown v. Kelly Broadcasting Co. \(1989\) 48 Cal.3d 711, 734-735 \[257 Cal.Rptr. 708, 771 P.2d 406\]](#).) Nonetheless it " 'carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic.' " ([Grange, supra, at p. 1358](#).) *Chicago Title's* statement concerning Insurance Code [**27] exclusivity satisfies neither of these requirements.

Like most of the opinion in *Chicago Title*, the quoted statement was authored by a court of appeal and "adopted" by the Supreme Court. ([69 Cal.2d at p. 311](#).) This in itself does not warrant lessened deference, but the statement also betrays a certain lack of authorial attention. To begin with, it confuses the Cartwright Act with the UBPA. The subject dictum is immediately preceded by a citation to [Business and Professions Code sections 17040- 17051](#). ([69 Cal.2d at p. 322](#).) These statutes are part of the UBPA and not, as the author of the dictum seemed to believe, the Cartwright Act. (See *ibid.*; cf. [id. at pp. 315, 322](#) [correctly defining Cartwright Act]; [Food & Agr. Code, § 66524, 65521](#) [same]; [Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d at p. 42](#) [same]; cf. [Bus. & Prof. Code, § 17000](#) [defining Unfair Practices Act].) ¹² The statement that "these statutes" have been superseded by the Insurance Code is thus burdened with a glaring anomaly.

[**28] Moreover, the court never identified *any* provision of the Insurance Code which "expressly superseded and contravened" *any* other statute. In particular, *the opinion never mentioned the UIPA*. Instead it cited certain provisions of the Insurance Code involving the regulation of *title insurance rates*. ([Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at pp. 322-323](#), citing [Ins. Code, § 12404- 12412](#).) None of those provisions could be said to "expressly abrogate" any other statute. Indeed, some five years later the Legislature *did* enact an express exemption covering some of the activities authorized by the cited portion of the Code. ([Ins. Code, § 12414.26](#), added by Stats. 1973, ch. 1130, § 15, p. 2314.) The absence of [*1645] such a statute in 1968 renders the *Chicago Title* dictum nearly unintelligible. Certainly the Legislature could not have given that case the meaning defendants do, or it would not have bothered to enact the cited statute.

The two paragraphs immediately following the subject dictum suggest that three of the complaint's 11 counts might intrude upon the commissioner's jurisdiction over title insurance [**29] rates. ([Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at pp. 322-323](#).) None of these three counts invoked the Cartwright Act. We note sharp historical and analytical distinctions between the regulation of rate-setting practices and the broad prohibitions in the UIPA. (See [Karin v. Zalta, supra, 154 Cal.App.3d at pp. 973-977](#).)

The court thus seemed to say no more than that part of the complaint *might* intrude upon regulatory turf. Even with respect to that part of the complaint, however, the court ultimately returned to its *holding*, declaring that the factual allegations under scrutiny "fail in each instance to support the charge" and that the counts discussed to that point "state facts insufficient to establish proscribed conduct." ([Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at p. 323](#).) The court only then turned to claims having any bearing here, declaring that "the final counts charging antitrust infringements fall for similar reasons." (*Ibid.*) On the next page, the Supreme Court itself inserted a declaration that the Cartwright Act counts failed "because plaintiffs' vague and conclusionary [**30] pleadings fail to allege sufficient facts." (at p. 324.)

It thus appears that the subject dictum means at most that the three claims concerning rates were repugnant, or potentially repugnant, to the "specific provisions of the Insurance Code" concerning rate setting. The allusion to the Speegle case, and thus apparently to the Cartwright Act, was not only dictum, but unsound. (See 9 Witkin, Cal. Procedure, Appeal, *op. cit. supra*, § 795, at p. 768, quoting [In re Johnson \(1949\) 92 Cal.App.2d 467, 470 \[207 P.2d 123\]](#).)

latter finding, which is determinative, is in the negative." ([Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at p. 313](#), italics added.)

¹² Concerning our use of the term "Unfair Business Practices Act," see footnote 2, *ante*.

Indeed, if we held California's general antitrust laws superseded by the UIPA, we would stand alone in opposition to "general law throughout the country." (9 Witkin Cal. Procedure, Appeal, *op. cit. supra*, § 799, at p. 772.) Every court to address the issue has concluded that its version of the UIPA does *not* displace general laws regulating unlawful trade restraints or unfair competition. (*Mead v. Burns (1986) 199 Conn. 651 [509 A.2d 11, 18]; Dodd v. Commercial Union Ins. Co. (1977) 373 Mass. 72 [365 N.E.2d 802, 803-806]; Fischer, etc. v. Forrest T. Jones & Co. (Mo. 1979) 586 S.W.2d 310* [general **antitrust law** applied to claimed **[**31]** conspiracy to withhold necessary **[*1646]** information from potentially competing brokers]; *St. ex rel. Stratton v. Gurley Motor Co. (1987) 105 N.M. 803 [737 P.2d 1180, 1182-1184]; Ray v. United Family Life Ins. Co., Inc. (W.D.N.C. 1977) 430 F.Supp. 1353, 1356-1357*, approved in *Ellis v. Smith-Broadhurst, Inc. (1980) 48 N.C.App. 180 [268 S.E.2d 271, 273]; Skinner v. Steele (Tenn.App. 1987) 730 S.W.2d 335, 337-338* [purpose of act was to "oust federal antitrust jurisdiction as completely as possible," not to exempt insurance from other state statutes]; *Attorney General of Tex. v. Allstate Ins. Co. (Tex.Civ.App. 1985) 687 S.W.2d 803, 805; Grams v. Boss (1980) 97 Wis.2d 332 [294 N.W.2d 473, 480]*.) Several of these courts expressly cited their states' respective versions of *Insurance Code section 790.09*. (See *Mead v. Burns, supra, 509 A.2d at p. 17; Dodd v. Commercial Union Ins. Co., supra, 365 N.E.2d at p. 804; Skinner v. Steele, supra, 730 S.W.2d at p. 338; Attorney General of Tex. v. Allstate Ins. Co., supra, 687 S.W.2d at p. 805.*)¹³

[32]** Defendants cite *Greenberg v. Equitable Life Assur. Society, supra, 34 Cal.App.3d 994*, where the court stated in a footnote that under *Chicago Title*, the Cartwright Act was "superseded and contravened" by the *Insurance Code*. (*34 Cal.App.3d 994, 999, fn. 2*.) However, the court explained *Chicago Title*'s lengthy discussion of pleading issues by attributing it to tacit recognition of a private right of action under *Insurance Code section 790.03*. This reading of *Chicago Title* is untenable. As previously noted, the court in *Chicago Title* never mentioned the UIPA. The only sections of the Insurance Code cited in proximity to the "superseded and contravened" language dealt with title insurance rates. (*69 Cal.2d at pp. 322-323*.)

Furthermore, the premise on which the *Greenberg* interpretation of *Chicago Title* rests--that the UIPA itself affords a private right of action has been flatly repudiated by the Supreme Court in *Moradi-Shalal v. Fireman's Fund Ins. Companies, supra, 46 Cal.3d at page 304*. While rejecting the attempt to predicate new rights of action on the UIPA, the court in *Moradi-Shalal* emphasized that existing remedies were unaffected **[**33]** by that Act. It "urge[d] the Insurance Commissioner and the courts to continue to enforce the laws forbidding [unlawful insurance] practices to the full extent consistent with our opinion," and declared that ". . . the courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions, based on such traditional theories as fraud, infliction of **[*1647]** emotional distress, and (as to the insured) either breach of contract or breach of the implied covenant of good faith and fair dealing." (at pp. 304-305, italics added.)

Defendants assert that *Moradi-Shalal* recognizes only the preservation of *common law* claims, not those based on statute. Such a scheme, however, would fail to protect the putative exclusivity of regulatory jurisdiction, while forcing prospective plaintiffs, for no apparent reason, to attempt to conform their claims to obsolete pre-Cartwright forms. We are no more willing to attribute such bizarre distinctions to the Supreme Court than to the Legislature.

We understand the reference to the common law in *Moradi-Shalal* to rest on the premise that the cause of action asserted there--unfair **[**34]** claims practices--had no statutory basis outside the UIPA. Since the UIPA itself afforded no right of action, the plaintiff was relegated to such common law claims as might be available.

Moradi-Shalal marks a return to the fundamental principle that **HN18** the UIPA, like all statutes, is to be applied according to its terms. Its language neither creates new private rights *nor* destroys old ones. This was the view of Justice Richardson, whose dissent in *Royal Globe Ins. Co. v. Superior Court, supra, 23 Cal.3d at pages 895-898*,

¹³ Apparently failing to discover this solid edifice of adverse sister-state authority, defendants cite only *Chick's Auto Body v. State Farm etc. (1979) 168 N.J.Super. 68 [401 A.2d 722]*, affd. *(1980) 176 N.J.Super. 320 [423 A.2d 311]*. That case is patently inapposite because it rests on an express exemption from that state's antitrust laws for the activities of insurers "to the extent that such activities are subject to regulation by the Commissioner of Insurance." (*401 A.2d at p. 724*, citing *N.J. Stats. Ann. § 56:9-5, subd. (b)(4)*.) We can find no fault with the court's analysis. Nor can we find any guidance in it, for this state has no such statute.

was heavily cited in *Moradi-Shalal*. ([46 Cal.3d at pp. 294-296](#).) He wrote that [Insurance Code section 790.09](#) "preserves any preexisting civil or criminal liability which the insurer might face under other statutory or decisional law." (*Royal Globe, supra*, [23 Cal.3d at p. 893](#), some italics added; see *id. at p. 896*.) Similarly, the court in *Shernoff v. Superior Court, supra*, [44 Cal.App.3d 406, 409](#), acknowledged that [section 790.09](#) "expressly reserves to litigants all civil and criminal remedies against persons who have violated the law." (Italics added.) These authorities are consistent with the language of the statute [**35] and with the *unanimous* view of courts elsewhere. Insofar as *Greenberg* reached a contrary conclusion, it must be considered unsound.

For these reasons we are disinclined to follow later cases which, in dicta, uncritically accepted *Greenberg*'s view of UIPA exclusivity. The court in *Liberty Transport, Inc. v. Harry W. Gorst Co.* ([1991\) 229 Cal.App.3d 417, 432 \[280 Cal.Rptr. 159\]](#), disapproved on another point in *Adams v. Murakami* ([1991\) 54 Cal.3d 105, 116 \[284 Cal.Rptr. 318, 813 P.2d 1348\]](#), followed *Greenberg* because, due to the limited retroactivity of *Moradi-Shalal*, it had to apply the law in effect under *Royal Globe*. ([229 Cal.App.3d at p. 426, fn. 1](#)) In *Karlin v. Zalta, supra*, [154 Cal.App.3d 953](#), the court ultimately concluded that the claims before it were not governed by the [*1648] UIPA but by the McBride-Grunsky Insurance Regulatory Act. (At p. 979.) It had no occasion to reconsider *Greenberg*'s reading of *Chicago Title* since it found both cases (along with *Royal Globe*) inapposite. (*Ibid.*)

We reject any notion that defendants' claim of exemption from the antitrust laws, however unsound, rests upon a settled rule [**36] and is therefore sheltered by the doctrine of stare decisis. (See 9 Witkin Cal. Procedure, Appeal, op. cit. *supra*, § 787, 795, at pp. 758, 768-769.) *No court has ever held that insurance companies are immune from civil liability for antitrust injuries.* Rather, some--cases notably *Greenberg* and *Royal Globe*--mistook the statute under which such remedy should be pursued. Defendants seek to blend those discredited cases with the anomalous and misleading dictum in *Chicago Title*, and the corrective holding of *Moradi-Shalal*, to fashion a new immunity made of odds and ends and resting neither on statute nor principle but on misconstrued precedents. We decline to adopt such a course based on the false invocation of stare decisis.

D. SUBSEQUENT RATIFICATION

Defendants contend that the Legislature ratified *Chicago Title* and *Greenberg* by amending the UIPA on several occasions "without altering the rule articulated in those opinions." This contention is unsound.

[HN19](#) [↑] The rule of subsequent ratification applies to statutes which "have previously been judicially construed." (*Marina Point, Ltd. v. Wolfson* ([1982\) 30 Cal.3d 721, 734 \[180 Cal.Rptr. 1**371 496, 640 P.2d 115, 30 A.L.R.4th 1161](#)), cert. den., [459 U.S. 858 \[74 L.Ed.2d 111, 103 S.Ct. 129\]](#).) (Italics added.) No case has construed the UIPA to bar Cartwright Act claims. The court in *Greenberg* merely cited *Chicago Title* for the proposition that unspecified provisions of the Insurance Code superseded the Cartwright Act. (*Greenberg v. Equitable Life Assur. Society, supra*, [34 Cal.App.3d at p. 999, fn. 2](#), citing [69 Cal.2d at p. 322](#).) As we have already noted, *Chicago Title* never so much as mentioned the UIPA. Ensuing cases repeated *Greenberg*'s conclusion without seeking or offering any justification in the language of the UIPA or any other statute. Since none of the cases purports to "construe" a statute, an inference of legislative approval is wholly unwarranted.

Moreover, the holding in *Greenberg*, and then in *Royal Globe*, granted persons suffering antitrust injuries the substantial remedial equivalent of a Cartwright Act claim. These developments deprived the Legislature of any concrete reason to correct the courts' error. As the Supreme Court has acknowledged, the Legislature is concerned with " 'bottom-line' results" and is unlikely to fine-tune [**38] judicial decisions. (*Harris v. Capital Growth Investors XIV* ([1991\) 52 Cal.3d 1142, 1157 \[278 Cal.Rptr. 614, 805 P.2d 873](#).)

[*1649] E. PROPOSITION 103

The parties devote considerable attention to Proposition 103, by which the voters in 1988 substantially revised the McBride-Grunsky Insurance Regulatory Act of 1947, [Insurance Code sections 1850- 1860.3](#) (McBride-Grunsky). (See Stats. 1947, ch. 805, § 1 et seq., p. 1896 et seq.) That act previously authorized casualty insurers to cooperate in ratesetting and other matters in ways which might otherwise violate antitrust laws. (See Ins. Code, former § 1853-1853.8.) Proposition 103 repealed these provisions. It also added a declaration that the insurance

industry "shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act . . . , and the antitrust and unfair business practices laws" ([Ins. Code, § 1861.03, subd. \(a\).](#))

If [Insurance Code section 1861.03](#) stood by itself it would easily dispose of this case by explicitly subjecting defendants to state [antitrust law](#). In context, however, it is unclear whether the statute reaches life insurance. [**39] McBride-Grunsky is by its terms inapplicable to life insurance. ([Ins. Code, § 1851, subd. \(b\).](#)) On the other hand, if [section 1861.03](#) does not subject defendants to the Cartwright Act, Proposition 103 appears to be irrelevant to this case.

Defendants point out that the ballot summary concerning Proposition 103 stated that under then-existing law, insurance companies were "not subject to the state's antitrust laws." However, such a summary "cannot supply language which does not appear [on the face of the initiative]." ([Sanford v. Garamendi \(1991\) 233 Cal.App.3d 1109, 1123 \[284 Cal.Rptr. 897\]](#), review den., brackets in original; quoting [Metropolitan Water District v. Dorff \(1979\) 98 Cal.App.3d 109, 115 \[159 Cal.Rptr. 211\]](#).) Obviously, it cannot supply language missing from existing laws. Indeed, [HN20](#)[] courts are never bound by a legislative statement concerning the intent of a prior enactment. ([Droeger v. Friedman, Sloan & Ross \(1991\) 54 Cal.3d 26, 44, fn. 14 \[283 Cal.Rptr. 584, 812 P.2d 931\]](#).)

We conclude that the UIPA does not pose an impediment to plaintiff's claims under the Cartwright Act.

II. UNFAIR INSURANCE PRACTICES ACT

As previously noted, the [**40] Supreme Court has already determined that the UIPA does not create a private right of action for violations of its terms. ([Moradi-Shalal v. Fireman's Fund Ins. Companies, supra, 46 Cal.3d 287, 304.](#)) Plaintiff asks us to distinguish that case on the ground that it [*1650] involved unfair claims practices prohibited by [Insurance Code section 790.03, subdivision \(h\)](#), whereas this case involves an unlawful boycott in violation of 790.03(c). We see no basis, however, for such a distinction here.

Moradi-Shalal's conclusion that the UIPA does not create private rights of action appears fully applicable to any unlawful conduct in the business of insurance. The court in effect concluded that *Royal Globe* had misconstrued [section 790.09](#) to recognize a right of action, when in fact there was no textual basis for such a right. It may remain possible, at least theoretically, to judicially "imply" a right of action for some violations of the UIPA. Even were we to accept that theoretical possibility, however, the conditions for such an implied right of action are not satisfied here.

[HN21](#)[] Before a court may imply a right of action based on violations of a substantive statute [**41] it must appear that (1) the plaintiff belongs to the class of persons the statute is intended to protect; (2) a private remedy will appropriately further the purpose of the legislation; and (3) such a remedy appears to be "needed to assure the effectiveness" of the statute. ([Rest.2d, Torts, § 874A](#), quoted and applied in [Middlesex Ins. Co. v. Mann \(1981\) 124 Cal.App.3d 558, 570 \[177 Cal.Rptr. 495\]](#).)

In this case the third element of this test is not satisfied, if only because the Cartwright Act already grants plaintiff remedies which will "assure the effectiveness" of [section 790.03\(c\)](#). Accordingly, there is no occasion to "imply" a private remedy under the UIPA and plaintiff has not stated a cause of action under that statute. (See [Arriaga v. Loma Linda University \(1992\) 10 Cal.App.4th 1556, 1564 \[13 Cal.Rptr.2d 619\]](#), review den.)

III. UNFAIR COMPETITION

(11) Nor do we believe plaintiff has stated a cause of action under the UCA, [Business and Professions Code section 17200 et seq.](#) To be sure, [HN22](#)[] that act contains broad standing provisions ([Bus. & Prof. Code, § 17203, 17204](#)), and a declaration that its remedies are cumulative (, [§ 17205](#)). Moreover, it has been [**42] applied to permit private actions based on violations of other statutes which did not themselves confer standing. (E.g., [People v. McKale \(1979\) 25 Cal.3d 626, 632-634 \[159 Cal.Rptr. 811, 602 P.2d 731\]](#); [Farmers Ins. Exchange v. Superior Court, supra, 2 Cal.4th 377, 382, 383, 400](#).) However, the UCA cannot be utilized to "plead around" absolute barriers to relief by relabeling the nature of the action as one brought under the unfair competition statute. ([Rubin v. Green \(1993\) 4 Cal.4th 1187, 1201 \[17 Cal.Rptr.2d 828, 847 P.2d 1044\]](#).) The purpose of the act is to

permit [*1651] private enforcement of statutory prohibitions where to do so would not interfere with legislative objectives and limitations otherwise prescribed.

HN23 [+] It is settled that the UCA cannot be utilized to confer private standing to enforce the UIPA. In *Rubin v. Green, supra*, the Supreme Court cited approvingly three decisions which, as the court put it, "held that the bar on . . . implied private causes of action, imposed by our decision in *Moradi-Shalal* . . . may not be circumvented by recasting the action as one under *Business and Professions Code section 17200*." (4 Cal.4th at [**43] p. 1202, citing *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491 [265 Cal.Rptr. 585]; *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592 [270 Cal.Rptr. 222], review den.; *Industrial Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1093 [257 Cal.Rptr. 655]; see also *American Internat. Group, Inc. v. Superior Court, supra*, 234 Cal.App.3d at p. 768.)

Alternatively, plaintiff seems to suggest that it can state a cause of action under Insurance Code section 17200 because of its valid claim under the Cartwright Act. We fail to see the logic of this. If the predicate violation for the UCA claim is a violation of the Cartwright Act, then the UCA claim is merely redundant. If, on the other hand, the intent is to assert standing to enforce the UIPA, then as we have said, the claim is barred by *Moradi-Shalal*.

In other words, we decline to permit suit under the UCA when there is a valid regulatory scheme in place dealing with the specific wrong of which the plaintiff complains and the Legislature has made that scheme enforceable exclusively by a regulatory authority. The fact that the plaintiff has been injured by conduct violating the regulatory [**44] scheme, and possesses a cause of action under another statute as a result of that wrong, does not confer standing under the regulatory statute or under the UCA.

Accordingly, plaintiff has not stated a cause of action under the UCA.

DISPOSITION

In No. A052795, let a peremptory writ of mandate issue directing the superior court to set aside its order of January 25, 1991, insofar as that order overruled defendants' demurrers to the third cause of action (Unruh Civil Rights Act), the fourth cause of action (*Ins. Code, § 790.03, subd. (c)*), and the fifth cause of action (*Bus. & Prof. Code, § 17200 et seq.*), and to sustain those demurrers to said causes of action without leave to amend. The alternative writ is otherwise discharged.

[*1652] In No. A055038, let a peremptory writ of mandate issue directing the superior court to set aside its order of July 23, 1991, insofar as that order sustained defendants' demurrers to the first and second causes of action (Cartwright Act), and to overrule the demurrers to those causes of action. The alternative writ is otherwise discharged.

Smith, Acting P. J., and Phelan, J., concurred. [**45]



In re Belmac Corp. Sec. Litig.

United States District Court for the Middle District of Florida, Tampa Division

April 6, 1994, Decided ; April 11, 1994, Filed

CASE NUMBER: 92-1814-CIV-T-23C

Reporter

1994 U.S. Dist. LEXIS 21584 *

IN RE BELMAC CORP. SECURITIES LITIGATION

Disposition: [*1] Judgment entered in accordance with the Order and Final Judgment entered by the Court on April 6, 1994. Plaintiffs' lead counsel, on behalf of all class counsel, awarded the sum of \$ 650,000.00 as counsel fees, and \$ 47,236.41 as reimbursement of expenses submitted to date.

Core Terms

securities litigation, graduate, district court, admitted to practice, settlement, Appeals, class action, law school, shareholder, class settlement, lead counsel, bar association, co-lead, law firm, joining, partner, cases, law clerk, antitrust, paralegals, participated, practiced, derivative, plaintiffs', matters, prosecuted, expenses, securities fraud, state court, chart

Counsel: For HAL FOGEL, plaintiff: Ira A. Schochet, Emily C. Komlossy, Goodkind, Labaton, Rudoff & Sucharow, New York, NY USA.

For HAL FOGEL, plaintiff: Michael J. Pucillo, Burt & Pucillo, West Palm Beach, FL USA.

For HAL FOGEL, plaintiff: Michael C. Addison, Law Office of Michael C. Addison, Tampa, FL.

For SUSAN STERN, consolidated plaintiff: Mary S. Scriven, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, PA, Tampa, FL USA.

For PAUL H. HOCHISER, consolidated plaintiff: Michael C. Addison, Law Office of Michael C. Addison, Tampa, FL.

For FRED HART, MARTIN MICHAELOFF, consolidated plaintiffs: Michael J. Pucillo, Burt & Pucillo, West Palm Beach, FL USA.

Judges: Steven D. Merryday, United States District Judge.

Opinion by: Steven D. Merryday

Opinion

ORDER AND FINAL JUDGMENT

By Order dated December 22, 1993, (the "Implementing Order") this Court conditionally certified Plaintiffs as representatives [*2] of a class including all persons who purchased the common stock of Belmac Corporation ("Belmac") during the period (the "Class Period") from March 18 through November 16, 1992, inclusive, excluding

defendants and certain others (the "Class"). Notice of said Class Certification was provided pursuant to the Implementing Order. On November 22, 1993, Plaintiffs, acting on behalf of themselves and the Class, entered into a Stipulation of Settlement (the "Settlement Stipulation") in settlement of all claims in the Action (the "Settlement") with Defendants Belmac, Jean-Francois Rossignol and Marc Ayers, and have applied to this Court for approval of the Settlement pursuant to [Rule 23\(e\) of the Federal Rules of Civil Procedure](#).

Also pursuant to the Implementing Order, this Court scheduled a hearing for March 7, 1994 at 10:00 a.m. to determine, among other things, whether the proposed Settlement and compromise set forth in the Settlement Stipulation should be approved by the Court as being fair, reasonable and adequate and whether final judgment should be entered thereon, and to consider whether to approve the applications of All Class Counsel for awards of attorneys' fees, costs, and disbursements. [*3] This Court ordered that the Notice of Class Action Determination, Settlement of Class Action and Settlement Hearing, substantially in the form attached to the Settlement Stipulation as Exhibit "A1" (the "Class Settlement Notice"), be mailed by first-class mail, postage prepaid, on or before January 24, 1994, to each member of the Class who could be identified, and that a Summary Notice substantially in the form attached to the Settlement Stipulation as Exhibit "A2" be published in the national edition of [The Wall Street Journal](#), one weekday within ten days after the mailing of the Class Settlement Notice.

As attested by the Declaration of Sherrie R. Savett, Esquire filed with this Court on March 3, 1994, the provisions of said Order as to notice were complied with. Moreover, the hearing on the proposed Settlement was duly held before this Court on March 7, 1994, at which time all interested persons were afforded the opportunity to be heard. This Court has duly considered all of the submissions and arguments presented with respect to the proposed Settlement.

After due deliberation, this Court hereby FINDS, CONCLUDES, AND ADJUDGES that:

1. This Order is binding on all members [*4] of the Class as described in the Court's Orders of December 22, 1993, excluding all persons who timely filed a request to be excluded from the Class, pursuant to [Rule 23\(c\)\(2\) of the Federal Rules of Civil Procedure](#), who are not bound by any of the terms of this Order.
2. The proposed Settlement of the Action on the terms and conditions set forth in the Settlement Stipulation is fair, reasonable and adequate, is in the best interests of the Class and should be approved, especially in light of the benefits to the Class and the complexity, expense and probable duration of further litigation, the substantial discovery and investigation conducted and the risks of establishing liability, causation and damages.
3. This Court hereby finds that the terms and conditions of the issuance of that certain number of shares of Belmac common stock into the Settlement Fund, as determined by paragraph 1 of the Stipulation of Settlement, and the subsequent distribution of those shares pursuant to the Stipulation of Settlement, are fair and adequate for purposes of exempting such shares from registration pursuant to section 3(a)(10) of the Securities Act of 1933.
4. The notification provided for and [*5] given to the Class constitutes the best notice practicable under the circumstances and is in full compliance with the notice requirements of due process and [Rule 23 of the Federal Rules of Civil Procedure](#).
5. There is no just reason for delay in the entry of judgment as agreed upon in the Settlement Stipulation, pursuant to [Rule 54\(b\) of the Federal Rules of Civil Procedure](#).
6. Entry of final judgment and final approval of the Proposed Settlement will settle all claims alleged in the Action between Plaintiffs and the Class on the one hand and the Defendants on the other.
7. This Order and Final Judgment is final for purposes of appeal and may be appealed notwithstanding other matters presently pending, and the Clerk is hereby directed to enter judgment thereon.
8. Certification under [Rule 54\(b\)](#) will not result in unnecessary appellate review nor will review of the adjudicated claims moot any further developments in this Action. Even if subsequent appeals are filed, the nature of these claims are such that the appellate court would not have to decide the same issues more than once. The reservation

of jurisdiction by the Court in this matter does not affect in any way the finality [*6] of this Order and Final Judgment.

It is further ORDERED as follows:

1. The Settlement Stipulation and the proposed Settlement are hereby approved and shall be consummated in accordance with the terms and provisions thereof.
2. All Class Claims alleged in this Action are hereby dismissed in their entirety on the merits, with prejudice, and without costs to any party.
3. The Consolidated Class Action Complaint is hereby dismissed in its entirety on the merits, with prejudice, and without costs to any party.
4. All members of the Class (including its, his, her, or their heirs, executors, administrators, predecessors, successors, affiliates and assigns), and each of them, for good and sufficient consideration, release, remise and forever discharge the Defendants in the Action (including each individual or entity and his, her, its, or their respective spouses, heirs, executors, administrators, assigns, past, present and former directors, partners, principals, officers, employees, agents, attorneys, accountants, insurers, subsidiaries, shareholders, parents, divisions, affiliates, predecessors or successors), and each of them, of and from any and all manner of actions and causes of [*7] actions, suits, obligations, claims, debts, agreements, promises, liabilities, controversies, costs, expenses and attorneys' fees whatsoever, whether in law or in equity and whether based on any federal law, state law, common law right of action or otherwise, foreseen or unforeseen, matured or unmatured, known or unknown, accrued or not accrued, which the members of the Class in the Action, or any of them, ever had, now have, can have or shall or may hereafter have, either individually or as a member of a class, by reason of, based upon, arising from or in any way related to, the alleged acts, failures to act, omissions, misrepresentations, facts, events, transactions, statements, occurrences or other subject matter which occurred prior to or during the Class Period and which either were or which could have been set forth, alleged, embraced, complained of or otherwise could have been consolidated or coordinated with the Action or could have been brought in any other forum.
5. The Defendants (including each individual or entity and his, her, its, or their respective spouses, heirs, executors, administrators, assigns, past, present and former directors, partners, principals, officers, [*8] employees, agents, attorneys, accountants, insurers, subsidiaries, shareholders, parents, divisions, affiliates, predecessors or successors), and each of them, for good and sufficient consideration, release, remise and forever discharge the Class Plaintiffs in the Action (including that individual and his or her respective spouses, heirs, executors, administrators or assigns), and each of them, of and from any and all manner of actions and causes of actions, suits, obligations, claims, debts, agreements, promises, liabilities, controversies, costs, expenses and attorneys' fees whatsoever, whether in law or in equity and whether based on any federal law, state law, common law right of action otherwise, foreseen or unforeseen, matured or unmatured, known or unknown, accrued or not accrued, which defendants or any of them, ever had, now have, can have or shall or may hereafter have, either individually or as a member of a class, by reason of, based upon, arising from or in any way related to, the alleged acts, failures to act, omissions, misrepresentations, facts, events, transactions, statements, occurrences or other subject matter, either in connection with the prosecution of this action [*9] or any other matter which could have been set forth, alleged, embraced, complained of or otherwise could have been consolidated or coordinated with the Action or could have been brought in any other forum.
6. This Judgment, the Settlement Stipulation, and all papers related to it are not, and shall not be construed to be, an admission by any of the Defendants of any liability or wrongdoing whatsoever, and shall not be offered as evidence of any such liability or wrongdoing in this or any future proceeding, and shall not be deemed as a concession or an admission by Class Plaintiffs or the Class of any lack of merit of their claims.

7. Plaintiffs' Lead Counsel, on behalf of All Class Counsel, are hereby awarded the sum of \$ 650,000.00 ¹ as counsel fees and \$ 47,236.41 as reimbursement of expenses submitted to date. The expenses shall be reimbursed from the cash portion of the Settlement Fund. Counsel fees shall be paid one-half from the cash Portion of the Settlement the Settlement Fund, and one-half from the stock portion of Fund.

[*10] 8. To the extent permitted by law, jurisdiction is hereby reserved over all matters relating to the consummation of the settlement in accordance with the Settlement Stipulation.

ORDERED in Tampa, Florida, on April 6th, 1994.

Steven D. Merryday

United States District Judge

JUDGMENT IN A CIVIL CASE - April 8, 1994

Decision by Court. This action came before the Court. A decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in accordance with the Order and Final Judgment entered by the Court on April 6, 1994. Judgment is final for purposes of appeal and may be appealed notwithstanding other matters presently pending. Plaintiffs' lead counsel, on behalf of all class counsel, are hereby awarded the sum of \$ 650,000.00 as counsel fees, and \$ 47,236.41 as reimbursement of expenses submitted to date; the expenses shall be reimbursed from the cash portion of the settlement fund; counsel fees shall be paid one-half from the cash portion of the settlement the settlement fund, and one-half from the stock portion of fund.

April 8, 1994

Date

EXHIBIT

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

IN [*11] RE BELMAC CORP. SECURITIES LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

MASTER FILE NO. 92-1814-CIV-T-23(C)

EXHIBITS TO PLAINTIFFS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION COSTS AND EXPENSES

IN RE BELMAC CORP. SECURITIES LITIGATION

EXHIBIT NO.

¹ The Court reduced the maximum hourly rate to \$ 350.00, resulting in a reduction in the total fee award of \$ 10,000.00.

1 MICHAEL C. ADDISON FEE & EXPENSE AFFIDAVIT
2 BERGER & MONTAGUE, P.C. FEE & EXPENSE AFFIDAVIT
3 BURT & PUCILLO & PREDECESSOR FIRMS FEE & EXPENSE AFFIDAVIT
4 CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A. FEE & EXPENSE AFFIDAVIT
5 GOODKIND LABATON RUDOFF & SUCHAROW FEE & EXPENSE AFFIDAVIT
6 KAUFMAN, MALCHMAN, KIRBY & SQUIRE FEE & EXPENSE AFFIDAVIT
7 SCHIFFRIN & CRAIG, LTD. FEE & EXPENSE AFFIDAVIT
8 COMPOSITE SUMMARY OF PLAINTIFFS' COUNSEL'S FEES & EXPENSES

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

IN RE BELMAC CORP. SECURITIES LITIGATION:

FOGEL, et al.

Plaintiffs, vs.

BELMAC CORPORATION, et al., Defendants.

Master File No.

Case No. 92-1814-Civ-T-23C

Civil Action

AFFIDAVIT OF MICHAEL C. ADDISON IN SUPPORT OF JOINT PETITION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

[*12] STATE OF FLORIDA)

COUNTY OF HILLSBOROUGH)

I, Michael C. Addison, being duly sworn, depose and say:

1. I am a sole practitioner who practices law in Hillsborough County, Florida. I am submitting this Affidavit in support of my application for an award of attorneys' fees in connection with services rendered to the Plaintiff class and the reimbursement of expenses incurred by me in the course of this litigation.
2. I am local counsel of record for Plaintiffs Hal Fogel in Case No. 92-1814-Civ-T 23(C), Paul H. Hocheiser in Case No. 92-1880-Civ-T-23(A), and Fred Hart and Martin Michaeloff in Case No. 92-1895-Civ-T-23(C), and commenced these actions in this Court. Thereafter, I participated in the prosecution of this consolidated action in cooperation with other Plaintiffs' counsel. Specifically, my firm acted as local counsel in accordance with the local rules of the court. Initially, I was involved in drafting and filing the complaint on behalf of Plaintiffs Hal Fogel, Paul H. Hocheiser, Fred Hart and Martin Michaeloff.
3. The chart attached as Exhibit A presents a detailed summary indicating the time expended by me and a paralegal employed by me on the litigation, at our [*13] current rates. The chart includes the my name and that of my paralegal, our hourly billing rates and number of hours expended by me and my paralegal on this matter. The chart was prepared from contemporaneous daily time records maintained by my firm. The hourly rates for me and my paralegal are the regular rates charged for our services in litigation similar to this. In my opinion, my rate and the rate of my paralegal are reasonable. Time expended in preparing this Affidavit in support of my firm's application for fees and reimbursement of expenses has not been included in this request.

4. The total number of hours expended on this litigation by my firm is 78.80 hours. The total lodestar for my firm is \$ 14,793.50, consisting of \$ 14,298.50 for attorneys' time and \$ 495.00 for paralegals' time.
5. With respect to the standing of counsel in this case, attached as Exhibit B is my brief biography.
6. My firm expended a total of \$ 48.42 in unreimbursed expenses in connection with the prosecution of this litigation broken down as follows:

Description	Amount
Long Distance Telephone; Telecopier	\$ 15.95
Postage	23.87
Photocopies	8.60
TOTAL	\$ 48.42

7. The [*14] expenses incurred pertaining to this case are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source material and are an accurate recordation of the expenses incurred.

FURTHER AFFIANT SAYETH NAUGHT.

Michael C. Addison

STATE OF FLORIDA)

COUNTY OF HILLSBOROUGH)

BEFORE ME on this 16th day of February, 1994, personally appeared Michael C. Addison, who is personally known to me, and who, after being duly sworn, says that he executed the foregoing affidavit.

NOTARY PUBLIC, State of Florida

Name: Victoria Byrd

Serial No. __

My Commission Expires: NOTARY PUBLIC, STATE OF FLORIDA.

MY COMMISSION EXPIRES: Jan. 9, 1995.

BONDED THRU NOTARY PUBLIC UNDERWRITERS.

Exhibit A

MICHAEL C. ADDISON

ATTORNEY'S FEES

IN RE BELMAC CORP. SECURITIES LITIGATION

Timekeeper	Hourly Rate	Total Hours	Lodestar
Michael C. Addison, Attorney	\$ 200.00	72.2	\$ 14,298.50
Myrna D. Lesnek, Paralegal	75.00	6.6	495.00
Firm Totals		78.8	\$ 14,793.50

EXHIBIT B**BRIEF BIOGRAPHY OF MICHAEL C. ADDISON, ESQ.**

Michael C. Addison was born on July 17, 1947. He [*15] attended Iowa State University where he received a B.S. in 1969. He received his J.D. from Georgetown University in 1972. After law school, he clerked for two years with Judge C. Clyde Atkins of the United States District Court for the Southern District of Florida. In 1974, he practiced law in Tampa with Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, P.A. He became a stockholder in that firm in 1978. In 1980, he resigned and established his own firm. In 1983 he formed Addison, Ketchey & Horan, P.A. In 1990, he resigned and joined Dykema Gossett. He left Dykema Gossett in December 1992, and currently practices as a sole practitioner in Tampa, Florida. Mr. Addison is a Board Certified Civil Trial Lawyer and practices exclusively in litigation, with a focus upon complex commercial matters. His current hourly billing rate is \$ 195.00.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA**TAMPA DIVISION****IN RE BELMAC CORP. SECURITIES LITIGATION****THIS DOCUMENT RELATES TO:****ALL ACTIONS****MASTER FILE NO. 92-1814-CIV-T-23(C)****AFFIDAVIT OF SHERRIE R. SAVETT IN SUPPORT OF JOINT PETITION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES FILED ON BEHALF OF BERGER & MONTAGUE. [*16] P.C.****COMMONWEALTH OF PENNSYLVANIA:****COUNTY OF PHILADELPHIA:****ss.**

I, SHERRIE R. SAVETT, being duly sworn, depose and say:

1. I am a shareholder and co-chairperson of the Securities Litigation Department of the law firm of Berger & Montague, P.C. I am submitting this Affidavit in support of my firm's application for an award of attorneys' fees in connection with services rendered to the Plaintiff class and the reimbursement of expenses incurred by my firm in the course of this litigation.
2. This firm, as counsel of record for Plaintiff Susan Stern, commenced an action in this Court. My firm was Co-Lead Counsel for the Class Action Plaintiffs in this action. We were intimately involved in every aspect of the case from its inception through the settlement. A more detailed description of the history of the litigation and the professional services provided by my firm appears in my extensive Affidavit in Support of the Proposed Class

Action Settlement and Joint Petition for Attorneys' Fees and Reimbursement of Costs and Expenses. Specifically, my firm assisted lead counsel in formulating the theory and assisted in developing the facts of Plaintiffs' case. Initially, the [*17] attorneys of my firm were involved in investigation, factual analysis and drafting and filing the complaint on behalf of Plaintiff Susan Stern. Later, my firm finalized the Consolidated Complaint; coordinated the confirmatory discovery document review; and attended the confirmatory deposition. Further, with respect to settlement, our firm was involved in all aspects of negotiation, and also drafted the papers in support of the settlement.

3. The chart attached hereto as Exhibit A presents a detailed summary indicating the time expended by the attorneys, law clerks and paralegals of this firm on the litigation, at current rates. The chart includes the name of the attorneys who worked on the case, the hourly billing rates and number of hours expended by the attorneys, law clerks and paralegals on this matter. The chart was prepared from contemporaneous daily time records maintained by my firm. The hourly rates for the attorneys, law clerks and paralegals in my firm are the regular rates charged for their services in similar litigation such as this one. In my opinion, the rates charged by the various attorneys, the law clerks and the paralegals in my firm are reasonable. Time expended [*18] in preparing this Affidavit in support of my firm's application for fees and reimbursement of expenses has not been included in this request.

4. The total number of hours expended on this litigation by my firm is 384.8¹ hours. The total lodestar for my firm is \$ 82,804.50, consisting of \$ 70,803.50 for attorneys' time and \$ 12,001.00 for law clerks' and paralegals' time.

[*19] 5. With respect to the standing of counsel in this case, attached hereto as Exhibit B is a brief biography of my firm and the attorneys of my firm who worked on this litigation.

6. My firm expended a total of \$ 3,647.10² in unreimbursed expenses in connection with the prosecution of this litigation from inception through February 16, 1994 broken down as follows:

Description	Amount
Long Distance Telephone; Telecopier	\$ 154.36
Travel & Living	1,237.79
Photocopying (in-house & outside)	1,341.03
Publications	13.46
Postage; Delivery & Freight	295.31
Computer Research	605.15
TOTAL	\$ 3,647.10

7. The expenses incurred pertaining to this case are reflected on the books and records of my firm. These books and records [*20] are prepared from expense vouchers, check records and other source material and are an accurate recordation of the expenses incurred.

SHERRIE R. SAVETT

¹ Includes actual time spent through February 25, 1994 plus additional time as follows: 35 for myself estimated to be spent in connection with completing the briefs in support of the settlement, travel to, preparation for and attendance at the settlement hearing scheduled for March 7, 1994; 45 hours for A. Stock estimated to be spent in connection with completing the briefs in support of the settlement; and 30 hours for N.L. Vernick, the settlement coordinator of Berger & Montague, P.C., estimated to be spent in connection with responding to shareholder inquiries and communications with the accountants assisting in settlement administration.

² Includes estimated travel expenses in the amount of \$ 915 for myself for travel to and attendance at the settlement hearing scheduled for March 7, 1994 and estimated additional miscellaneous expenses (photocopying, telephone, overnight mail service) of \$ 250.00.

SWORN TO AND SUBSCRIBED

before me this [ILLEGIBLE TEXT] day of March, 1994.

Notary Public

EXHIBIT A

IN RE BELMAC CORP. SECURITIES LITIGATION

FIRM: BERGER & MONTAGUE, P.C.

Inception through February 25, 1994¹

[*21]

ATTORNEY	RATE	HOUR	TOTAL	LODESTAR
		LY	RS	
S.R. Savett (P)	\$ 395	86.5		\$ 34,167.50
G.E. Cantor (P)	340	5.6		1,904.00
A. Stock (A)	190	182.8		34,732.00
TOTAL ATTORNEYS:				
(P) - Partner, (A) - Associate		274.9		\$ 70,803.50
LAW CLERKS/				
PARALEGALS				
S.V. Pastino (LC)	\$ 110	1.5		\$ 165.00
P.V. Telang (Senior PL)	115	16.5		1,897.50
N.L. Vernick (Senior PL)	115	49.9		5,738.50
M.W. Berger (PL)	100	42.0		4,200.00
TOTAL LAW CLERKS/PARALEGALS:		109.9		\$ 12,001.00

¹ Includes actual time spent through February 25, 1994 plus additional time as follows: 35 hours for S.R. Savett estimated to be spent in connection with completing the briefs in support of the settlement, travel to, preparation for and attendance at the settlement hearing scheduled for March 7, 1994; 45 hours for A. Stock estimated to be spent in connection with completing the briefs in support of the settlement; and 30 hours for N. L. Vernick, the settlement coordinator of Berger & Montague, P.C., estimated to be spent in connection with responding to shareholder inquiries and communications with the accountants assisting in settlement administration.

ATTORNEY	HOUR LY	TOTA L	LODESTAR
FIRM TOTAL:		384.8	\$ 82,804.50

EXHIBIT B

BIOGRAPHY OF BERGER & MONTAGUE, P.C.

Berger & Montague, P.C. (formerly David Berger, P.A.) has been engaged in the practice of complex and class action litigation for over 20 years. The firm has been recognized by courts throughout the country for its ability and experience in handling major litigation, particularly in the fields of securities, antitrust and mass tort litigation brought as class and derivative actions. Currently, the Berger firm consists of 58 lawyers, of whom 24 are members of its Securities Litigation Department. Together with a support staff of paralegals, [*22] law clerks and others, the firm numbers over 100 individuals.

In the past 20 years, the Berger firm has successfully concluded many securities, antitrust and mass tort class and derivative actions wherein it played a principal or lead role. Examples are:¹

In Re PNC Securities Litigation, Civil Action No. 90-0592 (W.D. Pa.) -- the firm as co-lead counsel obtained a class settlement of \$ 6.3 million, approved December 6, 1993.

Belman, et al. v. Warrington, et al., Civil Action No. H-91-3767 (S.D. Tex.) (Sanifill Securities Litigation) -- the firm as co-lead counsel obtained a class settlement of \$ 3.3 million, approved November 16, 1993.

In re Amdahl Securities Litigation, 1993 U.S. Dist. LEXIS 15271, Master File No. C-92-20609-JW(EAI) (N.D. Cal.) -- the firm as co-lead counsel obtained a class settlement of \$ 13 million, approved on September 29, 1993.

In Re Melridge Securities Litigation, CV87-1426FR [*23] (D. Or.) -- the firm as lead counsel representing purchasers of Melridge common stock and convertible debentures secured partial settlements totaling \$ 25 million. Following a four-month jury trial, the firm won a verdict on May 27, 1993 against the non-settling defendants for an additional \$ 57 million.

In re Revco Securities Litigation: Arsam Company v. Salomon Brothers Inc., et al., Civil Action No. 89-00593 (N.D. Oh.) -- the firm as lead counsel obtained individual class settlements with defendants totaling \$ 35,985,000 in the aggregate. The first class settlement was with defendant underwriter Salomon Brothers Inc. for \$ 29,750,000. It was approved on April 1, 1992. The remaining settlements were approved on March 26, 1993.

In Re Rospatch Corporation Securities Litigation, Case No. 1:90-CV-806 et al. (W.D. Mich.) -- the firm as lead counsel obtained a class settlement of over \$ 6.5 million, approved March 9, 1993.

¹ Unless otherwise indicated, all cases mentioned are securities class or derivative actions.

Masnik, et al. v. Bolar Pharmaceutical Co., Inc., Civil Action No. 90-4086 (E.D. Pa.) -- the firm as co-lead counsel obtained a class settlement of over \$ 2.5 million, approved February 1, 1993.

In re Meridian Securities Litigation, [*24] Master File No. 90-6211 (E.D. Pa.) -- the firm as co-lead counsel obtained a class settlement of \$ 3.25 million, approved November 27, 1992.

In Re Kenbee Limited Partnerships Litigation, Civil Action No. 91-2174 (GEB) (D. NJ) -- the firm served as co-lead counsel in a class action involving 119 separate limited partnerships resulting in cash settlement and debt restructuring with as much as \$ 100 million in potential wrap mortgage reductions, approved November 19, 1992.

In Re Surgical Laser Technologies, Inc. Securities Litigation, Master File No. 91-CV-2478 (E.D. Pa.) -- the firm as co-lead counsel obtained a class settlement of \$ 5.5 million, approved on October 29, 1992.

Swanick, et al. v. Flagship Financial Corp., et al., Civil Action No. 91-1350 (E.D. Pa.) -- the firm as co-lead counsel obtained a class settlement of over \$ 2 million, approved October 1, 1992.

In Re Public Service Company of New Mexico Class and Derivative Actions, Master File No. 91-536-K-(M) (S.D. Cal.) -- the firm as lead counsel for class plaintiffs obtained a class and derivative settlement of \$ 33 million, approved on June 29, 1992.

Cytryn, et al. v. Cook, et al., [*25] No. C-89-20801-RFP (N.D. Cal.) (Raychem Securities Litigation) -- the firm as co-lead counsel obtained a class settlement of \$ 19.5 million, approved on May 1, 1992.

In Re Tucson Electric Power Company Securities Litigation, Civ. 89-1274 PHX WPC (D. Ariz) -- the firm as co-lead counsel obtained class and derivative settlements of \$ 30 million, approved on February 20, 1992.

In Re Lomas Financial Corporation Securities Litigation, Civil Action No. CA-3-89-1962-G (N.D. Tex.) -- the firm as co-lead counsel obtained a class settlement in excess of \$ 20 million, approved on January 28, 1992.

In Re RAC Mortgage Investment Corporation Securities Litigation, Master File No. K89-1796 (D. Md.) -- the firm as a member of plaintiffs' executive committee obtained a class settlement of \$ 11 million, approved on December 4, 1991.

Berl v. The Southland Corporation, et al., Civil Action No. CA3-90-1254-H (N.D. Tex.) -- the firm as lead counsel obtained a class settlement of \$ 5 million, approved on November 1, 1991.

In Re Home Shopping Network Securities Litigation -- Action I, Case No. 87-428-Civ-T-13(A) (M.D. Fla.) -- the firm as co-lead counsel [*26] obtained a class settlement of \$ 18.2 million, approved on October 15, 1991.

In Re Kay Jewelers Securities Litigation, Civil Action Nos. 90-1663(A) through 90-1668(A) (E.D. Vir.) -- the firm as co-lead counsel obtained a class settlement of \$ 3 million during middle of trial, approved on September 26, 1991.

In Re Ames Department Stores Securities Litigation, Master File No. H-87-697 (AHN) (D. Conn.) -- the firm as co-lead counsel obtained a class settlement of \$ 3.295 million, approved on September 4, 1991.

In Re Seagate Technology Securities Litigation, Master File No. C-84-20756(A) -WAI (N.D. Cal.) -- the firm as co-lead counsel obtained a class settlement of \$ 9.3 million, approved on August 14, 1991.

Squitieri v. Gould, et al., Case No. 89-6832 (E.D. Pa.) (Commodore International Securities Litigation) -- the firm as co-lead counsel obtained a class settlement of \$ 3.25 million, approved on March 1, 1991.

In re Genentech, Inc. Securities Litigation, Master File No. C-88-4038-DLJ (N.D. Cal.) -- the firm as co-lead counsel obtained a class settlement of \$ 29 million, approved on February 21, 1991.

In Re: Subaru of America, Inc. [*27] Shareholder Litigation, Superior Court of New Jersey, Chancery Division, Camden County, Master Docket No. C-00016-90 -- the firm as co-lead counsel obtained a class settlement with benefits to the class of over \$ 70 million, approved on February 14, 1991.

Malanka v. de Castro, et al., [1990 U.S. Dist. LEXIS 18171] CCH Fed. Sec. L. Rep. P95,657 (D. Mass. 1990) (Data General Securities Litigation) -- the firm as lead counsel obtained a class settlement of \$ 6 million, approved on November 20, 1990.

In Re Smithkline Beckman Corporation Securities Litigation, [751 F. Supp. 525] CCH Fed. Sec. L. Rep. P95,686 (E.D. Pa. 1990) -- the firm as co-lead counsel obtained a class settlement of \$ 22 million, approved on October 29, 1990.

In Re Telesphere International Securities Litigation, Civil Action No. 89 C 1875 (N.D. Ill.) -- the firm as co-lead counsel obtained a class settlement of \$ 1.425 million, approved on October 23, 1990.

In Re: Philadelphia Electric Company Derivative Litigation, Court of Common Pleas, Philadelphia County, March Term, 1987, No. 7090 -- the firm as co-lead counsel obtained a settlement in excess of \$ 34 million, approved on September 14, 1990.

[*28] David Stein, et al. v. James C. Marshall, et al., No. CIV 89-66 PHX-CAM (D. Ariz.) (In Re Residential Resources Mortgage Investment Corporation Securities Litigation) -- the firm as co-lead counsel obtained a class settlement in excess of \$ 10 million, approved on September 7, 1990.

In Re Sunrise Securities Litigation, [131 F.R.D. 450] MDL No. 655 (E.D. Pa.) -- the firm as co-lead counsel obtained a partial class settlement of approximately \$ 11 million, approved on May 29, 1990.

Heideman, et al. v. Toreson, et al., Civ. No. C-86-20024-SW (N.D. Cal.) (Xebec Securities Litigation) -- the firm as co-lead counsel obtained a class settlement of \$ 7.15 million, approved December 20, 1989.

Geist v. Arizona Public Service Company, C.A. No. 87-1172 (PHX) CLH -- the firm as lead counsel obtained a class settlement of \$ 7 million, approved on June 6, 1989.

Isidore Kallus and Faye Kallus, et al. v. General Host Corporation, C.A. No. B-87-160 (TFGD) -- the firm as co-lead counsel obtained a class settlement of \$ 2.15 million, approved on March 29, 1989.

In re American Integrity Securities Litigation, Master File No. 86-7133 (E.D. Pa.) -- the firm as lead [*29] counsel obtained a class settlement of \$ 6.5 million, approved on March 13, 1989.

In re LILCO Securities Litigation, 84 Civ. 0588 (LDW) (E.D.N.Y.) -- the firm as co-lead counsel obtained a settlement of \$ 48.5 million, approved on October 11, 1988.

Silver Diversified Ventures Limited Money Purchase Pension Plan v. Barrow, et al., C.A. No. B-86-1520-CA (E.D. Tex.) (Gulf States Utilities Securities Litigation), the firm as lead derivative counsel obtained a combined class and derivative settlement of \$ 6.5 million, approved on June 30, 1988.

Bank-America Securities Litigation, Master File No. CV 85-4779 WDK (Bx) (C.D. Cal.) - the firm as lead counsel obtained a settlement of \$ 39.25 million in this derivative action, approved on April 6, 1988.

Engel v. Elsner (Tandon Securities Litigation), CV 86-4566-RS WL (Kx) (C.D. Cal.) - class settlement of in excess of \$ 16 million, approved March 15, 1988.

The Southland Corporation Securities Litigation, Cause No. 87-8834-K (Dist. Ct., Dallas County, Tex.) - class settlement of at least \$ 20 million, approved on October 20, 1987.

Iomega Securities Litigation, C.A. No. B-86-260 (D.C.Ct.) [*30] the firm as lead counsel obtained a class settlement in excess of \$ 2.5 million in cash plus securities, approved on October 1, 1987.

In re Fiddler's Woods Bondholders Litigation, C.A. No. 83-2340 (E.D. Pa.), the firm as co-lead counsel obtained a class settlement of \$ 6.4 million, approved on September 10, 1987.

In re MCorp Securities Litigation, C.A. No. H-85-5894 (S.D. Tex.), the firm as co-lead counsel obtained a class settlement in excess of \$ 4 million, approved on July 6, 1987.

In re Computer Input Services, Inc. Securities Litigation, Master File No. 83-1393 (E.D. Pa.), the firm as co-lead counsel obtained a class settlement of \$ 4.6 million, approved on June 18, 1987.

In re First Jersey Securities Litigation, C.A. No. 85-6059 (E.D. Pa.), the firm as lead counsel obtained a class settlement of \$ 10 million, approved on May 29, 1987.

Naye v. Boyd, C83-771R (W.D. Wash.) (Seafirst Securities Litigation), the firm as lead counsel obtained a class settlement of \$ 13.6 million approved on March 24, 1987.

AM International, Inc. Securities Litigation, Master File No. M-21-31 (S.D.N.Y.), the firm as co-lead counsel obtained class [*31] settlements of approximately \$ 20 million, approved on February 20, 1987.

Continental-Illinois Securities Litigation, C.A. -No. 84-C-8596 (N.D. Ill.), the firm as co-lead counsel obtained a class settlement of \$ 17.5 million, approved on January 21, 1987.

American Savings and Loan Securities Litigation, C.A. No. 85-0659 (S.D. Fla.), the firm as co-lead counsel obtained a class settlement of \$ 4 million, approved on January 9, 1987.

Houston Oil Securities Litigation, C.A. No. H-82-551 (S.D. Tex.), the firm had major participation in obtaining a class settlement of \$ 45 million approved on December 16, 1986.

In re Coleco Securities Litigation, Master File No. 83 Civ. 9199 (S.D.N.Y.), the firm as lead counsel obtained a class settlement of \$ 15.75 million, approved October 2, 1986.

In re Oak Industries Securities Litigation, No. 83-0537-G(M) (S.D. Cal.), where the firm as co-lead counsel obtained a class settlement in excess of \$ 33 million approved on August 29, 1986.

Lundy v. InterFirst Corporation, No. 3-84-0952-H (N.D. Tex.), the firm as lead counsel obtained a class settlement of \$ 6.7 million, approved July 3, 1986.

In [*32] re Cincinnati Gas & Electric Securities Litigation, Master File No. C-1-83-1721 (S.D. Ohio), the firm as co-lead counsel obtained a class settlement of almost \$ 14 million approved on January 2, 1986.

In re Baldwin United Annuity Litigation, No. M-21-35 (S.D.N.Y.), where the firm was co-lead counsel in a consolidated proceeding on behalf of purchasers of annuities which has been partially settled, for \$ 135 million.

In re Warner Communications Securities Litigation, 618 F. Supp. 735 (S.D.N.Y. 1986) -- class settlement of \$ 18.4 million.

In re Crocker Shareholder Litigation, Cons. C.A. No. 7405, Court of Chancery, State of Delaware, New Castle County -- class settlement in the range of \$ 35 to \$ 70 million.

Vukovich v. McCormick Oil & Gas Company, et al., C.A. No. H-82-3094 (S.D. Tex.) -- class settlement \$ 4.7 million, approved March 12, 1984.

In re Louisville Explosions Litigation, Master File No. 81-0080-L(B) (W.D. Ky.) -- first trial of mass tort class action settled on a formula basis for approximately \$ 26 million.

Jerozal, et al. v. Cash Reserve Management, 81 Civ. 1579 (CES), 81 Civ. 1726 (CES), 82 Civ. 3338 [*33] (CES), (S.D.N.Y. November 28, 1983) -- derivative settlement benefits to the Fund of \$ 3.75 million assuming asset levels of the fund remain constant.

In re Corrugated Container Antitrust Litigation, M.D.L. No. 310 (S.D. Tex.) -- antitrust class settlement of \$ 366 million plus interest.

In re Caesars World Shareholder Litigation, Master File No. 81-3442, M.D.L. No. 496 -- derivative settlement where \$ 7 million was paid to the corporation.

Robbins v. Steinberg, CV-6506, Delaware Court of Chancery (Reliance Securities Litigation) -- class settlement of "going private" case where approximately \$ 10 million of additional value went to the shareholders.

Spilove v. Anderson, CV-81-833-R (C.D. Cal.) (Mattel Securities Litigation) -- class settlement of \$ 3.9 million.

In re First Pennsylvania Securities Litigation, C.A. No. 77-1610 (E.D. Pa.) -- class settlement in excess of \$ 11 million.

In re Food Fair Securities Litigation, M.D.L. No. 368 (E.D. Pa.) -- class settlement of \$ 2.5 million.

Charal v. Andes, et al., C.A. No. 77-1725; Hubner v. Andes, et al., C.A. No. 78-1610 (E.D. Pa.) (Franklin Mint Corporation) -- class settlement [*34] of over \$ 6 million.

In re Magic Marker Securities Litigation, C.A. No. 77-3155 (E.D. Pa.) -- class settlement of \$ 1.6 million.

Mazza v. Fidelcor, Inc., et al., C.A. Nos. 78-1349 and 78-1527 (E.D. Pa.) -- class settlement of \$ 2.4 million.

In re: Three Mile Island Litigation, C.A. No. 79-0432 -- settlement of \$ 25 million in this mass tort class action.

Waldman v. Fidelco Growth Investors, C.A. Nos. 78-623 and 78-796 (E.D. Pa.) -- class settlement of \$ 1.3 million plus substantial benefits to FGI in settlement of the derivative action.

In re Consolidated Pretrial Proceedings in Ampex Securities Cases, Master File No. C-72-360-SW (N.D. Cal.) - - class settlement of \$ 9 million.

Seiden v. Nicholson, (CNA Corporation), 74-C-3117 and related cases (N.D. Ill.) -- class settlement of \$ 9.5 million.

Penn Central Securities Litigation, M.D.L. Docket No. 56 -- total settlement for all plaintiff entities including shareholder class in excess of \$ 10.5 million.

The standing of Berger & Montague, P.C., in successfully conducting major securities and antitrust litigation has been recognized by numerous courts. In Re: Subaru of [*35] America, Inc. Shareholder Litigation, where Sherrie R. Savett served as co-lead counsel, Judge Lowengrub stated:

I think that the settlement achieved through the very skillful and diligent work of counsel on behalf of the shareholders was excellent. I cannot just say that it was -- it is fair and reasonable. It's an excellent result.

It was done without the intervention of the Court. The Court was not burdened with a multiplicity of motions, management conferences, et cetera, that generally raise their head in this type of litigation or in any complex litigation.

In In Re American Integrity Securities Litigation 1989 U.S. Dist. LEXIS 9207, Fed. Sec. L. Rep. (CCH) P94,738 at p. 93,989 (E.D. Pa. 1989), where Berger & Montague was sole lead counsel and the litigation was conducted by a team headed by Sherrie R. Savett and Gary E. Cantor, Judge Shapiro cited "the excellent results obtained" and awarded lead counsel an additional multiplier "warranted by the high quality of work including the management and coordination to avoid duplication of effort and insure a prompt and efficient resolution of the litigation."

At the June 5, 1987 hearing in In re E.F. Hutton Banking Practices Litigation, [*36] where Sherrie R. Savett was lead counsel, Judge Knapp stated in his opinion at pp. 35-36:

[I] will say without question that I think the work was highly competent.... I will state unequivocally, I think the work has been extraordinarily competent.

In In re AM International Securities Litigation, approving an approximate \$ 20 million settlement in cash and warrants, Judge Sprizzo addressed Lead Counsel, including Messrs. Wolfe and Stiefel of the Berger firm, as follows:

Obviously you are all able lawyers. And I think the case was handled -- and I will say it for the record so you can put it in your next set of papers -- at least in my view, competently and expertly....

In approving a \$ 33 million cash settlement where Sherrie R. Savett was one of the lead counsel in In re Oak Industries Securities Litigation, the Honorable Harry R. McCue stated in his opinion at pp.24-30:

This is an outstanding achievement, and it has been rarely achieved or equaled anywhere in the United States in similar class action securities litigation.

* * *

There can be no doubt that the public good was fully served by the attorneys for the plaintiffs in this case, **[*37]** because they invested their own time, their own money, they invested their special skills and knowledge to vindicate the rights and interests of the thousands of investors who invested their money and placed their trust in the integrity of the securities market.

* * *

I conclude that the achievement of plaintiffs' counsel under any of those tests was superior.

* * *

I think that the manner in which this case was handled and litigated by counsel for each of the defendants and counsel for the plaintiffs, this litigation, the way this was conducted, should serve as a textbook example of how these cases should be conducted.

* * *

I think this is an example of how, with the combined skill, wisdom and experience of attorneys representing the plaintiffs and attorneys who are similarly skilled and experienced and wise representing the defendants, they sat down and resolved a very difficult situation; and if this case was in the hands of less-experienced, less-skilled, less-wise attorneys, I predict that this could have turned into a disaster.

In In re Coleco Securities Litigation, Master File No. 83 Civ. 9199 (S.D.N.Y.), where Stanley R. Wolfe was the lead counsel, **[*38]** the court in approving the settlement stated in its opinion at pp. 28-29.

... I just want to comment on one thing and that is the point that has been made that the litigation has been conducted without unnecessary frills or consumption of time. And I must say that apart from my own observations of the progress of this case I have consulted with the magistrate who shares the same view. * * * I am satisfied that able and sophisticated counsel on both sides have pursued the case on the merits and the fact that they are being generously compensated for their efforts is entirely as it should be.

In In re Warner Communications Securities Litigation, 618 F. Supp. 735 (S.D.N.Y. 1985), where Sherrie R. Savett was one of the lead counsel, the court stated in its opinion at pp. 748-49.

... The quality of the work of plaintiffs' counsel on this case is also demonstrated by the efficient manner of prosecution. Rather than engaging in long months of extensive motion practice... plaintiff's counsel were able to successfully negotiate these issues with defendants and proceed directly to discovery on merits... This

efficient prosecution enabled the plaintiffs' counsel [*39] to concentrate their energy on the complex issues of the lawsuit.

Judge Keenan further commented in his opinion:

The quality of work of plaintiffs' counsel on this case is also demonstrated by the efficient manner of prosecution.... At the settlement hearing, defense counsel conceded that plaintiffs' counsel constitute the "cream of the plaintiffs' bar." The court cannot find fault with that characterization. *Id.*

In *Charal v. Andes*, 88 F.R.D. 265, 267 (E.D. Pa. 1980), Judge Bechtle noted:

... Counsel in this case are highly experienced in securities litigation and have enjoyed nationwide respect in this area....

In *Gross, et al. v. National Liquid Reserves, Inc. et al.*, 1984 U.S. Dist. LEXIS 20791, Fed. Sec. L. Rep. (CCH) P99,618, the court found that:

Counsel...are highly respected members of the bar and have substantial experience in shareholder class and derivative actions.

at p. 97,424.

Furthermore, the court stated that "the actions were resolved with great efficiency..." at p. 97,426.

In *Wolgin v. Magic Marker Corporation*, 82 F.R.D. 168, 175 (E.D. Pa. 1979), where the Berger firm was lead counsel, Chief [*40] Judge Luongo stated:

... I am fully satisfied that [counsel for the named plaintiffs] are capable of conducting the proposed class action in a vigorous and efficient manner.

In awarding fees in the *Magic Marker* case, Judge Luongo noted that the settlements achieved in that action represented "an outstanding result by any standard" and that the application of the contingency and quality factors to the Berger firm's hours, the bulk of which "[were] attributable to the services of Sherrie R. Savett and Gary E. Cantor," would warrant increasing the Berger firm's lodestar "by a multiple of two." *In re Magic Marker Securities Litigation*, 1979 U.S. Dist. LEXIS 9777, Fed. Sec. L. Rep. (CCH) P97,116 at p. 96,195 (E.D. Pa. 1979).

In *In re Master Key Antitrust Litigation*, 1977 U.S. Dist. LEXIS 12948, 1978-1 Trade Cas. (CCH) P61,887 (D. Conn. 1977), where Berger & Montague was co-lead counsel, Judge Blumenfeld expressly found:

. . . The work of the Berger firm showed a high degree of efficiency and imagination, particularly in the maintenance and management of the national class actions.

at pp. 73,725-73,726.

Similar statements appear in *City of Detroit v. Grinnell Corporation*, 1976 U.S. Dist. LEXIS 15479, 1976-1 Trade Cas. (CCH) P60,913 at p. 68,981 [*41] (S.D.N.Y. 1976) (where Judge Metzner favorably commented on the skill of the predecessor firm to Berger & Montague); *In re Anthracite Coal Antitrust Litigation*, 81 F.R.D. 499, 502-03 (M.D. Pa. 1979) (Judge Muir); *Hedges Enterprises, Inc. v. Continental Group Inc.*, 81 F.R.D. 461, 466 (E.D. Pa. 1979) (Judge Bechtle); *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 382 F. Supp. 999, 1974-2 Trade Cas. (CCH) P75,361 (E.D. Pa. 1974) (Judge Harvey). In *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator Standard Sanitary Corp.*, 382 F. Supp. 999, 1974-2 Trade Cas. (CCH) P75,361 (E.D. Pa. 1974), Judge Harvey found that David Berger "has an unequalled national reputation as a plaintiffs' class action attorney" (at p. 98,157), that his "experience in national class action litigation . . . can hardly be equalled by any attorney in the country" (at p. 98,165), and that he "... was not only capable of successfully conducting a national class action litigation, but was also possessed of a visible track record which demonstrates his successes in this field" (at p. 98,157). See also, *PASA v. GAB*, 352 F. Supp. 648, 651 (E.D. Pa. 1972); [*42] *Lindy I*, 341 F. Supp. 1077, 1090-91 (E.D. Pa. 1972); *Philadelphia Electric Company v. Anaconda American Brass Co.*, 47 F.R.D. 557, 559 (E.D. Pa. 1969).

The Berger firm has been responsible for obtaining many favorable opinions which have broken new ground in the class action or securities fields or which have promoted shareholder rights in prosecuting these actions. Among them are:

1994 U.S. Dist. LEXIS 21584, *42

[Delgocco v. Kenny, 266 N.J. Super. 169, 628 A.2d 1080 \(1993\).](#)

[In re U.S. Bioscience Securities Litigation, \[806 F. Supp. 1197\]](#) Fed. Sec. L. Rep. [(CCH)] P97,226 (E.D. Pa. 1992).

[In re Genentech, Inc. Securities Litigation, \[1990 U.S. Dist. LEXIS 11389\]](#) Fed. Sec. L. Rep. [(CCH)] P95,347 (N.D. Cal. 1990).

[In re Genentech, Inc. Securities Litigation, \[1989 U.S. Dist. LEXIS 13424\]](#) Fed. Sec. L. Rep. [(CCH)] P94,813 (N.D. Cal. 1989).

[In re Genentech, Inc. Securities Litigation, \[1989 U.S. Dist. LEXIS 14819\]](#) Fed. Sec. L. Rep. [(CCH)] P94,544 (N.D. Cal. 1989).

[Cytryn v. Cook, \(Raychem Securities Litigation\), \[1990 U.S. Dist. LEXIS 14371\]](#) Fed. Sec. L. Rep. [(CCH)] P95,409 (N.D. Cal. 1990).

[In re School Asbestos Litigation, 789 F.2d 996](#) (3d Cir.), cert. denied, 479 U.S. 852, 107 S. Ct. 182, 93 L. Ed. 2d 117 (1986). [*43]

[Blackie v. Barrack, 524 F.2d 891 \(9th Cir. 1975\)](#), cert. denied, 429 U.S. 816, 50 L. Ed. 2d 75, 97 S. Ct. 57.

[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).

[In re LILCO Securities Litigation, \[625 F. Supp. 1500\]](#) CCH Fed. Sec. L. Rep. P92,777 (E.D. N.Y. 1986).

[In re Gulf Oil Tender Offer Litigation, \[112 F.R.D. 383\]](#) CCH Fed. Sec. L. Rep. P92,931 (S.D.N.Y. 1986)

[In re Coleco Securities Litigation, \[591 F. Supp. 1488\]](#) Fed. Sec. L. Rep. (CCH) P91,617 (S.D.N.Y. 1984).

[Lewis v. Berry, \[1985 U.S. Dist. LEXIS 19585\]](#) Fed. Sec. L. Rep. (CCH) P92,354 and 92,355 (W.D. Wash. 1985)

[Lewis v. Berry, \[1983 U.S. Dist. LEXIS 12265\]](#) Fed. Sec. L. Rep. (CCH) P99,550 (W.D. Wash. 1983)

[Lewis v. Arthur Andersen & Co., \[101 F.R.D. 706\]](#) Fed. Sec. L. Rep. (CCH) P91,403 (W.D. Wash. 1984).

Ferber v. Morgan Stanley Co., Inc., [1984 U.S. Dist. LEXIS 20639] Fed. Sec. L. Rep. (CCH) P99,634 and P99,684. (E.D. Pa. 1984).

In re McDonnell Douglas Corp. Securities Litigation, [1982 U.S. Dist. LEXIS 15481] Fed. Sec. L. Rep. (CCH) P98,838 (E.D. Mo. 1982).

In re McDonnell Douglas Corp. Securities Litigation, [98 F.R.D. 613] Fed. Sec. L. Rep. (CCH) P98,737 (E.D. Mo. 1982). [*44]

In re McDonnell Douglas Corp. Securities Litigation, 92 F.R.D. 761 (E.D. Mo. 1981).

Kaplan v. T. Rowe Price & Associates, 1979 U.S. Dist. LEXIS 8280, 28 Fed. R. Serv. 2d (Callaghan) 743 (D. Md. 1979).

Wolgin v. Magic Marker Corp., 82 F.R.D. 168 (E.D. Pa. 1979).

BIOGRAPHIES OF INDIVIDUAL ATTORNEYS

Set forth below are the biographies of the attorneys who worked on the Belmac matter and who are individually listed on the chart attached to the accompanying affidavit as Exhibit A.

1. Sherrie R. Savett

Sherrie R. Savett is a graduate of the University of Pennsylvania (B.A. 1970 summa cum laude; J.D. 1973) and a member of Phi Beta Kappa. She is Co-Chairperson of the firm's Securities Litigation Department. She has served as a lead counsel in the following representative cases, all of which were successfully resolved for plaintiff classes:

In Re PNC Securities Litigation, Civil Action No. 90-0592 (W.D. Pa.) -- (class settlement of \$ 6.3 million);

Belman, et al. v. Warrington, et al., Civil Action No. H-91-3767 (S.D. Tex.) (Sanifill Securities Litigation) -- (class settlement of \$ 3.3 million); [*45]

In re Amdahl Securities Litigation, Master File No. C-92-20609-JW(EAI) (N.D. Cal.) -- (class settlement of \$ 13 million);

Masnik, et al. v. Bolar Pharmaceutical Co., Inc., Civil Action No. 90-4086 (E.D. Pa.) -- (class settlement in excess of \$ 2.5 million);

In Re Public Service Company of New Mexico Class and Derivative Actions, Master File No. 91-536-K-(M) (S.D. Cal.) -- (class and derivative settlement of \$ 33 million);

Cytryn, et al. v. Cook, et al., No. C-89-20801-RFP (N.D. Cal.) (Raychem Securities Litigation) -- (class settlement of \$ 19.5 million);

In Re Lomas Financial Corporation Securities Litigation, Civil Action No. CA-3-89-1962-G (N.D. Tex.) -- (class settlement in excess of \$ 20 million);

In Re Home Shopping Network Securities Litigation -- Action I, Case No. 87-428-Civ-T-13(A) (M.D. Fla.) (class settlement of \$ 18.2 million);

In Re Kay Jewelers Securities Litigation, Civil Action Nos. 90-1663 (A) through 90-1668(A) (E.D. Vir.) -- (class settlement of \$ 3 million obtained during middle of trial);

In Re Seagate Technology Securities Litigation, Master File No. C-84-20756 (A) -WAI (N.D. Cal.) -- [*46] (class settlement of \$ 9.3 million);

Squitieri v. Gould, et al., Case No. 89-6832 (E.D. Pa.) (Commodore International Securities Litigation) (class settlement of \$ 3.25 million);

In re Genentech, Inc. Securities Litigation, Master File No. C-88-4038-DLJ (N.D. Cal.) (class settlement of \$ 29 million);

In Re: Subaru of America, Inc. Shareholder Litigation, Superior Court of New Jersey, Chancery Division, Camden County, Master Docket No. C-00016-90 (class settlement with benefits to the class of over \$ 70 million);

Malanka v. de Castro, et al., [1990 U.S. Dist. LEXIS 18171] CCH Fed. Sec. L. Rep. P95,657 (D. Mass. 1990) (Data General Securities Litigation) (class settlement of \$ 6 million);

In Re Smithkline Beckman Corporation Securities Litigation, [751 F. Supp. 525] CCH Fed. Sec. L. Rep. P 95,686 (E.D. Pa. 1990) (class settlement of \$ 22 million);

In re Long Island Company Securities Litigation, 84 Civ. 0588 (LDW) (class settlement of \$ 48.5 million);

In re American Integrity Securities Litigation, Master File No. 86-7133 (E.D. Pa.) (class settlement of \$ 6.7 million);

BankAmerica Securities Litigation, CV 85-4779 (C.D. Cal.) (settlement [*47] of \$ 39.25 million, believed to be the largest derivative settlement ever obtained in a securities action);

Engel v. Elsner (Tandon Securities Litigation), CV 86-4566 (C.D. Cal.) (class settlement of \$ 16 million);

Fiddler's Woods Securities Litigation, C.A. 83-2340 (E.D. Pa.) (settlement of \$ 6.4 million obtained after trial had commenced);

Naye v. Boyd, C83-771R (W.D. Wash.) (Seafirst Securities Litigation) (class settlement of \$ 13.6 million);

In re Warner Communications Securities Litigation, Fed. Sec. L. Rep. (CCH) P 92, 272 (S.D.N.Y. 1985) (class settlement of \$ 18.4 million);

Oak Industries Securities Litigation, No. 83-0537-G(M) (S.D. Cal.) (class settlement of \$ 33 million);

Spilove v. Anderson, CV-81-833-R (C.D. Cal.) (Mattel Securities Litigation -- class action settled for \$ 3.9 million shortly before trial);

First Pennsylvania Securities Litigation (class settlement of \$ 11 million);

Charal v. Andes, C.A. Nos. 77-1725 and 78-1610 (E.D. Pa.) (class litigation involving Franklin Mint Corporation which resulted in a \$ 6 million settlement); and

Magic Marker Securities Litigation, [*48] C.A. No. 77-3155 (E.D. Pa.) (class settlement of \$ 1.6 million).

Mrs. Savett has lectured at the Wharton School of the University of Pennsylvania and at the Stanford Law School on prosecuting shareholder class actions. She has participated as a panelist in numerous professional seminars and is the author of several papers on various aspects of securities and complex litigation. Her writings include "Everything David Needs to Know to Battle Goliath - The Preparation and Trial of a Securities Class Action Fraud Case" published by The Brief, an American Bar Association magazine issued twice a year from the Tort and Insurance Practice Section, "Mass Accident/Mass Products Liability Tort Litigation" published by The Association of Trial Lawyers of America, and the following papers published by The Practicing Law Institute ("PLI") in their Securities Litigation series, each of which she presented at PLI seminars from 1984 through 1992: "The Fraud on the Market Theory Today: The Courts' Recognition of Reality in Securities Trading", "Prosecution of Derivative Actions: A Plaintiff's Perspective", "THE DERIVATIVE ACTION: An Important Shareholder Vehicle for Insuring Corporate Accountability [*49] in Jeopardy" and "Trial and Preparation of a Securities Class Action Fraud Case from a Plaintiff's Standpoint." The last paper was also presented by Mrs. Savett at the American Bar Association Annual Meeting, held in Toronto in Summer, 1988. In February, 1990, she participated in a PLI seminar entitled "Advanced Workshop on Problems in Securities Disclosures."

2. Gary E. Cantor

Gary E. Cantor is a graduate of Rutgers College (B.A. 1974) and the University of Pennsylvania (J.D. 1977), where he was a member of the Moot Court Board and the author of a law review comment on computer-generated evidence, 126 U. Pa. L. Rev. 425 (1977). Since joining the Berger firm in 1977, he has concentrated on complex litigation, particularly securities litigation. Among others, he has played a major role in In Re Kenbee Limited Partnerships Litigation, Civil Action No. 91-2174(GEB) (class action involving 119 separate limited partnerships resulting in cash settlement and debt restructuring with as much as \$ 100 million in potential wrap mortgage reductions); In Re Richard J. Dennis & Co. Litigation, 88 Civ. 8928 (MP) (S.D.N.Y.) (\$ 2.5 million commodity class action settlement [*50] approved November 20, 1990); American Integrity Securities Litigation, Seafirst Securities Litigation; Vukovich v. McCormick Oil & Gas Co.; Charal v. Andes, C.A. No. 77-1725 (E.D. Pa.) (Franklin Mint) and Wolgin v. Magic Marker class actions previously cited, and his work was recognized by Judge Luongo in his Magic Marker Opinion at [Fed. Sec. L. Rep. \(CCH\) P 97,116 at pp. 96,193](#) and 96,195.

3. Arthur Stock

Arthur Stock is a graduate of Yale University (B.A. 1984, with distinction in economics) and the Duke University School of Law (J.D. 1990, with high honors), where he served as Articles Editor of the Duke Law Journal and published a Note. From 1990 to 1991, he served as a law clerk to the Honorable Jackson L. Kiser in the United States District Court for the Western District of Virginia. Since joining the Berger firm, Mr. Stock has concentrated in securities class action professional malpractice, and derivative litigation. He has been heavily involved in U.S. Bioscience Securities Litigation, Interfund v. Stroock & Stroock & Lavan, and Salomon, Inc. Securities Litigation.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

IN [*51] RE BELMAC CORP. SECURITIES

LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

MASTER FILE NO. 92-1814-CIV-T-23-(C)

AFFIDAVIT OF MICHAEL J. PUCILLO IN SUPPORT OF JOINT PETITION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

I, MICHAEL J. PUCILLO, being duly sworn, depose and state as follows:

1. I am a Partner with the law firm of Burt & Pucillo which was formed on January 1, 1994. Previously, I was Partner with the firm of Chimicles, Burt & Jacobsen which was formed on June 26, 1994, and the firm of Greenfield & Chimicles which dissolved pursuant to its partnership agreement on June 26, 1993.
2. I am submitting this Affidavit in Support of Plaintiffs' Counsel's Petition for an Award of Attorneys' Fees in Connection with Services rendered to Plaintiffs' class and reimbursement of expenses incurred by my firm in the course of this litigation.
3. My current firm and former firms participated in the prosecution of this action in cooperation with other Plaintiffs' counsel. Specifically, my firm served as a member of Plaintiffs Executive Committee and assisted lead counsel in formulating the theory and developing the facts of Plaintiffs' case and assisted in discovery at [*52] the request of lead counsel. Initially, the attorneys of my firm were involved in investigation, factual analysis and drafting and filing the complaint on behalf of the Plaintiff class. We also assisted in preparing drafts of the Amended Complaint for review by lead counsel.
4. With respect to the standing of counsel in this case, attached as Exhibits "A", "B" and "C" are brief biographies from each firm and the attorneys who worked on this litigation.
5. The total number of hours expended in this litigation by Burt & Pucillo from January 1, 1994 through February 18, 1994, is 6.25 and the total amount of lodestar is \$ 1,281.23, as reflected in the chart attached as Exhibit "D". The total number of hours expended in this litigation by Chimicles, Burt & Jacobsen from July 31, 1993 through December 31, 1993 is 21.0 hours and the total lodestar is \$ 4,837.50, as reflected in the chart attached as Exhibit "E". The total number of hours expended in this litigation by Greenfield & Chimicles from inception through July 26, 1993, is 200.75 hours and the total lodestar is \$ 43,797.50, as reflected in the chart attached as Exhibit "F".
6. The total lodestar for the services performed by Burt [*53] & Pucillo, Chimicles, Burt & Jacobsen and Greenfield & Chimicles is from the time of inception through February 18, 1994, on current hourly billing rates is \$ 49,916.23 as reflected in Exhibits D, E & F. The charts were prepared from contemporaneous daily time records maintained by each firm and the hourly rates for the attorneys and paralegals are the regular rates charged for their services in similar litigation such as this one. In my opinion, the rates charged by the various attorneys and the paralegals are reasonable.
7. Attached hereto as Exhibit "G" and "H" and "I" are lists of expenses advanced and incurred by Burt & Pucillo, Chimicles, Burt & Jacobsen and Greenfield & Chimicles through February 18, 1994. The charts are compiled from the records regularly maintained by both firms. These records are prepared from expense vouchers, check records, and other source material, and are an accurate record of expenses incurred. The total unreimbursed expenses incurred from both firms in connection with the prosecution of this litigation is \$ 3981.75.

Dated: February 19, 1994

Michael J. Pucillo

The foregoing instrument was acknowledged before me this [ILLEGIBLE WORDS] by [*54] [ILLEGIBLE WORDS] who is personally known to me and who did take an oath.

OFFICIAL SEAL

JERRI K. AWBREY

My Commission Expires

Aug. 17, 1996

Comm. No. CC 222029

[ILLEGIBLE WORDS]

NOTARY PUBLIC

FIRM BIOGRAPHY OF BURT & PUCILLO

Burt & Pucillo was formed on January 1, 1994, by C. Oliver Burt, III and Michael J. Pucillo. The firm maintains its principal office in West Palm Beach, Florida, and has an office in Haverford, Pennsylvania. Prior to the formation of Burt & Pucillo, C. Oliver Burt and Michael J. Pucillo were partners in a major firm specializing in securities and class action litigation with offices in four states.

Burt & Pucillo concentrates its practice in the area of class action securities and consumer litigation. The firm has, in addition to its two partners, two associates and one of counsel attorney. The firm's goal is to achieve quality results for its clients, and, in the case of class litigation, for members of the class generally. The firm is also committed to taking on cases of a complex, high risk nature, often on a contingent fee basis. This is particularly true in the area of shareholder litigation.

Since its formation on January 1, 1994, the [*55] firm has been appointed lead counsel in the Blockbuster shareholder litigation pending in the Delaware Chancery Court, an action challenging the consideration given to Blockbuster shareholders in a proposed merger with Viacom, Inc. In addition, Messrs. Burt and Pucillo have and continue to serve as lead counsel in numerous securities class actions more fully described below.

C. OLIVER BURT, III, graduated from Swarthmore College in 1964 with a Bachelor of Arts Degree in History. In 1967 he graduated from the Law School of the University of Pennsylvania. Upon graduation from law school, he was an associate with a major Philadelphia law firm working primarily in the litigation department where he participated, among other things, in antitrust litigation. In May, 1971 he was appointed Assistant U.S. Attorney for the Eastern District of Pennsylvania. As an Assistant U.S. Attorney he tried a number of criminal cases, and participated in several major Grand Jury investigations including an investigation in 1971-72 involving the Health and Welfare Fund of the Carpenter's Union of Philadelphia and Vicinity which led to several indictments, including United States v. John McCrae, Criminal [*56] No. 71-684. McCrae was charged with embezzling funds from two employee benefit plans established by the Carpenter's Health and Welfare Fund. Mr. Burt tried the case in March of 1972 and obtained the conviction of Mr. McCrae. The Court's opinion denying post-trial motions is reported at 344 F. Supp. 942.

As an Assistant U.S. Attorney, Mr. Burt prosecuted white-collar criminal cases involving securities fraud, mail fraud, wire fraud, "check-kiting," embezzlement of bank funds, interstate transportation of stolen motor vehicles, income tax evasion and other offenses. Mr. Burt was appellate counsel in United States v. George Hykel, 461 F.2d 721 (3d Cir. 1972), a criminal case involving misapplication of bank funds. In United States v. Bertram Lazar, Mr. Burt prosecuted and secured a guilty plea from a stock-broker for engaging in a "Ponzi Scheme" and selling unregistered securities. He also represented the Government in a number of civil matters, and in May, 1973 he was appointed Chief of the Civil Division of the United States Attorney's Office. Thereafter, in addition to serving as

Chief of the Civil Division and trying civil cases, he conducted the [*57] Grand Jury investigation concerning the bankruptcy of the Penn Central Railroad, and tried other criminal and civil cases. In connection with the Penn Central Grand Jury proceedings he appeared in and participated in hearings in the Princely Provincial Court of Liechtenstein seeking to compel the production of records of secret Liechtenstein bank accounts. In January, 1977, he returned from private practice briefly as a Special Assistant U.S. Attorney to try United States v. Rosenbaum, 439 F. Supp. 176 (E.D. Pa. 1977), the criminal case arising out of the Penn Central Grand Jury investigation.

Previously, Mr. Burt was a partner in a Philadelphia law firm where he was primarily engaged in commercial litigation including antitrust, securities litigation, unfair competition, white collar criminal cases, and general business litigation. While with that firm, Mr. Burt tried, among other cases, Callan, et al. v. State Chemical Manufacturing Company, decision on pretrial motions reported at 584 F. Supp. 619 (E.D. Pa. 1984); a civil RICO case, The Mader Group, Inc. v. Gekoski, et al., 6 Phila. 556 (1981), involving unfair competition and violation [*58] of corporate fiduciary duties by former employees; General Business Services, Inc. v. Rouse, et al., 495 F. Supp. 526 (E.D. Pa. 1980), involving alleged trademark infringement, unfair competition and unlawful tying arrangements; Beta Consultants & Administrators v. Centennial Life Ins. Co., unreported opinion by Judge Newcomer (E.D. Pa. 1980), an alleged antitrust conspiracy case, United States v. Natale, et al., a criminal RICO and mail fraud case, opinion on post-trial motions reported at 494 F. Supp. 1114 (E.D. Pa. 1979), aff'd, 631 F.2d 726 (3d Cir. 1980); Commonwealth of Pennsylvania v. Richard Wolf, a white collar criminal case involving alleged corporate scheme to defraud city by tampering with pollution control devices, case resolved by plea agreement before trial after extended preliminary hearing, Pennsylvania Supreme Court opinion reported at 495 Pa. 211, 433 A.2d 18 (1981). He also participated as counsel for plaintiff in Levin v. Barish, et al., litigation arising out of a law firm dissolution, opinion by Supreme Court of Pennsylvania reported at 505 Pa. 514, 481 A.2d 1183 (Pa. 1984).

From 1972 [*59] through 1985, Mr. Burt was Chairman of the Criminal Law Committee of the Philadelphia Bar Association Young Lawyers' Section Basic Legal Practice Course. He authored course materials on federal criminal practice for that Course, and during the years 1972 through 1985 lectured on the subject of federal criminal practice as part of the Basic Legal Practice Course, sponsored by the Philadelphia Bar Association.

Since 1985, Mr. Burt has participated actively in securities and class action litigation. In August 1992 he was plaintiff's lead trial counsel in Upp v. Mellon, (E.D. Pa. C.A. No. 91-5219), a class action brought on behalf of trust beneficiaries in which the Court found in favor of the class and ordered Mellon to refund all "sweep fees" collected from the trust accounts of class members together with interest. The Court's opinion is reported at 799 F. Supp. 540 (1992). That opinion was later reversed by the Third Circuit Court of Appeals on the grounds that the trial court lacked subject matter jurisdiction.

Mr. Burt acted as trial co-counsel in Peil v. Speiser, Civil Action No. 82-1289 (E.D. Pa.), a "fraud on the market" case, which was tried in April, 1985. [*60] Mr. Burt was also appellate counsel in that case and presented oral argument in the case in the Court of Appeals for the Third Circuit. In its landmark opinion in that case, the Court adopted "Fraud on the Market" as the law of the Circuit, reported as Peil v. Speiser, 806 F.2d 1154 (3d Cir. 1986). Mr. Burt was also plaintiff's lead trial counsel in Kumpis v. Wetterau, 586 F. Supp. 152 (E.D. Mo.), a securities fraud class action which was settled in the course of trial in December, 1985.

Mr. Burt was Lead Derivative Counsel in Pacific Gas & Electric Shareholder Derivative Litigation, Master File No. 893849, (Superior Court, San Francisco County, Cal.), a case which settled for \$ 21,000,000 in 1990; PSFS Securities Litigation, Civil Action No. 85-4978 (E.D. Pa.) and in First Peoples Bank Shareholder Litigation, Civil Action No. 83-2713 (D.N.J.). He was plaintiffs' Co-Lead Counsel in Duguesne Light Shareholder Litigation, Civil Action No. 86-1046 (W.D. Pa.). He is currently active in numerous cases in which the Firm is counsel including First American Bank and Trust Litigation, Civil Action No. 88-0638 (S.D. Fla.); and AmeriFirst [*61] Bank Litigation, Civil Action No. 89-2614 (S.D. Fla.), in which he and his partner, Michael J. Pucillo, serve as Lead Counsel; and Hoexter v. Simmons, CIV 89-1069-PHX-RCB (D. Ariz.), a securities fraud class action involving Valley National Bank.

Mr. Burt was principal plaintiffs' counsel in Bell Atlantic v. Bolger, et al., 771 F. Supp. 686 (E.D. Pa.), a combined proxy fraud derivative case against the Bell Atlantic Board of Directors which was settled in June 1992. The settlement was approved in an opinion by the Third Circuit Court of Appeals issued on August 18, 1992. Mr. Burt was also one of plaintiffs' lead counsel in U.S. West, Inc. v. MacAllister, 1992 U.S. Dist. LEXIS 22695 (D. Col.), a proxy fraud derivative case in the District of Colorado involving claims against the Board of Directors with respect to a \$ 10 million civil penalty imposed by the Department of Justice, and the company's disclosures to shareholders concerning that subject. Settlement of that case was approved by the District Court in Denver on December 18, 1992.

Mr. Burt is admitted to practice before the Supreme Court of the United States, the Supreme Court of Pennsylvania, the Third [*62] Circuit Court of Appeals, the Eighth Circuit Court of Appeals, the Ninth Circuit Court of Appeals, the District Court for the Eastern District of Pennsylvania, the District Court for the Northern District of New York, and the District Court for the District of Arizona.

MICHAEL J. PUCILLO has been a member of the Florida Bar since 1978, and is admitted to practice before the United States Court of Appeals for the Fifth and Eleventh Circuits and the United States District Courts for the Southern and Middle Districts of Florida. Mr. Pucillo is a member of the Southern District of Florida Trial Bar. During 1989-1990, he served as President of the Gold Coast Chapter of the Federal Bar Association. He is a graduate of Williams College (1975), and Georgetown University Law School (1978). From 1978 to 1979, Mr. Pucillo served as Law Clerk to the Honorable Charles B. Fulton, United States District Judge for the Southern District of Florida. From 1979 to 1981, Mr. Pucillo served as Law Clerk to the Honorable William J. Campbell, Senior United States District Judge for the Northern District of Illinois. From 1983 to 1984, Mr. Pucillo was a Staff Attorney at the Division of Enforcement of the [*63] United States Securities and Exchange Commission in Washington, D.C. Upon returning to Florida, he practiced Commercial Litigation with an emphasis on Securities.

Since 1989, Mr. Pucillo has been active in numerous class actions and shareholder derivative actions throughout Florida. Mr. Pucillo was lead derivative counsel in the FPL Group Shareholder Derivative Action, Case No. 91-3563-AC (15th Judicial Circuit), a case that settled for \$ 7,000,000 plus significant corporate governance changes. He and Mr. Burt currently serve as lead counsel in In Re Amerifirst Bank Securities Litigation, Case No. 89-2614-HOEVELER (S.D. Fla.), an action in which partial settlements in excess of \$ 10 million have been achieved to date. The balance of the case is expected to go to trial in mid-1994. Mr. Pucillo was lead counsel in Charles v. Levy, Case No. 91-8177-CIV-GONZALEZ (S.D. Fla.), a class and derivative action brought on behalf of shareholders of a Real Estate Investment Trust traded on the New York Stock Exchange. The settlement of approximately \$ 2.5 million in this case resulted in class members receiving approximately 50% of their losses after deducting attorneys' fees.

Mr. [*64] Pucillo is also currently acting as co-lead counsel, with other firms, in In Re Southeast Bank Securities Litigation, Case No. 90-0760-CIV-ZLOCH (S.D. Fla.) (\$ 5 million settlement pending); Dycom Securities Litigation; Case No. 91-8395-CIV-GRAHAM (S.D. Fla.); In Re C&S/Sovran Securities Litigation, Case No. 1:91-CV-1354-JEC (N.D. Ga.); Tapken v. Brown, 1992 U.S. Dist. LEXIS 11744 (S.D. Fla.), a shareholder action arising out of the collapse of General Development Corporation; and in In Re Sheffield Industries Securities Litigation, Case No. 93-1068-CIV-MORENO (S.D. Fla.); and several other actions pending in the Southern and Middle Districts of Florida. Mr. Pucillo has also prosecuted Cameon v. Posner, Case No. 1:92 CV 1164 (N.D. Ohio), an action seeking equitable relief under federal regulations governing proxy solicitations, which was ultimately settled by a change in control of DWG Corporation.

Mr. Pucillo is a member of the Academy of Florida Trial Lawyers. He has lectured on Class Actions and on recent developments in Commercial and Business Tort Litigation for the Academy.

Mr. Pucillo was recently invited to become a member of the faculty of the College [*65] of Advanced Judicial Studies where he will teach "Managing the Complex Civil Case" to Florida judges.

WENDY H. ZOBERMAN is an associate in the Firm in its West Palm Beach, Florida office. She is admitted to practice before the United States District Court for the Middle and Southern Districts of Florida, as well as all Florida State Courts. Ms. Zoberman is a 1981 graduate of Wellesley College, where she was a Durant Scholar, and was

elected to the Phi Beta Kappa Society. She received her law degree from Columbia University in 1984. At Columbia she served as an Articles Editor of the Columbia University-Volunteer Lawyers for the Arts Journal of Art and the Law, and is a co-author of "An Introduction to the New York Artists' Authorship Rights Act," appearing at Vol. 8, No. 3 Columbia - VLA Journal of Art and the Law 369.

ANDREW H. KAYTON is an associate of the Firm in its West Palm Beach office. He is admitted to practice in the States of California and Florida, and for the United States Court of Appeals for the Ninth Circuit as well as the United States District Courts for the Central District of California, Southern District of Florida and Middle District of Florida. Mr. Kayton [***66**] received his bachelor's degree from Amherst College in 1983 and is a 1988 graduate of the Law School at the University of Chicago. From 1988 to 1989, he served as a law clerk to the Honorable Charles L. Levin of the Michigan Supreme Court.

CAROL MCLEAN BREWER is Of Counsel to Burt & Pucillo. She is a 1979 graduate of the University of Florida School of Law and a 1976 honors graduate of the University of Florida, College of Business Administration. Ms. Brewer has been active in commercial litigation in Palm Beach County since 1979 when she joined a major South Florida firm. She has also been active in various committees of the Florida Bar and currently serves as Secretary of the 2,200 - member Palm Beach County Bar Association. Ms. Brewer specializes in litigation in which state issues also underlie the federal securities law claim. She actively participated in discovery in C.V. Reit, Inc., et al., v. Irwin Levy, et al., Case No. 91-8177-CIV-GONZALEZ (S.D. Fla.) and also Dycom Securities Litigation, Case No. 91-8395-CIV-GRAHAM (S.D. Fla.)

Esperante Building

222 Lakeview Avenue

Suite 960

West Palm Beach, Florida 33401

Telephone: (407) 835-9400

Telecopier: (407) 835-0322

[***67**] and

339 West Lancaster Avenue

Post Office Box 135

Haverford, Pennsylvania 19041-0135

Telephone: (610) 658-0900

Telecopier: (610) 658-0770

CHIMICLES, BURT & JACOBSEN

Firm Biography

Chimicles, Burt & Jacobsen has offices in Haverford, PA, West Palm Beach, FL, Wilmington, DE and Los Angeles, CA. The Firm's practice is concentrated in the area of complex litigation, especially securities litigation. The Firm is also involved from time to time in significant consumer rights, antitrust and environmental matters. Chimicles, Burt & Jacobsen (formerly Chimicles, Burt, Jacobsen & McNew) was formed in June, 1993, upon the termination of Greenfield & Chimicles, with which the Firm's Partners had previously been affiliated. As a group, the Partners in Chimicles, Burt & Jacobsen have significant substantive experience in the prosecution of class action litigation in

general, and securities litigation in particular. The Firm is comprised of eleven Partners, three Of Counsel and twenty-nine Associates. The Firm also has a Financial Specialist on staff.

NICHOLAS E. CHIMICLES is a senior partner and Chairman of the Firm's Executive Committee. Mr. Chimicles is a 1970 graduate of the University [*68] of Pennsylvania, where he received a Bachelor of Arts Degree with Honors. Mr. Chimicles graduated in 1973 from the University of Virginia School of Law, where he was a member of the Editorial Board of the University of Virginia Law Review and was the author of several published comments. While attending law school, he co-authored a course and study guide entitled "Student's Course Outline on Securities Regulation," published by the University of Virginia School of Law. Upon graduation from law school, Mr. Chimicles joined a major Philadelphia law firm where he practiced for eight years and specialized in litigation including complex commercial, antitrust and securities fraud cases and served as principal or assistant trial counsel in United States v. Pfizer, Inc., (Antibiotics Antitrust Litigation), Civil Action No. 78-1155 (E.D. Pa.); Penn Galvanizing Co. v. Lukens Steel Co., Civil Action No. 71-1777 (E.D. Pa.); Wolgin v. State Mutual Investors, 265 Pa. Super. 525, 402 A.2d 669 (1979); Beta Consultants & Administrators v. Centennial Life Ins. Co., unreported opinion by Judge Newcomer (E.D. Pa. 1980); and R. & M. Musselman, Inc., et al. v. Line Lexington [*69] Lumber & Millwork, Inc., C.A. 727458-02-1 (Bucks Co. 1981).

Mr. Chimicles has actively prosecuted major complex litigation, antitrust and securities fraud suits. He is serving as a Lead Counsel in the Scott Paper Securities Litigation, Civil Action No. 906192 (E.D. Pa.) and the PNC Financial Securities Litigation, Civil Action No. 90-592 (W.D. Pa.). He has served as the Lead Counsel in the Storage Technology Corp. Securities Litigation, Master File No. 84-F-1981 (D. Colo.) (recovery of \$ 18 million in cash and stock); a Lead Counsel for the shareholder class in the Continental Illinois Securities Litigation, Civil Action No. 82 C 4712 (N.D. Ill.) (one aspect of which involved a twenty-week jury trial conducted by Mr. Chimicles that concluded in July, 1987; ultimate recovery of nearly \$ 40 million for the class); a Lead Counsel in In re: Fiddler's Woods Bondholders Litigation, Civil Action No. 83-2340 (E.D. Pa.), a bondholders' class action arising out of a default on a \$ 33 million industrial development bond issue (recovery of more than \$ 7 million for the class), and Lead Counsel in the Charter Securities Litigation, Civil Action No. 84-448 Civ-J-12 (M. [*70] D. Fla.) (recovery of \$ 7.75 million).

By virtue of the Fiddler's Woods litigation (in which Mr. Chimicles also represented the court-appointed Receiver), his representation of the Bondholders' Protection Committee for the Baptist Estates Life Care Facility (Doylestown, PA), a \$ 15 million tax-exempt bond issue which defaulted, and his representation of bondholders in other litigation pending in Atlanta, Orlando and New Jersey arising from defaulted bond issues aggregating over \$ 135 million, Mr. Chimicles has established a significant reputation for representing the interests of bondholders in default situations.

Mr. Chimicles has also represented stockholders in numerous suits brought in courts across the country arising from proposed mergers, acquisitions and hostile takeovers. For example, in Garlands, Inc. Profit Sharing Plan et al. v. The Pillsbury Company, a Delaware corporation, et al., State of Minnesota, County of Hennepin, Fourth Judicial District, Court File No. 88-17834, Mr. Chimicles was a lead counsel in a suit brought to compel Pillsbury's board of directors to negotiate in good faith with Grand Metropolitan and persuaded the court to enjoin a proposed spin-off [*71] of Burger King, a device sought to be used by Pillsbury's board to ward off Grand Metropolitan's takeover. In numerous other cases, Mr. Chimicles has represented shareholders in obtaining enhanced consideration for their stock in the context of a takeover or going private transaction. Randee L. Shantzer, et al. v. Charter Medical Corp., et al., Court of Chancery, State of Delaware, New Castle County, Consolidated Civil Action No. 9530. In Re Interstate Bakeries Corporation Shareholders Litigation, Court of Chancery, State of Delaware, New Castle County, Consolidated Civil Action No. 9263.

As an appellate advocate, Mr. Chimicles has handled cases which have protected the rights of victims of securities fraud in bankruptcy proceedings. In cases that he successfully argued before the Courts of Appeals for the Tenth and Eleventh Circuits, due process and notice principles were extended to protect securities purchasers filing claims in bankruptcy cases, In re Standard Metals Corp., 817 F.2d 625 (10th Cir.), rev'd in part on rehearing, 839 F.2d 1383 (1987), and it was established that class proofs of claim are allowable in bankruptcy proceedings, [*72] In re the Charter Company, 876 F.2d 866 (11th Cir. 1989).

Mr. Chimicles has also actively prosecuted suits involving public utilities constructing nuclear plants. He was Lead Counsel in the Philadelphia Electric Company Securities Litigation, Master File No. 85-1878 (E.D. Pa.) and a Lead Counsel in the Consumers Power Company Derivative Litigation, Master File No. 84-CV-3788 AA (E.D. Mich.). Mr. Chimicles was co-lead counsel in the stockholder derivative suit arising from mismanagement claims against former officers of Philadelphia Electric Company involved in the closing of the Peach Bottom Nuclear Plant, a suit which Mr. Chimicles was authorized to bring by a PECO board of directors resolution. In re Philadelphia Electric Company Derivative Litigation, Case No. 7090, Court of Common Pleas, Philadelphia County, PA. That case resulted in a recovery of \$ 35 million for the utility company in November 1990.

Mr. Chimicles was also a Co-Lead Counsel in a major environmental litigation, Ashland Oil Spill Litigation, Master File M-14670 (W.D. Pa.), involving the claims of residents and businesses for damage arising from the largest inland waterway oil spill [*73] in history that occurred on January 2, 1988 in Pittsburgh. In 1990, the case was settled upon creation of a claims fund of over \$30 million for the class. This and similar environmental suits in which the Firm is involved were the subject of a program, "Toxic Torts May Not Be Hazardous To Your Health: A Lawyer's Guide to Health Survival in Mass Tort Litigation," in which Mr. Chimicles was a principal speaker at this program which was held at the American Bar Association's 1989 Convention in Honolulu.

Mr. Chimicles has acted as Special Counsel for the City of Philadelphia and the Philadelphia Housing Authority in an action seeking to hold lead pigment manufacturers liable for federally mandated abatement of lead paint in properties owned, managed or operated by the plaintiffs. City of Philadelphia, et al. v. Lead Industries Ass'n, et al., Civil Action No. 90-7064 (E.D. Pa.), appeal pending, No. 92-1420 (3rd Cir.).

Mr. Chimicles is admitted to practice in the Supreme Court of the United States, numerous federal district and appellate courts, as well as the Supreme Court of Pennsylvania. He is a member of the American Bar Association (Sections of Litigation; Antitrust; and Corporation, [*74] Banking and Business Law), the Pennsylvania Bar Association, the Philadelphia Bar Association (Federal Courts Committee and various subcommittees). Mr. Chimicles has lectured frequently on securities law at the Rutgers University Law School - Camden, the Wharton School Graduate Division of the University of Pennsylvania, New York University, the University of Virginia, and for Prentice Hall Law and Business Publications. Mr. Chimicles has addressed several professional conferences, including the Pennsylvania Bond Counsel Association and the Pennsylvania Institute of Public Accounts, and has also frequently appeared as a speaker in several state and national bar association sponsored seminars on topics involving federal securities laws, RICO, class actions, hostile corporate takeovers, and professional ethics. Mr. Chimicles also is a contributor to and member of the advisory boards of various professional publications involving the securities law field. Mr. Chimicles is a member of the Board of Overseers of the School of Arts and Sciences of the University of Pennsylvania and was recently elected President-Elect of the National Association of Securities and Commercial Law Attorneys, [*75] a Washington, D.C. based organization comprising nearly 100 member law firms interested in a strong system of federal and state legal protection for investors and consumers.

C. OLIVER BURT, III, a partner, graduated from Swarthmore College in 1964 with a Bachelor of Arts Degree in History. In 1967 he graduated from the Law School of the University of Pennsylvania. Upon graduation from law school, he was an associate with a major Philadelphia law firm working primarily in the litigation department where he participated, among other things, in antitrust litigation. In May, 1971 he was appointed Assistant U.S. Attorney for the Eastern District of Pennsylvania. As an Assistant U.S. Attorney he tried a number of criminal cases, and participated in several major Grand Jury investigations including an investigation in 1971-72 involving the Health and Welfare Fund of the Carpenter's Union of Philadelphia and Vicinity which led to several indictments, including United States v. John McCrae, Criminal No. 71-684. McCrae was charged with embezzling funds from two employee benefit plans established by the Carpenter's Health and Welfare Fund. Mr. Burt tried the case in March of 1972 and obtained [*76] the conviction of Mr. McCrae. The Court's opinion denying post-trial motions is reported at 344 F. Supp. 942.

As an Assistant U.S. Attorney, Mr. Burt prosecuted white-collar criminal cases involving securities fraud, mail fraud, wire fraud, "check-kiting," embezzlement of bank funds, interstate transportation of stolen motor vehicles, income tax evasion and other offenses. Mr. Burt was appellate counsel in United States v. George Hykel, 461 F.2d 721 (3d

Cir. 1972), a criminal case involving misapplication of bank funds. In United States v. Bertram Lazar, Mr. Burt prosecuted and secured a guilty plea from a stockbroker for engaging in a "Ponzi Scheme" and selling unregistered securities. He also represented the Government in a number of civil matters, and in May, 1973 he was appointed Chief of the Civil Division of the United States Attorney's Office. Thereafter, in addition to serving as Chief of the Civil Division and trying civil cases, he conducted the Grand Jury investigation concerning the bankruptcy of the Penn Central Railroad, and tried other criminal and civil cases. In connection with the Penn Central Grand Jury proceedings he appeared in [*77] and participated in hearings in the Princely Provincial Court of Liechtenstein seeking to compel the production of records of secret Liechtenstein bank accounts. In January, 1977, he returned from private practice briefly as a Special Assistant U.S. Attorney to try United States v. Rosenbaum, 439 F. Supp. 176 (E.D. Pa. 1977), the criminal case arising out of the Penn Central Grand Jury investigation.

Previously, Mr. Burt was a partner in a Philadelphia law firm where he was primarily engaged in commercial litigation including antitrust, securities litigation, unfair competition, white collar criminal cases, and general business litigation. While with that firm, Mr. Burt tried, among other cases, Callan, et al. v. State Chemical Manufacturing Company, decision on pretrial motions reported at 584 F. Supp. 619 (E.D. Pa. 1984); a civil RICO case, The Mader Group, Inc. v. Gekoski, et al., 6 Phila. 556 (1981), involving unfair competition and violation of corporate fiduciary duties by former employees; General Business Services, Inc. v. Rouse, et al., 495 F. Supp. 526 (E.D. Pa. 1980), involving alleged trademark infringement, [*78] unfair competition and unlawful tying arrangements; Beta Consultants & Administrators v. Centennial Life Ins. Co., unreported opinion by Judge Newcomer (E.D. Pa. 1980), an alleged antitrust conspiracy case, United States v. Natale, et al., a criminal RICO and mail fraud case, opinion on post-trial motions reported at 494 F. Supp. 1114 (E.D. Pa. 1979), aff'd, 631 F.2d 726 (3d Cir. 1980); Commonwealth of Pennsylvania v. Richard Wolf, a white collar criminal case involving alleged corporate scheme to defraud city by tampering with pollution control devices, case resolved by plea agreement before trial after extended preliminary hearing, Pennsylvania Supreme Court opinion reported at 495 Pa. 211, 433 A.2d 18 (1981). He also participated as counsel for plaintiff in Levin v. Barish, et al., litigation arising out of a law firm dissolution, opinion by Supreme Court of Pennsylvania reported at 505 Pa. 514, 481 A.2d 1183 (Pa. 1984).

From 1972 through 1985, Mr. Burt was Chairman of the Criminal Law Committee of the Philadelphia Bar Association Young Lawyers' Section Basic Legal Practice Course. He authored course materials on federal [*79] criminal practice for that Course, and during the years 1972 through 1985 lectured on the subject of federal criminal practice as part of the Basic Legal Practice Course, sponsored by the Philadelphia Bar Association.

Since 1985, Mr. Burt has participated actively in securities and class action litigation. In August 1992 he was plaintiff's lead trial counsel in Upp v. Mellon, (E.D. Pa. C.A. No. 91-5219), a class action brought on behalf of trust beneficiaries in which the Court found in favor of the class and ordered Mellon to refund all "sweep fees" collected from the trust accounts of class members together with interest. (The total of all sweep fees collected from all accounts was approximately \$55 million.) The Court's opinion is reported at 799 F. Supp. 540 (1992). That opinion was later reversed by the Third Circuit Court of Appeals on the grounds that the trial court lacked subject matter jurisdiction. He also acted as trial co-counsel in Peil v. Speiser, Civil Action No. 82-1289 (E.D. Pa.), a "fraud on the market" case, which was tried in April, 1985. Mr. Burt was also appellate counsel in that case and presented oral argument in the case in the Court [*80] of Appeals for the Third Circuit. In its opinion in that case, the Court adopted "Fraud on the Market" as the law of the Circuit, reported as Peil v. Speiser, 806 F.2d 1154 (3d Cir. 1986). Mr. Burt was also plaintiff's lead trial counsel in Kumpis v. Wetterau, 586 F. Supp. 152 (E.D. Mo.), a securities fraud class action which was settled in the course of trial in December, 1985.

Mr. Burt was Lead Derivative Counsel in Pacific Gas & Electric Shareholder Derivative Litigation, Master File No. 893849, (Superior Court, San Francisco County, Cal.), a case which settled for \$ 21,000,000 in 1990; PSFS Securities Litigation, Civil Action No. 85-4978 (E.D. Pa.) and in First Peoples Bank Shareholder Litigation, Civil Action No. 83-2713 (D.N.J.). He was plaintiffs' Co-Lead Counsel in Duquesne Light Shareholder Litigation, Civil Action No. 86-1046 (W.D. Pa.). He is currently active in numerous cases in which the Firm is counsel including First American Bank and Trust Litigation, Civil Action No. 88-0638 (S.D. Fla.); and AmeriFirst Bank Litigation, Civil Action No. 89-2614 (S.D. Fla.), in which he and his partner, Michael J. Pucillo, serve [*81] as Lead Counsel; and Hoexter v. Simmons, CIV 89-1069-PHX-RCB (D. Ariz.), a securities fraud class action involving Valley National Bank.

Mr. Burt was principal plaintiffs' counsel in [Bell Atlantic v. Bolger, et al., 771 F. Supp. 686](#) (E.D. Pa.), a combined proxy fraud derivative case against the Bell Atlantic Board of Directors which was settled in June 1992. The settlement was approved in an opinion by the Third Circuit Court of Appeals issued on August 18, 1992. Mr. Burt was also one of plaintiffs' lead counsel in [U.S. West, Inc. v. MacAllister, 1992 U.S. Dist. LEXIS 22695](#) (D. Col.), a proxy fraud derivative case in the District of Colorado involving claims against the Board of Directors with respect to a \$10 million civil penalty imposed by the Department of Justice, and the company's disclosures to shareholders concerning that subject. Settlement of that case was approved by the District Court in Denver on December 18, 1992.

Mr. Burt is admitted to practice before the Supreme Court of the United States, the Supreme Court of Pennsylvania, the Third Circuit Court of Appeals, the Eighth Circuit Court of Appeals, the Ninth Circuit Court of Appeals, the District [*82] Court for the Eastern District of Pennsylvania, the District Court for the Northern District of New York, and the District Court for the District of Arizona.

KENNETH A. JACOBSEN, a partner, is admitted to practice before the Supreme Court of Pennsylvania, the United States Supreme Court, the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the Ninth Circuit, the United States Court of Appeals for the Eleventh Circuit, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the Northern District of California and the United States District Court for the District of New Jersey. Mr. Jacobsen is a 1979 cum laude graduate of the Villanova University School of Law, where he was the Managing Editor of the Villanova Law Review and was elected to the Order of the Coif. From 1979 to 1980, he served as the Law Clerk for a Judge of the United States District Court for the District of New Jersey. Following his clerkship, Mr. Jacobsen was an associate at a major Philadelphia law firm for three years, where he participated actively in the handling of complex commercial litigation matters, including [*83] claims arising out of the bankruptcy of O.P.M. Leasing Services, Inc. In the area of securities litigation, Mr. Jacobsen has played a leadership role in the prosecution of the Petro-Lewis Securities Litigation, Civil Action No. 84-C-326 (D. Colo.), in which a settlement valued in excess of \$ 137 million was recovered on behalf of shareholders and limited partners; in the Baldwin United SPDA Litigation, MDL No. 581 (S.D.N.Y.), in which a settlement of more than \$ 170 million in cash and other benefits was obtained on behalf of purchasers of annuities; and in several other substantial securities and consumer class actions and derivative litigation, including In re Coleco Securities Litigation, Master File No. 83 Civ. 9199 (LBS) (S.D.N.Y.) (Derivative Counsel--global settlement of \$ 16 million obtained on behalf of security holders and corporation); In re Petro-Lewis Broker-Dealer Litigation, Consolidated Civil Action File No. 1:85-cv-172-RLV (N.D. Ga.) (Lead Counsel--global settlement of \$ 17 million obtained from six broker-dealers on behalf of investors in oil and gas partnerships); In re Rohm & Haas Company Litigation, Master File 89-2724 (E.D. Pa.) (\$ 5 million [*84] settlement of consumer class action arising out of contaminated anti-cholesterol drug). Drawing on his extensive experience in bank litigation, Mr. Jacobsen recently served as Lead Counsel in a massive securities fraud case involving First RepublicBank, a Texas bank holding company, in which settlements totalling more than \$ 75 million were obtained on behalf of stock and bond purchasers, and was instrumental in negotiating multi-million dollar settlements in cases involving such other banks as Goldome, MCorp, Home Unity and Trustcorp. Mr. Jacobsen also has been responsible for establishing appellate precedents in the securities area, most notably [Hayes v. Gross, 982 F.2d 104 \(3d Cir. 1992\)](#); [Shapiro v. UJB Financial Corp., 964 F.2d 272 \(3d Cir.\)](#), cert. denied, 506 U.S. 934, 113 S. Ct. 365, 121 L. Ed. 2d 278 (1992); and [Kirkpatrick v. J. C. Bradford & Co., 827 F.2d 718 \(11th Cir. 1987\)](#), cert. denied, 485 U.S. 959 (1988).

MICHAEL J. PUCILLO, a partner resident in the Firm's West Palm Beach, Florida office, has been a member of the Florida Bar since 1978, and is admitted to practice before the United [*85] States Court of Appeals for the Fifth and Eleventh Circuits and the United States District Courts for the Southern and Middle Districts of Florida. Mr. Pucillo is a member of the Southern District of Florida Trial Bar. During 1989-1990, he served as President of the Gold Coast Chapter of the Federal Bar Association. He is a graduate of Williams College (1975), and Georgetown University Law School (1978). From 1978 to 1979, Mr. Pucillo served as Law Clerk to the Honorable Charles B. Fulton, United States District Judge for the Southern District of Florida. From 1979 to 1981, Mr. Pucillo served as Law Clerk to the Honorable William J. Campbell, Senior United States District Judge for the Northern District of Illinois. From 1983 to 1984, Mr. Pucillo was a Staff Attorney at the Division of Enforcement of the United States Securities and Exchange

Commission in Washington, D.C. Upon returning to Florida, he practiced Commercial Litigation with an emphasis on Securities, and from 1986 to 1990, was a partner in a major South Florida law firm.

Since 1989, Mr. Pucillo has been active in numerous class actions and shareholder derivative actions throughout Florida. Mr. Pucillo was lead derivative [*86] counsel in the FPL Group Shareholder Derivative Action, Case No. 91-3563-AC (15th Judicial Circuit), a case that settled for \$ 7,000,000 plus significant corporate governance changes. He currently serves as lead counsel (with Oliver Burt) in In Re Amerifirst Bank Securities Litigation, Case No. 89-2614-HOEVELER (S.D. Fla.); and in Charles v. Levy, Case No. 91-8177-CIV-GONZALEZ (S.D. Fla.), a class and derivative action brought on behalf of shareholders of a Real Estate Investment Trust traded on the New York Stock Exchange; and co-lead counsel in In Re Southeast Bank Securities Litigation, Case No. 90-0760-CIV-ZLOCH (S.D. Fla.); Dycom Securities Litigation; Case No. 91-8395-CIV-GRAHAM (S.D. Fla.); Tapken v. Brown, 1992 U.S. Dist. LEXIS 11744 (S.D. Fla.), a shareholder action arising out of the collapse of General Development Corporation; and in In Re Sheffield Industries Securities Litigation, Case No. 93-1068-CIV-MORENO (S.D. Fla.); and several other actions pending in the Southern and Middle Districts of Florida. Mr. Pucillo has also prosecuted Cameleon v. Posner, Case No. 1:92 CV 1164 (N.D. Ohio), an action seeking equitable relief under federal regulations [*87] governing proxy solicitations, which was ultimately settled by a change in control of DWG Corporation.

Mr. Pucillo is a member of the Academy of Florida Trial Lawyers. He has lectured on Class Actions and on recent developments in Commercial and Business Tort Litigation for the Academy.

PAMELA S. TIKELLIS, a partner and resident attorney in the Firm's Wilmington, Delaware office, is admitted to practice before all courts in the State of Delaware and the United States Court of Appeals for the Third Circuit. Ms. Tikellis is a graduate of the Delaware Law School of Widener University (1982) where she served as Managing Editor of The Delaware Journal of Corporate Law. She is also a graduate of Manhattanville College (B.A. - 1974), and the Graduate Faculty of the New School for Social Research (M.A. - 1976). From 1982 to 1983, Ms. Tikellis served as a law clerk in the Court of Chancery in Wilmington, Delaware. Upon completion of her clerkship, Ms. Tikellis has engaged in significant shareholder litigation practice.

KEVIN M. PRONGAY, a resident partner in the Firm's Los Angeles office is admitted to practice in the states of California (1979), New York (1975) and New Jersey (1973). [*88] Mr. Prongay is also admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Second, Third and Ninth Circuits and before the United States District Court for the Northern, Central and Southern Districts of California and the Southern and Eastern Districts of New York, as well as the District of New Jersey. Mr. Prongay is a member of the American Bar Association (Sections on Antitrust, Business Law, International Law and Practice and Litigation) and the California State Bar Association. Mr. Prongay is a 1970 graduate of Rutgers University, where he received an A.B. degree in Economics and a 1973 graduate of Seton Hall University School of Law. In addition, Mr. Prongay was awarded an LL.M. in Trade Regulation from New York University School of Law in 1974. From 1974 to 1976, Mr. Prongay served as counsel to a private civil rights organization, funded by the Ford Foundation, for which he prosecuted numerous class actions challenging institutional discrimination in the housing and real estate industries. From 1976 to 1979, Mr. Prongay served as litigation counsel to a major multi-national pharmaceutical company where he actively managed complex [*89] and protracted antitrust, commercial, product liability and intellectual property litigation. From 1979 to 1983, Mr. Prongay worked for an American subsidiary of a major European based electronics firm where he directed the company's international and domestic technology transfer program, and structured and negotiated licensing agreements, joint venture agreements and international capital formation agreements. From 1983 to 1984 Mr. Prongay served as a partner in a New York and New Jersey based law firm where he handled a variety of corporate and securities transactional matters and commercial litigation. In 1984, Mr. Prongay relocated to San Diego, California and joined a nationally prominent securities litigation firm where he handled a variety of security class actions and stockholder derivative suits on behalf of investors, participating in the prosecution of In Re Oak Industries Securities Litigation, Master File No. 83-0537 G(m) (S.D. Cal.) (Settled for \$ 33 million); In Re Cousins Securities Litigation, Master File no. 84-1821-D(IEG) (S.D. Cal.) (settled for \$ 13.5 million). Van de Walle v. Slutsky, Civil No. 82-5669 (AHS) (JRx) (C.D. Cal.) (settled for \$ 5.2 million). [*90] From 1988-1990, Mr. Prongay served as a Los Angeles resident partner of a New York based national law firm where he was

responsible for a variety of securities class actions, stockholder derivative suits, civil RICO, antitrust, copyright, trademark and unfair competition litigation.

Since October, 1990, Mr. Prongay has concentrated his practice in securities, derivative and environmental litigation. Mr. Prongay served as co-lead counsel in In Re De Laurentiis Securities and In Re De Laurentiis Film Partners Securities Litigation, Master File No. CV 88-01582 MRP (Bx) (C.D. Cal.) which resulted in recovery in excess of \$ 16.5 million for defrauded investors. He also served as lead counsel in In Re Union Exploration Partners Ltd., Case No. CV 90-3125 RSWL (Kx) consolidated with 90-5149 RSWL (Kx) and 91-0306 RSWL (Kx) (C.D. Cal) which resulted in a recovery of \$ 9 million on behalf of limited partners of Union Oil Co. whose interests were "rolled-up" by Unocal.

In Almeida v. Peat Marwick Mitchell & Company, et al., Consolidated Actions: No. 668436-9 and No. 668491-6 (Super. Ct. California, County of Alameda). Mr. Prongay was instrumental in developing theories of liability [*91] against Bank of the West ("BOW"), a wholly-owned subsidiary of Banc Nationale de Paris, in its acquisition of Central Banking Systems, Inc., which resulted in BOW's contribution in excess of \$ 6 million to settle claims of the class of Central Banking shareholders.

Mr. Prongay has been actively involved in prosecuting In re the Exxon Valdez, Civil Consol. No. A 89-095 (D. Alaska) and Exxon Valdez Oil Spill Litigation, Civil Consol. No. 3AN-89-2533 (Super. Ct. Alaska 3rd J.Dist.) since 1991, including coordination of depositions of the Exxon Board of Directors and Exxon's senior officers. He is also responsible for coordinating all expert discovery related to oiling of the Alaska shoreline and the persistence of such oiling.

Mr. Prongay is currently serving as co-lead counsel in In re ALZA Corp. Securities Litigation, Case No. C-93-20290 RMW(PVT) (N.D. Cal.). He is also serving as co-lead counsel in In re Sierra Semiconductor Corp. Securities Litigation, Master File No. C-93-20286 JW(PVT) (N.D. Cal.).

JAMES R. MALONE, JR., a partner, is admitted to practice before the Supreme Court of Pennsylvania, the Supreme Court of the United States, the United States Courts of [*92] Appeal for the Third, Ninth and D.C. Circuits and the United States District Courts for the Eastern District of Pennsylvania, the District of Arizona and the Northern District of California. Mr. Malone is a 1984 cum laude graduate of the Villanova University School of Law where he was a staff member on the Villanova Law Review and was elected to the Order of the Coif. Upon graduation from law school, Mr. Malone was associated with a major Philadelphia law firm where he specialized in bankruptcy and commercial litigation. Since January, 1987, Mr. Malone has been active in the prosecution of a number of class and derivative actions, and he has actively represented the interests of defrauded investors in bankruptcy proceedings.

MARTHA A. EVANS, a partner resident in the Firm's Los Angeles office, is admitted to practice before the Supreme Court of the United States, as well as in the States of California and Texas, Federal District Courts for the Southern District of California, Central District of California, Northern District of Texas, Southern District of Texas, Eastern District of Texas, and the United States Court of Appeals for the Fifth and Eleventh Circuits. Ms. Evans is [*93] a member of the California State Bar, Texas State Bar Association and the American Bar Association. Ms. Evans graduated from the University of Texas in 1973 with honors and from the University of Texas School of Law in 1977. Immediately after graduation from law school, Ms. Evans served as a law clerk to a federal district judge in Houston, Texas. Ms. Evans previously practiced commercial litigation in Houston and Dallas, Texas, and prosecuted securities fraud class actions and derivative suits while with a firm in San Diego, California.

Ms. Evans has particular experience in suing financial institutions, accountants and limited partnerships for securities fraud associated with a declining real estate market and/or a depressed oil and gas industry, e.g. In re First Republic Securities Litigation, Civil Action No. 3-88-0641-H (N.D. Tex.) involving First Republic Bank of Texas, and In re Sunderman Securities Litigation, Civil Action No. 3-87-0612-H (N.D. Tex.) and Odmark v. Mesa Limited Partnership, Civil Action No. 3-91-CV2376-G (N.D. Tex.). Ms. Evans also has experience with lender liability actions, e.g. Hunt, et al., v. Bankers Trust Company, et al., (N.D. Tex.), [*94] wherein the Hunt brothers sued their banks for, inter alia, breach of oral and written loan agreements. Ms. Evans co-authored the following paper with

Stephen D. Susman about lender liability cases: "Prosecuting the Common Law Lender Liability Case -- Evaluation of a Claim", Practicing Law Institute, 1989.

EUGENE MIKOLAJCZYK, a resident partner in the Firm's Los Angeles office, is admitted to practice in the Commonwealth of Pennsylvania (1978) and the State of California (1982). Mr. Mikolajczyk is also admitted to practice before the United States Court of Appeals to the Third and Ninth Circuits and before the United States District Courts in the Northern, Central and Southern Districts of California, as well as the State Bar of the State of California and Commonwealth of Pennsylvania. Mr. Mikolajczyk is a 1974 graduate of Elizabethtown College and in 1978 graduated the Dickinson School of Law where he was Managing Editor of the Dickinson Law Review. From 1978 through 1980 Mr. Mikolajczyk served as a Law Clerk to the Honorable Gwilym A. Price, Jr. of the Superior Court of Pennsylvania and from 1980 through 1983 was an associate member of the Pittsburgh, Pennsylvania law firm of [*95] Reed Smith Shaw & McClay. In 1983 Mr. Mikolajczyk located to San Diego, California where he served first as an associate and then a partner (1988 through 1992) of Milberg Weiss Bershad Specthrie & Lerach where he handled a variety of securities, class action and stockholder derivative suits on behalf of investors. Mr. Mikolajczyk participated in the prosecution of [In re Nucorp Energy Securities Litigation, 772 F.2d 1486 \(9th Cir. 1985\)](#) (settled for total recovery of \$ 55 million), [Heckmann v. Ahmanson, 168 Cal. App. 3d 119, 214 Cal. Rptr. 177 \(1985\)](#) (corporate greenmail actions settled for total class and derivative recovery of \$ 45 million after two weeks of trial) and [Ackerman v. Kassar](#), No. 91-1468 M (BTM) (S.D. Cal.) (corporate derivative action settled for total recovery of approximately \$ 45 million).

MICHAEL D. DONOVAN, a partner, is admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the Second, Eighth, Ninth and Tenth Circuits, the United States District Court for the Eastern District of Pennsylvania, the United States District Courts for the Southern and Eastern Districts of New York as [*96] well as the state courts of Pennsylvania and New York and the courts of Washington, D.C. He is a graduate of Vermont Law School (J.D. cum laude 1984) and Syracuse University (A.B. 1981). He was the Head Notes Editor and a staff member of the Vermont Law Review from 1982 through 1984. While on the Law Review, he authored Note, Zoning Variance Administration in Vermont, 8 Vt.L.Rev. 370 (1984). Following graduation from law school, Mr. Donovan was an attorney with the Securities and Exchange Commission in Washington, D.C., where he prosecuted numerous securities cases and enforcement matters, including injunctive and disciplinary actions against public companies, broker/dealers and accounting firms. Mr. Donovan has co-authored "The Overlooked Victims of the Thrift Crisis, "Miami Review, Feb. 13, 1990 and "Conspiracy of Silence: Why S&L Regulators Can't Always Be Trusted," Legal Times, Feb. 5, 1990.

Mr. Donovan has served as co-lead counsel in the following securities class actions: Lines v. Marble Financial Corp., Nos. 90-23 and 90-100 (D. Vt. 1991) (settled for \$ 2 million together with substantial changes to the company's loan loss reserve procedures); [*97] Jones v. Amdura Corp., No. 90-F-167 (D. Colo. 1991) (action against directors settled for \$ 4,962,500); In re Columbia (Del. Ch. 1991)(merger case settled for \$ 2 per share increase in amount paid to shareholders). In addition, Mr. Donovan has had a substantial role in the prosecution of the following cases, among others: In re Trustcorp Securities Litigation, No. 3:89-CV-7139 (N.D. Ohio 1990) (settled for \$ 5,600,000); [Moskowitz v. Lopp, 128 F.R.D. 624 \(E.D. Pa. 1989\)](#) (opinion certifying class of stock and option purchasers in fraud on the market and insider trading case); In re Hercules Corporation Securities Litigation, No. 90-442 (D. Del. 1992) (settled for \$ 17.25 million). In the area of consumer rights, Mr. Donovan has appeared on behalf of Bankcard Holders of America in numerous friend of the court briefs concerning federal preemption of state consumer protection statutes. He has also played an active role in several credit card class actions challenging the authority of out-of-state banks to impose default charges on residents of states where such charges are prohibited. In this regard, Mr. Donovan has appeared as a panel speaker at the Consumer [*98] Credit Regulation Forum of the New Jersey Bar Association. Mr. Donovan is a member of the American Bar Association (Litigation and Business Law Sections), the Pennsylvania Bar Association, the New York Bar Association, the District of Columbia Bar Association and the American Association of Individual Investors.

LISA J. RODRIGUEZ, a partner, is admitted to practice before the United States Court of Appeals for the Third Circuit, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the District of New Jersey, the Supreme Court of Pennsylvania and the Supreme Court of New Jersey. Ms.

Rodriguez is a graduate of The George Washington University Law School (1983, with honors). From 1983 to 1984 she served as a Law Clerk to the Honorable Mitchell H. Cohen, Senior Judge of the United States District Court for the District of New Jersey. Following her clerkship, Ms. Rodriguez was an associate at a New Jersey law firm where she was involved in a wide variety of litigation matters.

R. BRUCE McNEW, formerly a Partner and now Of Counsel to the Firm, is admitted to practice in the States of Delaware, Pennsylvania and California, the Federal [*99] District Courts for the District of Delaware, the Eastern District of Pennsylvania and the Northern and Central Districts of California, the United States Court of Appeals for the Third, Tenth and Eleventh Circuits and the Supreme Court of the United States. He is a member of the Delaware Bar Association, the Pennsylvania Bar Association, the California State Bar and the American Bar Association. Mr. McNew is a 1975 graduate of the University of Virginia where he received a Bachelor of Arts Degree with Distinction and a 1979 graduate of Marshall Wythe School of Law, the College of William and Mary, where he served as the Research Editor of the William and Mary Law Review. From 1979 to 1980 Mr. McNew served as law clerk to the Honorable John J. McNeilly, Justice of the Supreme Court of Delaware. For three years after serving as a clerk to the Delaware Supreme Court, Mr. McNew was an associate at a major Wilmington, Delaware law firm where his practice focused primarily on commercial litigation. Mr. McNew has been on the Editorial Boards of the M&A and Corporate Governance Law Reporter and the Corporate Counsel Law Reporter.

Mr. McNew has played a leadership role in numerous class actions [*100] on the west coast including acting as: a member of the Executive Committee for In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation, M.D.L. 834; lead counsel in In re American Medical International Shareholder Litigation, Consol. Action No. C718957 (LA County Super. Ct. Cent.Dist. Cal.); lead counsel in In re Cineplex Shareholders Litigation, Civil Action No. CV 89-2461 WJR (Tx) (C.D. Cal.); co-lead counsel in Ackerman, et. al. v. Kassar, et. al., Master File No. BC015018 (LA County Super. Ct. Cent.Dist. Cal.) involving Caroico Pictures; and co-lead counsel in Vogel, et al. v. First Interstate Bancorp, et al., Civil Action No. 91-3643 JGD(Tx) (C.D. Cal.).

Mr. McNew has represented classes of investors as both lead and co-lead counsel in the prosecution of major securities fraud and derivative litigation. Mr. McNew has prosecuted litigation on behalf of bondholders in various actions including: In re: Fiddler's Woods Bondholders Litigation, Civil Action No. 83-2340 (E.D. Pa.); Sheftelman v. NL Industries, Inc., et al., Civil Action No. 84-3199 (D. N.J.); Ockerman, et al. v. King & Spalding, et al., Civil Action No. 85-2958 (N. [*101] D. Ga.); Sheftelman v. Jones, et al., Civil Action 84-472A (N.D. Ga.); and Anderson v. Bank South, Civil Action No. 84-1562 (M.D. Fla.). Mr. McNew has represented classes of equity security holders in various actions including: In re: Winchell's Donuts Securities Litigation, Civil Action No. 9478 (Del. Ch.); In re: AFG Securities Litigation, Civil Action No. 9688 (Del. Ch.); and In re Ivan F. Boesky Securities Litigation, M.D.L. 732. In addition, he has been involved in the prosecution of cases pertaining to defense contractor fraud such as: Liebman, et. al. v. Zable, et. al., Civil Action No. 88- 1195B(M) (S.D. Cal.) involving Cubic Corp.; Wildflower Partnership, et. al. v. Hoch, et al., Civil Action No. 89-1967 RG(Sx) (C.D. Cal.) involving Litton Industries, Inc., In re Lockheed Securities Corporation Litigation, Master File No. CV-89-6745 TJH (C.D. Cal.); and Citron, et. al. v. Beall, et. al., Civil Action No. C728809 (LA County Super. Ct. Cent.Dist. Cal.) involving Rockwell International Corporation.

Mr. McNew also has experience in cases involving financial institutions such as: Almeida, et. al. v. Peat, Marwick, Mitchell & Company, et al., [*102] Action No. 668436-9 (Alameda County Super. Ct. Oakland Branch) involving Central Banking System; Koehler, et. al. v. Martin, et. al., Action No. BC025112 (LA County Super. Ct. Cent.Dist. Cal.) involving Coast Savings Financial, Inc.; and Goldman, et. al. v. Belzberg, et. al., Civil Action No. C754698 (LA County Super. Ct. Cent.Dist. Cal.) involving Farwest Financial Corp. Mr. McNew's environmental and consumer experience includes: McAleer, et. al. v. Prodigy Services Company, et. al., Master File No. 91-1517 KN (GHKx) (C.D. Cal.); In re Hanford Nuclear Reservation Litigation, Master File No. CY-91-3015 AAM (E.D. Wash.); Medley, et. al. v. Southern Pacific Trans. Company, et. al., Civil Action No. CV-S 91-1073 WES-JMF (E.D. Cal.) and In re Sacramento River Spill Cases I and II, J.C.C.P. Nos. 2617 and 2620 (Sac. County Super. Ct. Cal.); Nguyen v. FundAmerica, Inc., a California Corp., C90-2090 MHP (N.D. Cal.); and In re the Exxon Valdez, Civil Consol. No. A 89-095 (D. Alaska) and Exxon Valdez Oil Spill Litigation, Civil Consol. No. 3AN-89-2533 (Super. Ct. Alaska 3rd J.Dist.)

MORRIS M. SHUSTER, Of Counsel, is admitted to practice before the United [*103] States Supreme Court, United States Court of Appeals for the Third Circuit, the United States District Court for the Eastern District of Pennsylvania, the Supreme Court of Pennsylvania, and all other Pennsylvania Appellate and trial courts.

Mr. Shuster is a graduate of the Wharton School, University of Pennsylvania (B.S. in Economics, 1951), and of the University of Pennsylvania Law School (J.D., 1954).

Prior to joining the Firm, Mr. Shuster was an active civil litigator as an associate and partner in a major Philadelphia litigation firm, as a named-partner in his own firm, and as special litigation counsel to a large Philadelphia, full-service firm. Over the last 20 years, he has concentrated his practice in consumer class actions against banks and insurance companies. He has been successful in obtaining multi-million dollar recoveries in these cases:

Mr. Shuster is currently a faculty member at the University of Pennsylvania Law School where he teaches Trial Advocacy. In 1981, he was a full-time faculty member at the University of Pennsylvania Law School and taught a course in The Lawyering Process. He also has been a guest lecturer on various legal subjects at the University [*104] of Pennsylvania Law School, Medical School, and Dental School, and at Drexel University. He is a member of the Advisory Committee for the Public Service Program at the University of Pennsylvania Law School where he developed the mentor/student pro bono project.

Mr. Shuster is a past president of The Philadelphia Trial Lawyers' Association. He was appointed by the Third Circuit Court of Appeals as Chairperson of the Bankruptcy Judge Search Committee. He was appointed by the District Court for the Eastern District of Pennsylvania as Chairperson of a Panel to consider reappointment of a U.S. Magistrate.

In the Philadelphia Bar Association, Mr. Shuster has served as a member of the Board of Governors, Chairperson of the Judicial Commission, Committee on Judicial Selection and Reform, Committee on Civil Legislation/Legislative Liaison, and Committee on Civil Judicial Procedure (state courts). He is listed in Who's Who in American Law.

BRENDA M. NELSON, Of Counsel, is admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Third and Eleventh Circuits, the United States District Court for the Eastern District of Pennsylvania and the Supreme [*105] Court of Pennsylvania. Ms. Nelson is a graduate of Oglethorpe University (B.B.A. with a major in accounting, 1980, summa cum laude) and of Harvard Law School (J.D., 1983). Upon graduation, she was an associate at a major Philadelphia law firm for two years, where she participated actively in a broad variety of litigation matters. Ms. Nelson has played a lead role in the prosecution of a number of securities class actions and shareholder derivative suits, including Bally Shareholder Litigation, Master File No. 87-0373 (JFG) (D.N.J.); CBS v. Paley, 86 CIV 9140 (JMC) (S.D.N.Y.); and Booth v. Connelly Containers, Inc., No. 89-8280 (E.D. Pa.). Ms. Nelson was also a featured speaker on RICO and securities fraud cases at the 1990 Civil RICO Seminar sponsored by the Pennsylvania Bar Institute.

MICHAEL J. BONI is admitted to practice before the United States Court of Appeals for the Third Circuit, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the Northern District of California and all Pennsylvania state courts. Mr. Boni received his B.A. in 1977 from Albright College, his M.A. (psychology) in 1980 from the University [*106] of Connecticut, and his J.D. in 1988 from the University of Pennsylvania Law School. Mr. Boni previously practiced with a major Philadelphia law firm concentrating in labor and employment litigation.

CYNTHIA A. CALDER is an associate in the Firm's Wilmington, Delaware office. She is admitted to practice before the Supreme Court of Delaware, the United States District Court for the District of Delaware, and the Supreme Court of Pennsylvania. She graduated from the University of Delaware in 1987 with a Bachelor of Arts degree cum laude in International Relations and Russian. In 1991, she received her Juris Doctor degree from the Villanova University School of Law, where she was a Founding Member and Managing Editor of the Villanova Environmental Law Journal. From 1991 to 1992, she served as a judicial law clerk to the Honorable Maurice A. Hartnett, III, Vice Chancellor of the Delaware Court of Chancery.

LISA CHANOW DYKSTRA is admitted to practice before the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the District of New Jersey, the Supreme Court of Pennsylvania, and the Supreme Court of New Jersey. She is a 1992 cum [*107] laude graduate of the Villanova University School of Law where she served as Managing Editor of Student Work on the Villanova Law Review. She is a 1989 cum laude graduate of New York University, where she received a B.A. in Russian language and political science.

FRANCIS J. FARINA is admitted to practice in the States of New York and Pennsylvania. He is a graduate of Georgetown University Law Center (J.D., 1983), The George Washington University (M.B.A., 1975), and Suffolk University (B.S., 1973). Mr. Farina held positions as Deputy Auditor for Goldome Federal Savings Bank and Director, Internal Audit for Georgetown University and Medical Center. From 1975 to 1978, Mr. Farina was a Senior Auditor for a Big Eight accounting firm in Washington, D.C. He is licensed as a Certified Public Accountant in Virginia, New York and Pennsylvania and, in addition, is a Chartered Bank Auditor. Mr. Farina has served on the Editorial Advisory Board of the Journal of Accountancy and the Editorial Board of the Pennsylvania CPA Journal. He has served on numerous committees of state and national professional accounting organizations and been a frequent lecturer on accounting and audit matters. [*108] Mr. Farina has also been a member of the business school faculties at George Washington University and Georgetown University, teaching numerous courses at both undergraduate and graduate levels.

BARBARA M. FRIEND is admitted to practice before the Bar of the State of New York. She is a graduate of Brooklyn Law School (J.D., 1975) and Georgetown University (B.S. in Japanese, 1970). Before becoming associated with the Firm, Ms. Friend worked on a broad variety of legal matters, including acting as counsel to the Lake Placid Olympic Organizing Committee in 1979-80 and Director of the U.S. Bobsled & Skelton Federation, 1984-85. She continues to be very active, as both an interpreter and legal advisor, in United States Olympic activities; State Committee Person, New York State Republican Committee; past Chairperson, Saranac Lake Republican Committee. Since she joined the Firm, Ms. Friend has worked on a number of securities class actions.

J. PAUL GIGNAC is an associate in the Firm's Los Angeles office. Mr. Gignac is admitted to practice in the State of California and before the United States Court of Appeals for the Ninth Circuit as well as the United States District Courts for the Northern, [*109] Central and Southern Districts of California. Mr. Gignac is a 1983 cum laude graduate of Dartmouth College where he majored in government and a 1986 graduate of the UCLA School of Law. While at UCLA, Mr. Gignac served as a judicial extern to the Honorable A. Wallace Tashima, United States District Court Judge for the Central District of California.

Following graduation, Mr. Gignac was an associate with a major Los Angeles law firm. As an associate there, Mr. Gignac was certified as a trial attorney project ("tap") attorney by the Los Angeles County Bar and prosecuted three felony trials as a deputy district attorney in Los Angeles Superior Court. Mr. Gignac is a member of the Los Angeles County Bar Association and the State Bar of California.

MICHAEL D. GOTTSCH is admitted to practice before the Supreme Courts of Pennsylvania and New Jersey, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit. He is a graduate of Temple University School of Law (J.D. 1983) and Marquette University (B.S. 1977). From 1986 to 1987 he served as a Law [*110] Clerk to the Honorable Joseph H. Rodriguez, Judge of the United States District Court for the District of New Jersey.

PATRICK J. GRANNAN is an associate in the Firm's Los Angeles office. Mr. Grannan is admitted to practice in the State of California and before the United States Court of Appeals for the Ninth Circuit and the United States District Courts for the Central, Northern and Southern Districts of California and the District of Arizona. Mr. Grannan is a 1981 graduate of Haverford College where, as a Magill-Rhoads Scholar, he majored in psychology. Mr. Grannan is a 1984 magna cum laude graduate of New York Law School, where he was a John Ben Snow Scholar and served as an Articles Editor of the New York Law School Law Review. Mr. Grannan is the author of "California ex rel. State Lands Commission v. United States - Riparian Rights - Competing State and Federal Claims to Coastal Accretions" appearing at 29 N.Y.L. Sch. L. Rev. 491. Prior to joining the Firm, Mr. Grannan was employed by a Los Angeles firm practicing in the area of civil RICO and securities fraud litigation. While at his prior firm, Mr. Grannan was

counsel for petitioner in a successful petition [*111] for extraordinary writ clarifying the law in the State of California relating to the use of evidence related to one party consensual tape recordings in civil trials. *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 250 Cal. Rptr. 819 (1988). Since 1989, Mr. Grannan has been actively involved in the prosecution of a number of class and derivative actions on behalf of investors and consumers, including acting as a member of the plaintiff trial team in In re American Continental Corporation/Lincoln Savings and Loan Securities Litigation, MDL 834, which resulted in a substantial verdict for plaintiffs and *Almeida v. Peat Marwick*, No. 668436-9, a class action pending in the Superior Court of Alameda, State of California, which resulted in an \$ 8 million settlement with Peat Marwick believed to be among the first post-Bily settlements of a California state law claim with a major accounting firm.

TRUDY D. JOHNSON is an associate in the Firm's Los Angeles office, and is admitted to practice before all California State Courts and the United States District Courts for the Central, Northern and Southern Districts of California. Ms. Johnson is a 1986 graduate of Buena [*112] Vista College, Storm Lake, Iowa, where she majored in Business Management and graduated summa cum laude. Ms. Johnson received her law degree from the University of Iowa College of Law, where she was elected to the Order of the Coif. Prior to joining the Firm, Ms. Johnson practiced with a major Los Angeles firm in the areas of Environmental and General Commercial Litigation. Ms. Johnson is a member of the American Bar Association, the Los Angeles County Bar Association and the State Bar of California.

ANDREW H. KAYTON, is an associate in the Firm's West Palm Beach office. He is admitted to practice in the States of California and Florida, and for the United States Court of Appeals for the Ninth Circuit as well as the United States District Courts for the Central District of California, Southern District of Florida and Middle District of Florida. Mr. Kayton received his bachelor's degree from Amherst College in 1983 and is a 1988 graduate of the Law School at the University of Chicago. From 1988 to 1989, he served as a law clerk to the Honorable Charles L. Levin of the Michigan Supreme Court. Prior to joining the Firm, Mr. Kayton was an associate at a downtown Los Angeles law firm, [*113] where he worked on a wide range of civil litigation matters, including securities fraud, civil RICO, construction, employment and general corporate litigation.

ROBERT J. KRINER, JR. is an associate in the Firm's Wilmington, Delaware office. He is admitted to practice before the Supreme Court of Delaware and the United States District Court for the District of Delaware. Mr. Kriner is a 1983 graduate of the University of Delaware with a degree in chemistry, and a 1988 graduate of the Delaware Law School of Widner University, where he was managing editor of The Delaware Journal of Corporate Law. From 1988 to 1989, Mr. Kriner served as law clerk to the Honorable James L. Latchum, Senior Judge of the United States District Court for the District of Delaware. Following his clerkship and until joining the Firm, Mr. Kriner was an associate with a major Wilmington, Delaware law firm, practicing in the areas of corporate and general litigation.

FREDRIC I. LAZARUS is admitted to practice in the States of Pennsylvania and New Jersey, and before the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the District of Columbia Circuit and the United [*114] States District Court for the Eastern District of Pennsylvania. He is a graduate of the University of Pennsylvania Law School (J.D. cum laude 1990) and Drexel University (B.S. 1987) (electrical engineering). Mr. Lazarus is a member of Tau Beta Pi (the National Engineering Honor Society) as well as several local, state and national bar associations. Prior to joining the Firm, Mr. Lazarus practiced with a major Philadelphia law firm concentrating in the areas of creditors' rights litigation and real estate law.

JORDAN L. LURIE received his law degree in 1987 from the University of Southern California Law Center where he was Notes Editor of the University of Southern California Law Review. He received his undergraduate degree from Yale University in 1984 (Cum Laude). Prior to joining the Firm, Mr. Lurie practiced with a major Los Angeles law firm and specialized in complex litigation. Mr. Lurie is the author of "Rx for Pharmacy Malpractice: California's New Duty to Consult," CEB Civil Litigation Reporter, December 1991; co-author of "Chapter 54 - Consent Judgment" and "Chapter 55 - Submitted Case" Civil Procedure Before Trial (1990) published by California Continuing [*115] Education of the Bar; and co-author of "Postponing a Municipal Court Election: The November Election Provision of Government Code Section 71180(b)," California Courts Commentary, November 1989. Mr. Lurie is a member of the Los Angeles County Bar Association, the American Bar Association and the State Bar of California and is admitted to practice before all California state courts and the United States District Court for the Central District of California.

CAROLYN D. MACK, an associate in the Firm's Wilmington, Delaware office, is admitted to practice before all of the courts located in the State of Delaware and before the United States Court of Appeals for the Third Circuit. She was graduated from the University of Maryland in College Park, Maryland in 1981, where she received a Bachelor of Arts degree cum laude in Government and Politics and was elected to the Phi Kappa Phi and Phi Beta Kappa national honor societies. In 1984, Ms. Mack was graduated from the National Law Center of George Washington University and received her Juris Doctor degree with honors. From 1984 to 1985, Ms. Mack served as judicial law clerk to Vice Chancellor Maurice A. Hartnett, III of the Delaware [*116] Court of Chancery. Since completion of her clerkship, she has engaged in significant shareholder litigation practice.

MARY KATHERINE MEERMANS graduated cum laude from the Law School of University of Pennsylvania in 1982. She served as a law clerk to the Honorable Paul M. Chalfin, Philadelphia Court of Common Pleas, from September 1982 to January 1984, and to the Honorable Phyllis W. Beck from January 1984 to October 1984. She is a member of the Pennsylvania Bar.

KATHLEEN E. MORAN is an associate in the Firm's Los Angeles office. She is admitted to practice before all California state courts and the United States District Court for the Central District of California. Ms. Moran is a 1983 graduate of the University of Southern California, where she majored in Business Administration and graduated magna cum laude. Prior to attending law school, Ms. Moran worked as a Senior Auditor at a Big Eight accounting firm in Los Angeles, California and is licensed as a Certified Public Accountant in California. In 1990, Ms. Moran received her law degree from the University of California at Davis, where she was elected to the Order of the Coif and served as the Business Editor of the U. [*117] C. Davis Law Review. Prior to joining the Firm, Ms. Moran practiced with a major Los Angeles law firm where she worked on venture capital and securities transactions as well as bankruptcy matters. Ms. Moran is a member of the State Bar of California.

DEBRA N. NATHANSON is admitted to practice in the States of Pennsylvania and Georgia. She is a 1988 graduate of the University of Pennsylvania School of Law and received a Bachelor of Arts Degree from Bryn Mawr College in 1984. Ms. Nathanson was previously associated with the Atlanta office of a major Chicago law firm where she handled bankruptcy and commercial litigation matters.

TINA BAILER NIEVES is an associate in the Firm's Los Angeles office. Ms. Nieves is admitted to practice in the State of California and before the United States Court of Appeals for the Ninth Circuit as well as the United States District Court for the Central District of California. Ms. Nieves is a 1983 graduate of the University of California Berkeley, where she majored in Rhetoric. Ms. Nieves is a 1987 graduate of the University of California, Davis School of Law. While at U.C. Davis, Ms. Nieves participated in the trial practice program and was an active member [*118] in Law Students for the Arts. Prior to joining the Firm, Ms. Nieves was an associate with a major Los Angeles law firm, where she practiced in the areas of Civil RICO, Maritime, Insurance Coverage, and Contract Litigation.

MELANIE PIECH, an associate with the Firm's Los Angeles Office, is admitted to practice before all California State Courts, the United States Court of Appeals for the Ninth Circuit, and United States District Court for the Northern and Central Districts of California. Ms. Piech was graduated magna cum laude with a Bachelor of Arts Degree in Political Science from Loyola Marymount of Los Angeles in 1986. She received her law degree from Hastings College of the Law in San Francisco in 1989, having attended Vermont Law School for one semester. Prior to joining the Firm, she practiced with a major Los Angeles firm in the areas of Maritime, Employment and Insurance Litigation. Ms. Piech is a member of the American Bar Association and the State Bar of California.

ROBIN RESNICK is admitted to practice before the Supreme Court of Pennsylvania. Ms. Resnick is a 1986 cum laude graduate of the Law School of the University of Pennsylvania where she was elected to the [*119] Order of the Coif and a 1983 summa cum laude graduate of the College of Arts and Sciences of the University of Pennsylvania. She served as a law clerk to the Honorable Frank A. Kaufman, Senior Judge of the United States District Court for the District of Maryland. Ms. Resnick is also affiliated with the Disabilities Law Project, a non-profit law firm in Philadelphia.

CHRISTOPHER T. REYNA graduated from the Law School of the University of Pennsylvania in June, 1986. Mr. Reyna received his Bachelor's Degree from Harvard University in 1983. He is admitted to practice before the Supreme Court of Pennsylvania, the United States Courts of Appeals for the Third and Ninth Circuits and the Eastern District of Pennsylvania.

IRA NEIL RICHARDS is admitted to practice in the States of New York and Pennsylvania and in the United States District Courts for the Eastern District of Pennsylvania and the Southern District of New York, as well as the United States Court of Appeals for the Third Circuit. He is a graduate of the University of Pennsylvania School of Law (J.D. magna cum laude, 1986) where he served as special Project Director of the University of Pennsylvania Law Review. He was [*120] elected to the Order of the Coif and received the Philadelphia Trial Lawyers Association Award and the Wapner, Newman & Associates Award, both for trial advocacy. He is a 1983 graduate of Cornell University, where he received a B.S. in industrial and labor relations. Mr. Richards previously practiced with a major Philadelphia law firm concentrating in complex civil litigation.

STEVEN A. SCHWARTZ is admitted to practice before the Supreme Court of Pennsylvania, the United States District Court for the Eastern District of Pennsylvania, and the United States Court of Appeals for the Third Circuit. He is a graduate of the Duke University School of Law (J.D. 1987) where he served as senior editor of Law & Contemporary Problems. He is a 1984 cum laude graduate of the University of Pennsylvania, where he received a B.A. in political science. Mr. Schwartz previously practiced with a major Philadelphia firm concentrating in complex civil litigation.

DENISE DAVIS SCHWARTZMAN is admitted to practice in Pennsylvania, Florida, Texas and the District of Columbia. She is admitted to practice before all the State Courts in these jurisdictions and is admitted to the United States Courts of Appeals [*121] for the Third, Fifth, Eleventh and District of Columbia Circuits as well as United States District Courts within each Circuit. Ms. Schwartzman is a graduate of the Law School of the University of Pennsylvania (L.L.B. 1969) and Temple University (A.B. 1966). She holds a Master of Laws in Taxation from the Villanova University Law School. Ms. Schwartzman has practiced extensively at the trial and appellate levels before Federal and State Courts and before various administrative agencies. Ms. Schwartzman was appellate counsel on the brief in [In re Charter Company, 876 F.2d 866 \(11th Cir. 1989\)](#), a case which established that class proofs of claim are allowable in bankruptcy proceedings. Prior to relocating in Philadelphia, she was associated with a major law firm in San Antonio, Texas.

JONATHAN SHUB is admitted to practice in Pennsylvania and in the District of Columbia. He is a 1983 graduate of The American University with a degree in public communications, and a 1988 graduate of the Delaware Law School of Widener University (cum laude), where he was an articles editor of [The Delaware Journal of Corporate Law](#). Mr. Shub served as a law clerk to the Honorable Joseph [*122] T. Walsh of the Supreme Court of Delaware while a student at Widener University. Mr. Shub previously practiced in the Washington, D.C. office of a major New York law firm concentrating in civil litigation.

JEFFREY T. SPANGLER is admitted to practice before the Supreme Court of Pennsylvania, the United States District Courts for the Middle and Eastern Districts of Pennsylvania and the Third Circuit Court of Appeals. Mr. Spangler is a 1973 graduate of Lehigh University (B.A. in Biology) and a 1978 graduate of The Dickinson School of Law. Mr. Spangler has served as a Prosecuting Attorney for Pennsylvania's Medical Board and as a law clerk for The Honorable William W. Lipsitt of the Dauphin County Court of Common Pleas in Harrisburg. He is a member of the Philadelphia Bar Association.

J. DAVID STONER is admitted to practice before the United States Court of Appeals for the Third Circuit, the United States District Courts for the Eastern District of Pennsylvania and the District of New Jersey. He is also admitted to practice in the state courts of Pennsylvania, New York, New Jersey and Indiana. Mr. Stoner is a graduate of Harvard College (A.B. 1951, cum laude) and of Harvard Law School [*123] (J.D. 1955, cum laude), where he was a member of the Board of Student Advisers and an oralist on the moot court team that won the Harvard Moot Court Competition. After three years as an associate at a major Philadelphia law firm and three years teaching at Rutgers Law School, Camden, New Jersey, he worked in the Legal Adviser's Office in the United States Department of State, first serving the Bureau of Economic Affairs and then as Assistant Legal Adviser for

Administration. He has also worked as an attorney in the Philadelphia poverty law program and in the legal departments of the Federal Reserve Bank of Philadelphia, a Philadelphia bank holding company, the Bell Telephone Company of Pennsylvania and AT&T. While at AT&T he participated in the antitrust defense of AT&T in United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983) (settled after trial); Southern Pacific Communications Company v. AT&T, 556 F. Supp. 825 (D.D.C. 1982) (as amended Jan. 10, 1983), aff'd, 238 U.S. App. D.C. 309, 740 F.2d 980 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005, 84 L. Ed. 2d 380, 105 S. Ct. 1359 (1985); [*124] and 567 F. Supp. 326 (D.D.C. 1983), aff'd, , 238 U.S. App. D.C. 340, 740 F.2d 1011 (D.C. Cir. 1984); and in the multidistrict In re Long Distance Telephone Service Antitrust Litigation, MDL No. 550 S.W. (N.D. Cal.).

JAMES C. STRUM, an associate in the Firm's Wilmington, Delaware office, is admitted to practice before the Supreme Court of Delaware, the United States District Court for the District of Delaware, and the Third Circuit Court of Appeals. Mr. Strum is a 1982 graduate of Brown University and a 1986 graduate of Marshall-Wythe School of Law, the College of William and Mary. Mr. Strum practiced for four years in a major Wilmington, Delaware law firm in the area of corporate litigation, primarily in mergers and acquisitions.

WENDY H. ZOBERMAN is an associate in the Firm's West Palm Beach, Florida office. She is admitted to practice before the United States District Court for the Middle and Southern Districts of Florida, as well as all Florida State Courts. Ms. Zoberman is a 1981 graduate of Wellesley College, where she was a Durant Scholar, and was elected to the Phi Beta Kappa Society. She received her law degree from Columbia University in 1984. At Columbia she served [*125] as an Articles Editor of the Columbia University-Volunteer Lawyers for the Arts Journal of Art and the Law, and is a co-author of "An Introduction to the New York Artists' Authorship Rights Act," appearing at Vol. 8, No. 3 Columbia - VLA Journal of Art and the Law 369.

KATHLEEN P. BALON, ASA, the Firm's Financial Specialist, is a graduate of Drexel University (B.S. Finance 1983) and Villanova University (Master of Taxation 1992). Ms. Balon is a Senior Member of the American Society of Appraisers. Prior to joining the Firm, Ms. Balon was a Vice President of the investment bank, Howard, Lawson & Co., where she had responsibility for a broad range of corporate finance assignments. Ms. Balon has co-authored several articles, including "Giving the Company Away (While Keeping the Benefits)," Lawyer's Digest, March 1987 and "Leveraged ESOPs - Buyers of Companies," Lawyer's Digest, May 1988. Ms. Balon has also served as a panelist at various seminars and conventions regarding financing and valuation issues.

GREENFIELD & CHIMICLES

Firm Biography

Greenfield & Chimicles, with offices in Haverford, PA, West Palm Beach, FL, Wilmington, DE and Los Angeles, CA, specializes in [*126] complex litigation and, particularly, in securities litigation. Other substantive areas of significant litigation are consumer rights, antitrust and environmental matters. As a direct result of the Firm's efforts, many millions of dollars have been recovered for defrauded shareholders and other persons injured by illegal corporate activities. The Firm has also been responsible for obtaining a number of particularly noteworthy judicial opinions which have not only strengthened shareholder rights generally, but substantially aided in the prosecution of complex litigation to preserve such rights. In addition, the Firm has represented litigants in various pro bono suits, including Title VII litigation and prisoners' rights cases. The Firm is an active supporter of The Public Interest Law Center of Philadelphia of which Mr. Greenfield was a Director for a number of years.

Greenfield & Chimicles is currently Lead Counsel or Co-Lead Counsel for plaintiffs in major securities, derivative, and class action suits pending in, inter alia, the United States District Courts for the Southern and Eastern Districts of New York, the Eastern and Western Districts of Pennsylvania, the Northern [*127] District of Illinois, the Northern District of Ohio, the District of New Jersey, the Central District of California, the District of Delaware, the Southern District of Florida, the Court of Chancery of the State of Delaware, and elsewhere. The Firm is rated "AV" by Martindale-Hubbell.

RICHARD D. GREENFIELD is a senior partner and a member of the Firm's Executive Committee. He is admitted to practice before the Supreme Court of the United States, the Courts of Appeals for the Second, Third, Fifth, Ninth and Eleventh Circuits, various federal district courts as well as the Courts of the Commonwealth of Pennsylvania and the State of New York. Mr. Greenfield is a 1965 graduate of The Cornell Law School. In addition, he has earned degrees in Accounting (B.S. Queens College) and Business Administration (M.B.A. Columbia University Graduate School of Business).

Mr. Greenfield is thoroughly experienced in securities and consumer litigation, having served as Lead or Co-Lead Counsel for plaintiffs in shareholder class and derivative actions alleging violations of the federal securities laws such as In re First Pennsylvania Securities Litigation, Master File No. 80-1643 (E.D. Pa.), in which [*128] a \$ 12 million settlement was approved, and Cohen v. Uniroyal, Inc., 77 F.R.D. 685 (E.D. Pa. 1977) (certifying class actions) and 80 F.R.D. 480 (E.D. Pa. 1978) (overruling defendants' objections to discovery). Mr. Greenfield was Lead Counsel in In re Caesars World Shareholder Litigation, M.D.L., Civil Action No. 81-3442 (D.N.J.), in which more than \$ 7 million and other benefits were recovered derivatively for the company and in Wolfson v. Riley, Civil Action No. 79-642 (N.D. Ohio) where \$ 3.2 million was recovered in a class action on behalf of certain purchasers of the common stock of Firestone Tire and Rubber Co. More recently, Mr. Greenfield has been Lead Counsel in In re First Peoples Bank Share-holder Litigation, Civil Action No. 83-2713 (SSB) in the District of New Jersey, where a settlement of over \$ 6 million was approved, in the Crocker Bank Shareholder Litigation, No. 7405 (Del. Ch.), where a settlement valued at \$ 70 million was obtained for plaintiffs, and in Lepow Equities Corp., et. al. v. First Maryland Corp., Civil Action No. 88-260070, (Cir. Ct. Balt. City) where a settlement valued at \$ 36 million was obtained. [*129]

Mr. Greenfield has been or is Lead Counsel for the Class in BankAmerica Securities Litigation, Master File No. CV 85-4779 (WDK) (C.D. Cal.) (settled for \$ 21.1 million); Mellon Bank Shareholder Litigation, Civil Action No. 87-0755 (W.D. Pa.) (settled for \$7.5 million); In re Matthews & Wright Bondholders Litigation, MDL No. 739 (E.D. Pa.); Resorts International Shareholder Litigation, No. 9470 (Del. Ch.) (Recovery for shareholders of more than \$ 40 million); Broadview Savings Bank Shareholder Litigation, Civil Action No. C86-3522 (N.D. Ohio) (combined class and derivative recovery of more than \$ 2 million); Allegheny International Shareholder Litigation, Civil Action No. 86-1651 (W.D. Pa.) (settled for \$ 6.25 million); Trilogy Securities Litigation, Civil Action No. C-84-20617 (A) (N.D. Cal.) (settlement of cash and securities valued at approximately \$ 8 million); and trial counsel in a class action arising out of the fraudulent sale of interests in a "tax shelter" limited partnership, which led to a leading opinion in the area of liability of auditors and attorneys for violation of the federal securities laws, Eisenberg v. Gagnon, 766 F.2d 770 [*130] (3d Cir.), cert. denied, 474 U.S. 946, 88 L. Ed. 2d 290, 106 S. Ct. 343, 106 S. Ct. 342 (1985), as well as trial counsel in other Litigation. Mr. Greenfield is also Co-Lead Counsel in Martin Fox, et. al. v. The Chase Manhattan Corporation et. al., Civil Action No. 8192 (Del. Ch.) where a partial recovery of \$ 32.5 million in a derivative suit has already been obtained.

In the area of consumer litigation, Mr. Greenfield has represented and is representing victims of consumer fraud in numerous cases including: In Re Beechnut Apple Juice Litigation, Civil Action No. 86-6608 (E.D. Pa.) (involving fraudulent sale of sugar water as apple juice); Kenneth Eric Gross, et. al. v. The Hertz Corp., Civil Action No. 88-0661 (E.D. Pa.) (involving over-charges on accident-damaged rental vehicles); Troncelliti v. Minolta, Civil Action No. B-86-3848 (D. Md.) (involving resale price maintenance in connection with fixing retail prices of cameras); In Re Alamo Car Rental Litigation, Civil Action No. 89-0121 (E.D. Pa.) (involving deceptive practices employed in the rental of cars).

Mr. Greenfield has achieved national and international recognition for his and the Firm's achievements, including features on the British [*131] Broadcasting Corporation's Money Programme; American Broadcasting Company's Business World; a front-page article in The Wall Street Journal; and a substantial article in The New York Times; a cover story in Banker's Monthly; and profile articles in Florida Trend, The American Lawyer, Philadelphia Business Journal, The Philadelphia Inquirer, Dagens Industri (Sweden's equivalent of The Wall Street Journal) and American Banker. He is often sought by the business and legal media for comment on a wide variety of corporate, securities and shareholder rights topics and has been frequently quoted in every major business and law newspaper and

periodical. In 1989, he was selected by The National Law Journal as one of 50 lawyers under the age of 50 who have achieved national recognition for their professional accomplishments.

Mr. Greenfield has been a member of the faculty of the Practicing Law Institute and has participated as a lecturer and panelist in the program New Trends in Securities Litigation. He has also been a guest speaker at the Annual Meeting of the Conference of Actuaries in Public Practice held in Seattle, Washington, where he presented [*132] a paper entitled The Noose Tightens - Disclosure of Pension Liabilities Under The Federal Securities Laws, which was subsequently published. He has addressed Annual Conventions of the Association of Trial Lawyers of America and various programs of ALI-ABA and the Litigation Section of the American Bar Association, where he has spoken on various topics including class actions, securities fraud litigation, corporate governance, discovery in commercial litigation, attorneys fees and RICO litigation against accountants and lawyers, among others.

In 1985, Mr. Greenfield was a lecturer on bank fraud litigation at the Eighth Annual Banking Law Institute sponsored by the Texas Tech School of Law in Houston, and on securities litigation in 1985 and 1986 at the Minnesota Institute of Legal Education's annual "Lying, Cheating and Stealing" Seminar in Minneapolis. He organized and presented a program on Federal Class Actions for the Federal Bar Association in May, 1986. In 1987, he was the featured speaker at Institutional Investor Institute's "Spring Pension Fund Roundtable" in New York and at the Inner Circle of Advocates' Annual Meeting in San Diego. Mr. Greenfield is a member of the Board [*133] of Advisors of the Banking Law Review and has authored a chapter on class actions and other representative litigation in a desk book published by the New York State Bar Association entitled Federal Civil Practice.

Mr. Greenfield is a member of the Editorial Advisory Board of Class Action Reports, for which he authored an article entitled "Rewarding The Class Representative: An Idea Whose Time Has Come," which appeared in the First Quarter, 1986 issue. He also authored "No More Chastity Belts: U.S. Needs Federal Corporate Code" for the March 9, 1987 issue of Legal Times, as well as other articles for this publication and its affiliates in the American Lawyer Newspaper Group and he is a member of its National Board of Contributors. He is a member of the Federal Courts Committee of the Philadelphia Bar Association and the Complex Litigation Subcommittee thereof. He is also active in the Class and Derivative Action and Securities Litigation sub-committees of the American Bar Association's Section on Litigation, the Philadelphia Chapter of the Federal Bar Association and the Federal Bar Council of New York City. Mr. Greenfield has also served as a Director of Equimark Corporation, [*134] a \$ 2.5 billion, New York Stock Exchange listed bank holding company and two of its subsidiaries, Equibank (Delaware) N.A. and Liberty Savings Bank.

NICHOLAS E. CHIMICLES is a senior partner and member of the Firm's Executive Committee. Mr. Chimicles is a 1970 graduate of the University of Pennsylvania, where he received a Bachelor of Arts Degree with Honors. Mr. Chimicles graduated in 1973 from the University of Virginia School of Law, where he was a member of the Editorial Board of the University of Virginia Law Review and was the author of several published comments. While attending law school, he co-authored a course and study guide entitled "Student's Course Outline on Securities Regulation," published by the University of Virginia School of Law. Upon graduation from law school, Mr. Chimicles joined a major Philadelphia law firm where he practiced for eight years and specialized in litigation including complex commercial, antitrust and securities fraud cases and served as principal or assistant trial counsel in United States v. Pfizer, Inc., (Antibiotics Antitrust Litigation), Civil Action No. 78-1155 (E.D. Pa.); Penn Galvanizing Co. v. Lukens Steel Co., Civil Action [*135] No. 71-1777 (E.D. Pa.); Wolgin v. State Mutual Investors, 265 Pa. Super. 525, 402 A.2d 669 (1979); Beta Consultants & Administrators v. Centennial Life Ins. Co., unreported opinion by Judge Newcomer (E.D. Pa. 1980); and R. & M. Musselman, Inc., et al. v. Line Lexington Lumber & Millwork, Inc., C.A. 727458-02-1 (Bucks Co. 1981).

Mr. Chimicles has actively prosecuted major complex litigation, antitrust and securities fraud suits. He is serving as a Lead Counsel in the Scott Paper Securities Litigation, Civil Action No. 906192 (E.D. Pa.) and the PNC Financial Securities Litigation, Civil Action No. 90-592 (W.D. Pa.). He has served as the Lead Counsel in the Storage Technology Corp. Securities Litigation, Master File No. 84-F-1981 (D. Colo.) (recovery of \$ 18 million in cash and stock); a Lead Counsel for the shareholder class in the Continental Illinois Securities Litigation, Civil Action No. 82 C 4712 (N.D. Ill.) (one aspect of which involved a twenty-week jury trial conducted by Mr. Chimicles that concluded in July, 1987; ultimate recovery of nearly \$ 40 million for the class); a Lead Counsel in In re: Fiddler's Woods

Bondholders Litigation, [*136] Civil Action No. 83-2340 (E.D. Pa.), a bondholders' class action arising out of a default on a \$ 33 million industrial development bond issue (recovery of more than \$ 7 million for the class), and Lead Counsel in the Charter Securities Litigation, Civil Action No. 84-448 Civ-J-12 (M.D. Fla.) (recovery of \$ 7.75 million).

By virtue of the Fiddler's Woods litigation (in which Mr. Chimicles also represented the court-appointed Receiver), his representation of the Bondholders' Protection Committee for the Baptist Estates Life Care Facility (Doylestown, PA), a \$ 15 million tax-exempt bond issue which defaulted, and his representation of bondholders in other litigation pending in Atlanta, Orlando and New Jersey arising from defaulted bond issues aggregating over \$ 135 million, Mr. Chimicles has established a significant reputation for representing the interests of bondholders in default situations.

Mr. Chimicles has also represented stockholders in numerous suits brought in courts across the country arising from proposed mergers, acquisitions and hostile takeovers. For example, in Garlands, Inc. Profit Sharing Plan et al. v. The Pillsbury Company, a Delaware corporation, et al. [**137] al., State of Minnesota, County of Hennepin, Fourth Judicial District, Court File No. 88-17834, Mr. Chimicles was a lead counsel in a suit brought to compel Pillsbury's board of directors to negotiate in good faith with Grand Metropolitan and persuaded the court to enjoin a proposed spin-off of Burger King, a device sought to be used by Pillsbury's board to ward off Grand Metropolitan's takeover. In numerous other cases, Mr. Chimicles has represented shareholders in obtaining enhanced consideration for their stock in the context of a takeover or going private transaction. Randee L. Shantzer, et al. v. Charter Medical Corp., et al., Court of Chancery, State of Delaware, New Castle County, Consolidated Civil Action No. 9530. In Re Interstate Bakeries Corporation Shareholders Litigation, Court of Chancery, State of Delaware, New Castle County, Consolidated Civil Action No. 9263.

As an appellate advocate, Mr. Chimicles has handled cases which have protected the rights of victims of securities fraud in bankruptcy proceedings. In cases that he successfully argued before the Courts of Appeals for the Tenth and Eleventh Circuits, due process and notice principles were extended to [**138] protect securities purchasers filing claims in bankruptcy cases, In re Standard Metals Corp., 817 F.2d 625 (10th Cir.), rev'd in part on rehearing, 839 F.2d 1383 (1987), and it was established that class proofs of claim are allowable in bankruptcy proceedings, In re the Charter Company, 876 F.2d 866 (11th Cir. 1989).

Mr. Chimicles has also actively prosecuted suits involving public utilities constructing nuclear plants. He was Lead Counsel in the Philadelphia Electric Company Securities Litigation, Master File No. 85-1878 (E.D. Pa.) and a Lead Counsel in the Consumers Power Company Derivative Litigation, Master File No. 84-CV-3788 AA (E.D. Mich.). Mr. Chimicles was co-lead counsel in the stockholder derivative suit arising from mismanagement claims against former officers of Philadelphia Electric Company involved in the closing of the Peach Bottom Nuclear Plant, a suit which Mr. Chimicles was authorized to bring by a PECO board of directors resolution. In re Philadelphia Electric Company Derivative Litigation, Case No. 7090, Court of Common Pleas, Philadelphia County, PA. That case resulted in a recovery of \$ 35 million [**139] for the utility company in November 1990.

Mr. Chimicles was also a Co-Lead Counsel in a major environmental litigation, Ashland Oil Spill Litigation, Master File M-14670 (W.D. Pa.), involving the claims of residents and businesses for damage arising from the largest inland waterway oil spill in history that occurred on January 2, 1988 in Pittsburgh. In 1990, the case was settled upon creation of a claims fund of over \$ 30 million for the class. This and similar environmental suits in which the Firm is involved were the subject of a program, "Toxic Torts May Not Be Hazardous To Your Health: A Lawyer's Guide to Health Survival in Mass Tort Litigation," in which Mr. Chimicles was a principal speaker at this program which was held at the American Bar Association's 1989 Convention in Honolulu.

Currently, Mr. Chimicles is Special Counsel for the City of Philadelphia and the Philadelphia Housing Authority in an action seeking to hold lead pigment manufacturers liable for federally mandated abatement of lead paint in properties owned, managed or operated by the plaintiffs. City of Philadelphia, et al. v. Lead Industries Ass'n, et al., Civil Action No. 90-7064 (E.D. Pa.), appeal [**140] pending, No. 92-1420 (3rd Cir.). The action seeks class certification on behalf of all cities and housing authorities of communities in excess of 100,000 residents.

Mr. Chimicles is admitted to practice in the Supreme Court of the United States, numerous federal district and appellate courts, as well as the Supreme Court of Pennsylvania. He is a member of the American Bar Association (Sections of Litigation; Anti-trust; and Corporation, Banking and Business Law), the Pennsylvania Bar Association, the Philadelphia Bar Association (Federal Courts Committee and various subcommittees). Mr. Chimicles has lectured frequently on securities law at the Rutgers University Law School - Camden, the Wharton School Graduate Division of the University of Pennsylvania, New York University, and for Prentice Hall Law and Business Publications. Mr. Chimicles has addressed several legal conferences, including the Pennsylvania Bond Counsel Association, and has also frequently appeared as a speaker in several state and national bar association sponsored seminars on topics involving federal securities laws, RICO, class actions, hostile corporate take-overs, and professional ethics. Mr. Chimicles also [*141] is a contributor to and member of the advisory boards of various professional publications involving the securities law field. Mr. Chimicles is a member of the Board of Overseers of the School of Arts and Sciences of the University of Pennsylvania and was recently elected President-Elect of the National Association of Securities and Commercial Law Attorneys, a Washington, D.C. based organization comprising nearly 100 member law firms interested in a strong system of federal and state legal protection for investors and consumers.

C. OLIVER BURT, III, a partner, graduated from Swarthmore College in 1964 with a Bachelor of Arts Degree in History. In 1967 he graduated from the Law School of the University of Pennsylvania. Upon graduation from law school, he was an associate with a major Philadelphia law firm working primarily in the litigation department where he participated, among other things, in antitrust litigation. In May, 1971 he was appointed Assistant U.S. Attorney for the Eastern District of Pennsylvania. As an Assistant U.S. Attorney he tried a number of criminal cases, and participated in several major Grand Jury investigations including an investigation in 1971-72 involving [*142] the Health and Welfare Fund of the Carpenter's Union of Philadelphia and Vicinity which led to several indictments, including United States v. John McCrae, Criminal No. 71-684. McCrae was charged with embezzling funds from two employee benefit plans established by the Carpenter's Health and Welfare Fund. Mr. Burt tried the case in March of 1972 and obtained the conviction of Mr. McCrae. The Court's opinion denying post-trial motions is reported at [344 F. Supp. 942](#).

As an Assistant U.S. Attorney, Mr. Burt prosecuted white-collar criminal cases involving securities fraud, mail fraud, wire fraud, "check-kiting," embezzlement of bank funds, interstate transportation of stolen motor vehicles, income tax evasion and other offenses. Mr. Burt was appellate counsel in [United States v. George Hykel, 461 F.2d 721 \(3d Cir. 1972\)](#), a criminal case involving misapplication of bank funds. In United States v. Bertram Lazar, Mr. Burt prosecuted and secured a guilty plea from a stock-broker for engaging in a "Ponzi Scheme" and selling unregistered securities. He also represented the Government in a number of civil matters, and in May, 1973 he was appointed Chief [*143] of the Civil Division of the United States Attorney's Office. Thereafter, in addition to serving as Chief of the Civil Division and trying civil cases, he conducted the Grand Jury investigation concerning the bankruptcy of the Penn Central Railroad, and tried other criminal and civil cases. In connection with the Penn Central Grand Jury proceedings he appeared in and participated in hearings in the Princely Provincial Court of Liechtenstein seeking to compel the production of records of secret Liechtenstein bank accounts. In January, 1977, he returned from private practice briefly as a Special Assistant U.S. Attorney to try [United States v. Rosenbaum, 439 F. Supp. 176 \(E.D. Pa. 1977\)](#), the criminal case arising out of the Penn Central Grand Jury investigation.

Prior to joining Greenfield & Chimicles, Mr. Burt was a partner in a Philadelphia law firm where he was primarily engaged in commercial litigation including antitrust, securities litigation, unfair competition, white collar criminal cases, and general business litigation. While with that firm, Mr. Burt tried, among other cases, Callan, et al. v. State Chemical Manufacturing Company, decision on pretrial motions [*144] reported at [584 F. Supp. 619 \(E.D. Pa. 1984\)](#); a civil RICO case, [The Mader Group, Inc. v. Gekoski, et al., 6 Phila. 556 \(1981\)](#), involving unfair competition and violation of corporate fiduciary duties by former employees; [General Business Services, Inc. v. Rouse, et al., 495 F. Supp. 526 \(E.D. Pa. 1980\)](#), involving alleged trademark infringement, unfair competition and unlawful tying arrangements; Beta Consultants & Administrators v. Centennial Life Ins. Co., unreported opinion by Judge Newcomer (E.D. Pa. 1980), an alleged antitrust conspiracy case, United States v. Natale, et al., a criminal RICO and mail fraud case, opinion on post-trial motions reported at [494 F. Supp. 1114 \(E.D. Pa. 1979\)](#), aff'd, 631 F.2d 726 (3d Cir. 1980); Commonwealth of Pennsylvania v. Richard Wolf, a white collar criminal case involving alleged

corporate scheme to defraud city by tampering with pollution control devices, case resolved by plea agreement before trial after extended preliminary hearing, Pennsylvania Supreme Court opinion reported at [495 Pa. 211, 433 A.2d 18 \(1981\)](#). He also participated as counsel [*145] for plaintiff in [Levin v. Barish, et al.](#), litigation arising out of a law firm dissolution, opinion by Supreme Court of Pennsylvania reported at [505 Pa. 514, 481 A.2d 1183 \(Pa. 1984\)](#).

From 1972 through 1985, Mr. Burt was Chairman of the Criminal Law Committee of the Philadelphia Bar Association Young Lawyers' Section Basic Legal Practice Course. He authored course materials on federal criminal practice for that Course, and during the years 1972 through 1985 lectured on the subject of federal criminal practice as part of the Basic Legal Practice Course, sponsored by the Philadelphia Bar Association.

Since joining the Firm of Greenfield & Chimicles, Mr. Burt has participated actively in securities and class action litigation, including acting as trial co-counsel in [Peil v. Speiser](#), Civil Action No. 82-1289 (E.D. Pa.), a "fraud on the market" case, which was tried in April, 1985. Mr. Burt was also appellate counsel in that case and presented oral argument in the case in the Court of Appeals for the Third Circuit. In its opinion in that case, the Court adopted "Fraud on the Market" as the law of the Circuit, reported as [Peil v. Speiser, 806 F.2d 1154 \(3d Cir. 1986\)](#). [*146] Mr. Burt was also plaintiff's lead trial counsel in [Kumpis v. Wetterau, 586 F. Supp. 152](#) (E.D. Mo.), a securities fraud class action which was settled in the course of trial in December, 1985.

Mr. Burt was Lead Derivative Counsel in [Pacific Gas & Electric Shareholder Derivative Litigation](#), Master File No. 893849, (Superior Court, San Francisco County, Cal.), a case which settled for \$ 21,000,000 in 1990; [PSFS Securities Litigation](#), Civil Action No. 85-4978 (E.D. Pa.) and in [First Peoples Bank Shareholder Litigation](#), Civil Action No. 83-2713 (D.N.J.). He was plaintiffs' Co-Lead Counsel in [Duguesne Light Shareholder Litigation](#), Civil Action No. 86-1046 (W.D. Pa.). He is currently active in numerous cases in which the Firm is counsel including [First American Bank and Trust Litigation](#), Civil Action No. 88-0638 (S.D. Fla.); and [AmeriFirst Bank Litigation](#), Civil Action No. 89-2614 (S.D. Fla.), in which he and his partner, Michael J. Pucillo, serve as Lead Counsel; [Hoexter v. Simmons](#), CIV 89-1069-PHX-RCB (D. Ariz.), a securities fraud class action involving Valley National Bank; [In Re Perrier Bottled Water Litigation](#), MDL 844 (TFGD) (D. Conn. [*147]); and [Zitin v. Hurley](#), CIV 89-2061-PHX-CAM (D. Ariz.), a derivative case involving Pinnacle West Corporation.

Mr. Burt is admitted to practice before the Supreme Court of the United States, the Supreme Court of Pennsylvania, the Third Circuit Court of Appeals, the Eighth Circuit Court of Appeals, the Ninth Circuit Court of Appeals, the District Court for the Eastern District of Pennsylvania, the District Court for the Northern District of New York, and the District Court for the District of Arizona.

KENNETH A. JACOBSEN, a partner, is admitted to practice before the Supreme Court of Pennsylvania, the United States Supreme Court, the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the Ninth Circuit, the United States Court of Appeals for the Eleventh Circuit, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the Northern District of California and the United States District Court for the District of New Jersey. Mr. Jacobsen is a 1979 *cum laude* graduate of the Villanova University School of Law, where he was the Managing Editor of the Villanova Law Review and was elected [*148] to the Order of the Coif. From 1979 to 1980, he served as the Law Clerk for a Judge of the United States District Court for the District of New Jersey. Following his clerkship, Mr. Jacobsen was an associate at a major Philadelphia law firm for three years, where he participated actively in the handling of complex commercial litigation matters, including claims arising out of the bankruptcy of [O.P.M. Leasing Services, Inc.](#) Since joining the Firm, Mr. Jacobsen has played a leadership role in the prosecution of the [Petro-Lewis Securities Litigation](#), Civil Action No. 84-C-326 (D. Colo.), in which a settlement valued in excess of \$ 137 million was recovered on behalf of shareholders and limited partners; in the [Baldwin United SPDA Litigation](#), MDL No. 581 (S.D.N.Y.), in which a settlement of more than \$ 170 million in cash and other benefits was obtained on behalf of purchasers of annuities; and in several other substantial securities and consumer class actions and derivative litigation, including [In re Coleco Securities Litigation](#), Master File No. 83 Civ. 9199 (LBS) (S.D.N.Y.) (Derivative Counsel--global settlement of \$ 16 million obtained on behalf of security holders and [*149] corporation); [In re Petro-Lewis Broker-Dealer Litigation](#), Consolidated Civil Action File No. 1:85-cv-172-RLV (N.D. Ga.) (Lead Counsel--global settlement of \$ 17 million obtained from six broker-dealers on behalf of investors in oil and gas partnerships); [In re Rohm & Haas](#)

Company Litigation, Master File 89-2724 (E.D. Pa.) (\$ 5 million settlement of consumer class action arising out of contaminated anti-cholesterol drug). Drawing on his extensive experience in bank litigation, Mr. Jacobsen presently serves as Lead Counsel in a massive securities fraud case involving First RepublicBank, a Texas bank holding company, and was instrumental in negotiating multi-million dollar settlements in cases involving such other banks as Goldome, MCorp, Home Unity and Trustcorp. Mr. Jacobsen also has been responsible for establishing appellate precedents in the securities area, most notably Kirkpatrick v. J. C. Bradford & Co., 827 F.2d 718 (11th Cir. 1987), cert. denied, 485 U.S. 959 (1988), which is one of the leading cases in the Eleventh Circuit discussing the prerequisites for class certification.

R. BRUCE McNEW, a partner, is admitted to practice in [*150] the States of Delaware, Pennsylvania and California, the Federal District Courts for the District of Delaware, the Eastern District of Pennsylvania and the Northern and Central Districts of California, the United States Court of Appeals for the Third, Tenth and Eleventh Circuits and the Supreme Court of the United States. He is a member of the Delaware Bar Association, the Pennsylvania Bar Association, the California State Bar and the American Bar Association. Mr. McNew is a 1975 graduate of the University of Virginia where he received a Bachelor of Arts Degree with Distinction and a 1979 graduate of Marshall Wythe School of Law, the College of William and Mary, where he served as the Research Editor of the William and Mary Law Review. From 1979 to 1980 Mr. McNew served as law clerk to the Honorable John J. McNeilly, Justice of the Supreme Court of Delaware. For three years after serving as a clerk to the Delaware Supreme Court, Mr. McNew was an associate at a major Wilmington, Delaware law firm where his practice focused primarily on commercial litigation. Since joining Greenfield & Chimicles, Mr. McNew has been on the Editorial Boards of the M&A and Corporate Governance Law Reporter [*151] and the Corporate Counsel Law Reporter.

Mr. McNew has played a leadership role in numerous class actions on the west coast including acting as: a member of the Executive Committee for In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation, M.D.L. 834; lead counsel in In re American Medical International Shareholder Litigation, Consol. Action No. C718957 (LA County Super. Ct. Cent.Dist. Cal.); lead counsel in In re Cineplex Shareholders Litigation, Civil Action No. CV 89-2461 WJR (Tx) (C.D. Cal.); co-lead counsel in Ackerman, et. al. v. Kassar, et. al., Master File No. BC015018 (LA County Super. Ct. Cent.Dist. Cal.) involving Carolco Pictures; and co-lead counsel in Vogel, et al. v. First Interstate Bancorp, et al., Civil Action No. 91-3643 JGD(Tx) (C.D. Cal.).

Mr. McNew has represented classes of investors as both lead and co-lead counsel in the prosecution of major securities fraud and derivative litigation. Mr. McNew has prosecuted litigation on behalf of bondholders in various actions including: In re: Fiddler's Woods Bondholders Litigation, Civil Action No. 83-2340 (E.D. Pa.); Sheftelman v. NL Industries, Inc., et al., [*152] Civil Action No. 84-3199 (D. N.J.); Ockerman, et al. v. King & Spalding, et al., Civil Action No. 85-2958 (N.D. Ga.); Sheftelman v. Jones, et al., Civil Action 84-472A (N.D. Ga.); and Anderson v. Bank South, Civil Action No. 84-1562 (M.D. Fla.). Mr. McNew has represented classes of equity security holders in various actions including: In re: Winchell's Donuts Securities Litigation, Civil Action No. 9478 (Del. Ch.); In re: AFG Securities Litigation, Civil Action No. 9688 (Del. Ch.); and In re Ivan F. Boesky Securities Litigation, M.D.L. 732. In addition, he has been involved in the prosecution of cases pertaining to defense contractor fraud such as: Liebman, et. al. v. Zable, et. al., Civil Action No. 88-1195B(M) (S.D. Cal.) involving Cubic Corp.; Wildflower Partnership, et. al. v. Hoch, et. al., Civil Action No. 89-1967 RG(Sx) (C.D. Cal.) involving Litton Industries, Inc.; In re Lockheed Securities Corporation Litigation, Master File No. CV-89-6745 TJH (C.D. Cal.); and Citron, et. al. v. Beall, et. al., Civil Action No. C728809 (LA County Super. Ct. Cent.Dist. Cal.) involving Rockwell International Corporation.

Mr. McNew also has experience in [*153] cases involving financial institutions such as: Almeida, et. al. v. Peat, Marwick, Mitchell & Company, et al., Action No. 668436-9 (Alameda County Super. Ct. Oakland Branch) involving Central Banking System; Koehler, et. al. v. Martin, et. al., Action No. BC025112 (LA County Super. Ct. Cent.Dist. Cal.) involving Coast Savings Financial, Inc.; and Goldman, et. al. v. Belzberg, et. al., Civil Action No. C754698 (LA County Super. Ct. Cent.Dist. Cal.) involving Farwest Financial Corp. Mr. McNew's environmental and consumer experience includes: McAleer, et. al. v. Prodigy Services Company, et. al., Master File No. 91-1517 KN (GHKx) (C.D. Cal.); In re Hanford Nuclear Reservation Litigation, Master File No. CY-91-3015 AAM (E.D. Wash.); Medley, et. al. v. Southern Pacific Trans. Company, et. al., Civil Action No. CV-S 91-1073 WES-JMF (E.D. Cal.) and In re

Sacramento River Spill Cases I and II, J.C.C.P. Nos. 2617 and 2620 (Sac. County Super. Ct. Cal.); Nguyen v. FundAmerica, Inc., a California Corp., C90-2090 MHP (N.D. Cal.); and In re the Exxon Valdez, Civil Consol. No. A 89-095 (D. Alaska) and Exxon Valdez Oil Spill Litigation, Civil Consol. No. 3AN-89-2533 (Super. Ct. Alaska 3rd J.Dist.)

MICHAEL J. PUCILLO, a partner resident in the Firm's West Palm Beach, Florida office, has been a member of the Florida Bar since 1978, and is admitted to practice before the United States Court of Appeals for the Fifth and Eleventh Circuits and the United States District Courts for the Southern and Middle Districts of Florida. Mr. Pucillo is a member of the Southern District of Florida Trial Bar. During 1989-1990, he served as President of the Gold Coast Chapter of the Federal Bar Association. He is a graduate of Williams College (1975), and Georgetown University Law School (1978). From 1978 to 1979, Mr. Pucillo served as Law Clerk to the Honorable Charles B. Fulton, United States District Judge for the Southern District of Florida. From 1979 to 1981, Mr. Pucillo served as Law Clerk to the Honorable William J. Campbell, Senior United States District Judge for the Northern District of Illinois. From 1983 to 1984, Mr. Pucillo was a Staff Attorney at the Division of Enforcement of the United States Securities and Exchange Commission in Washington, D.C. Upon returning to Florida, he practiced Commercial Litigation with an emphasis on Securities, and from 1986 to [*155] 1990, was a Partner in a major South Florida law firm. In 1990 Mr. Pucillo joined Greenfield & Chimicles and opened the Florida Office of the Firm at West Palm Beach.

Since joining the firm of Greenfield & Chimicles, Mr. Pucillo has been active in numerous class actions and shareholder derivative actions throughout Florida. Mr. Pucillo was lead derivative counsel in the FPL Group Shareholder Derivative Action, Case No. 91-3563-AC (15th Judicial Circuit), a case that settled for \$ 7,000,000 plus significant corporate governance changes. He currently serves as lead counsel (with Oliver Burt) in In Re Amerifirst Bank Securities Litigation, Case No. 89-2614-HOEVELER (S.D. Fla.); and co-lead counsel in In Re Southeast Bank Securities Litigation, Case No. 90-0760-CIV-ZLOCH (S.D. Fla.); Dycom Securities Litigation; Case No. 91-8395-CIV-GRAHAM (S.D. Fla.); Tapken v. Brown, 1992 U.S. Dist. LEXIS 11744 (S.D. Fla.), a shareholder action arising out of the collapse of General Development Corporation; and several other actions pending in the Southern and Middle Districts of Florida. Mr. Pucillo has also lectured on class certification and class actions for the Academy of Florida Trial [*156] Lawyers.

PAMELA S. TIKELLIS, a partner and resident attorney in the Firm's Wilmington, Delaware office, is admitted to practice before all courts in the State of Delaware and the United States Court of Appeals for the Third Circuit. Ms. Tikellis is a graduate of the Delaware Law School of Widener University (1982) where she served as Managing Editor of The Delaware Journal of Corporate Law. She is also a graduate of Manhattanville College (B.A. - 1974), and the Graduate Faculty of the New School for Social Research (M.A. - 1976). From 1982 to 1983, Ms. Tikellis served as a law clerk in the Court of Chancery in Wilmington, Delaware. Upon completion of her clerkship, Ms. Tikellis has engaged in significant shareholder litigation practice.

KEVIN M. PRONGAY, a resident partner in the Firm's Los Angeles office is admitted to practice in the states of California (1979), New York (1975) and New Jersey (1973). Mr. Prongay is also admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Second, Third and Ninth Circuits and before the United States District Court for the Northern, Central and Southern Districts of California and the Southern [*157] and Eastern Districts of New York, as well as the District of New Jersey. Mr. Prongay is a member of the American Bar Association (Sections on Antitrust, Business Law, International Law and Practice and Litigation) and the California State Bar Association. Mr. Prongay is a 1970 graduate of Rutgers University, where he received an A.B. degree in Economics and a 1973 graduate of Seton Hall University School of Law. In addition, Mr. Prongay was awarded an LL.M. in Trade Regulation from New York University School of Law in 1974. From 1974 to 1976, Mr. Prongay served as counsel to a private civil rights organization, funded by the Ford Foundation, for which he prosecuted numerous class actions challenging institutional discrimination in the housing and real estate industries. From 1976 to 1979, Mr. Prongay served as litigation counsel to a major multinational pharmaceutical company where he actively managed complex and protracted antitrust, commercial, product liability and intellectual property litigation. From 1979 to 1983, Mr. Prongay worked for an American subsidiary of a major European based electronics firm where he directed the company's international and domestic technology transfer [*158] program, and structured and negotiated licensing agreements, joint venture agreements and international capital formation

agreements. From 1983 to 1984 Mr. Prongay served as a partner in a New York and New Jersey based law firm where he handled a variety of corporate and securities transactional matters and commercial litigation. In 1984, Mr. Prongay relocated to San Diego, California and joined a nationally prominent securities litigation firm where he handled a variety of security class actions and stockholder derivative suits on behalf of investors, participating in the prosecution of In Re Oak Industries Securities Litigation, Master File No. 83-0537 G(m) (S.D. Cal.) (Settled for \$ 33 million); In Re Cousins Securities Litigation, Master File no. 84-1821-D(IEG) (S.D. Cal.) (settled for \$ 13.5 million). Van de Walle v. Slutsky, Civil No. 82-5669 (AHS) (JRx) (C.D. Cal.) (settled for \$ 5.2 million). From 1988-1990, Mr. Prongay served as a Los Angeles resident partner of a New York based national law firm where he was responsible for a variety of securities class actions, stockholder derivative suits, civil RICO, antitrust, copyright, trademark and unfair competition litigation. [*159] Mr. Prongay joined the Firm of Greenfield & Chimicles in October, 1990.

JAMES R. MALONE, JR., a partner, is admitted to practice before the Supreme Court of Pennsylvania, the Supreme Court of the United States, the United States Court of Appeals for the Third Circuit and the United States District Courts for the Eastern District of Pennsylvania, the District of Arizona and the Northern District of California. Mr. Malone is a 1984 cum laude graduate of the Villanova University School of Law where he was a staff member on the Villanova Law Review and was elected to the Order of the Coif. Prior to joining the Firm in January, 1987, Mr. Malone was associated with a major Philadelphia law firm where he specialized in bankruptcy and commercial litigation. Since he joined the firm, Mr. Malone has been active in the prosecution of a number of class and derivative actions, and he has actively represented the interests of defrauded investors in bankruptcy proceedings.

MARTHA A. EVANS, a partner resident in the Firm's Los Angeles office, is admitted to practice before the Supreme Court of the United States, as well as in the States of California and Texas, Federal District Courts for the [*160] Southern District of California, Central District of California, Northern District of Texas, Southern District of Texas, Eastern District of Texas, and the United States Court of Appeals for the Fifth and Eleventh Circuits. Ms. Evans is a member of the California State Bar, Texas State Bar Association and the American Bar Association. Ms. Evans graduated from the University of Texas in 1973 with honors and from the University of Texas School of Law in 1977. Immediately after graduation from law school, Ms. Evans served as a law clerk to a federal district judge in Houston, Texas. Before joining Greenfield & Chimicles in April 1992, Ms. Evans practiced commercial litigation in Houston and Dallas, Texas, and prosecuted securities fraud class actions and derivative suits while with a firm in San Diego, California.

Ms. Evans has particular experience in suing financial institutions, accountants and limited partnerships for securities fraud associated with a declining real estate market and/or a depressed oil and gas industry, e.g. In re First Republic Securities Litigation, Civil Action No. 3-88-0641-H (N.D. Tex.) involving First Republic Bank of Texas, and In re Sunderman Securities [*161] Litigation, Civil Action No. 3-87-0612-H (N.D. Tex.) and Odmark v. Mesa Limited Partnership, Civil Action No. 3-91-CV2376-G (N.D. Tex.). Ms. Evans also has experience with lender liability actions, e.g. Hunt, et al., v. Bankers Trust Company, et al., (N.D. Tex.), wherein the Hunt brothers sued their banks for, inter alia, breach of oral and written loan agreements. Ms. Evans co-authored the following paper with Stephen D. Susman about lender liability cases: "Prosecuting the Common Law Lender Liability Case -- Evaluation of a Claim", Practicing Law Institute, 1989.

EUGENE MIKOLAJCZYK, a resident partner in the Firm's Los Angeles office, is admitted to practice in the Commonwealth of Pennsylvania (1978) and the State of California (1982). Mr. Mikolajczyk is also admitted to practice before the United States Court of Appeals to the Third and Ninth Circuits and before the United States District Courts in the Northern, Central and Southern Districts of California, as well as the State Bar of the State of California and Commonwealth of Pennsylvania. Mr. Mikolajczyk is a 1974 graduate of Elizabethtown College and in 1978 graduated the Dickinson School of Law where he was Managing [*162] Editor of the Dickinson Law Review. From 1978 through 1980 Mr. Mikolajczyk served as a Law Clerk to the Honorable Gwilym A. Price, Jr. of the Superior Court of Pennsylvania and from 1980 through 1983 was an associate member of the Pittsburgh, Pennsylvania law firm of Reed Smith Shaw & McClay. In 1983 Mr. Mikolajczyk located to San Diego, California where he served first as an associate and then a partner (1988 through 1992) of Milberg Weiss Bershad Specthrie & Lerach where he handled a variety of securities, class action and stockholder derivative suits on behalf of investors. Mr. Mikolajczyk participated in the prosecution of In re Nucorp Energy Securities Litigation, 772 F.2d

1486 (9th Cir. 1985) (settled for total recovery of \$ 55 million), Heckmann v. Ahmanson, 168 Cal. App. 3d 119, 214 Cal. Rptr. 177 (1985) (corporate greenmail actions settled for total class and derivative recovery of \$ 45 million after two weeks of trial) and Ackerman v. Kassar, No. 91-1468 M (BTM) (S.D. Cal.) (corporate derivative action settled for total recovery of approximately \$ 45 million). Mr. Mikolajczyk joined the Firm of Greenfield & Chimicles in January 1993.

[*163] MICHAEL D. DONOVAN, a partner, is admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the Eighth and Ninth Circuits, the United States District Court for the Eastern District of Pennsylvania, the United States District Courts for the Southern and Eastern Districts of New York as well as the state courts of Pennsylvania and New York and the courts of Washington, D.C. He is a graduate of Vermont Law School (J.D. cum laude 1984) and Syracuse University (A.B. 1981). He was the Head Notes Editor and a staff member of the Vermont Law Review from 1982 through 1984. While on the Law Review, he authored Note, Zoning Variance Administration in Vermont, 8 Vt.L.Rev. 370 (1984). Prior to joining the Firm in November, 1987, Mr. Donovan was an attorney with the Securities and Exchange Commission in Washington, D.C., where he worked on numerous securities cases and enforcement matters, including injunctive and disciplinary actions against public companies, broker/dealers and accounting firms. Mr. Donovan has co-authored "The Overlooked Victims of the Thrift Crisis," Miami Review, Feb. 13, 1990 and "Conspiracy of Silence: [*164] Why S&L Regulators Can't Always Be Trusted," Legal Times, Feb. 5, 1990.

LISA J. RODRIGUEZ, a partner, is admitted to practice before the United States Court of Appeals for the Third Circuit, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the District of New Jersey, the Supreme Court of Pennsylvania and the Supreme Court of New Jersey. Ms. Rodriguez is a graduate of The George Washington University Law School (1983, with honors). From 1983 to 1984 she served as a Law Clerk to the Honorable Mitchell H. Cohen, Senior Judge of the United States District Court for the District of New Jersey. Following her clerkship, Ms. Rodriguez was an associate at a New Jersey law firm where she was involved in a wide variety of litigation matters.

MORRIS M. SHUSTER, Of Counsel, is admitted to practice before the United States Supreme Court, United States Court of Appeals for the Third Circuit, the United States District Court for the Eastern District of Pennsylvania, the Supreme Court of Pennsylvania, and all other Pennsylvania Appellate and trial courts.

Mr. Shuster is a graduate of the Wharton School, University of Pennsylvania [*165] (B.S. in Economics, 1951), and of the University of Pennsylvania Law School (J.D., 1954).

Prior to joining the firm on May 1, 1993, Mr. Shuster was an active civil litigator as an associate and partner in a major Philadelphia litigation firm, as a named-partner in his own firm, and as special litigation counsel to a large Philadelphia, full-service firm. Over the last 20 years, he has concentrated his practice in consumer class actions against banks and insurance companies. He has been successful in obtaining multi-million dollar recoveries in these cases.

Mr. Shuster is currently a faculty member at the University of Pennsylvania Law School where he teaches Trial Advocacy. In 1981, he was a full-time faculty member at the University of Pennsylvania Law School and taught a course in The Lawyering Process. He also has been a guest lecturer on various legal subjects at the University of Pennsylvania Law School, Medical School, and Dental School, and at Drexel University. He is a member of the Advisory Committee for the Public Service Program at the University of Pennsylvania Law School where he developed the mentor/student pro bono project.

Mr. Shuster is a past president of The Philadelphia [*166] Trial Lawyers' Association. He was appointed by the Third Circuit Court of Appeals as Chairperson of the Bankruptcy Judge Search Committee. He was appointed by the District Court for the Eastern District of Pennsylvania as Chairperson of a Panel to consider reappointment of a U.S. Magistrate.

In the Philadelphia Bar Association, Mr. Shuster has served as a member of the Board of Governors, Chairperson of the Judicial Commission, Committee on Judicial Selection and Reform, Committee on Civil Legislation/Legislative Liaison, and Committee on Civil Judicial Procedure (state courts). He is listed in Who's Who in American Law.

BRENDA M. NELSON, of counsel, is admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Third and Eleventh Circuits, the United States District Court for the Eastern District of Pennsylvania and the Supreme Court of Pennsylvania. Ms. Nelson is a graduate of Oglethorpe University (B.B.A. with a major in accounting, 1980, summa cum laude) and of Harvard Law School (J.D., 1983). Upon graduation, she was an associate at a major Philadelphia law firm for two years, where she participated actively in a broad variety [*167] of litigation matters. Since joining the Firm in September 1985, Ms. Nelson has played a lead role in the prosecution of a number of securities class actions and shareholder derivative suits, including Bally Shareholder Litigation, Master File No. 87-0373 (JFG) (D.N.J.); CBS v. Paley, 86 CIV 9140 (JMC) (S.D.N.Y.); and Booth v. Connelly Containers, Inc., No. 89-8280 (E.D. Pa.). Ms. Nelson was also a featured speaker on RICO and securities fraud cases at the 1990 Civil RICO Seminar sponsored by the Pennsylvania Bar Institute.

MICHAEL J. BONI is admitted to practice before the United States Court of Appeals for the Third Circuit, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the Northern District of California and all Pennsylvania state courts. Mr. Boni received his B.A. in 1977 from Albright College, his M.A. (psychology) in 1980 from the University of Connecticut, and his J.D. in 1988 from the University of Pennsylvania Law School. Prior to joining the firm, Mr. Boni practiced with a major Philadelphia law firm concentrating in labor and employment litigation.

CYNTHIA A. CALDER is an associate in the Firm's [*168] Wilmington, Delaware office. She is admitted to practice before the Supreme Court of Delaware, the United States District Court for the District of Delaware, and the Supreme Court of Pennsylvania. She graduated from the University of Delaware in 1987 with a Bachelor of Arts degree cum laude in International Relations and Russian. In 1991, she received her Juris Doctor degree from the Villanova University School of Law, where she was a Founding Member and Managing Editor of the Villanova Environmental Law Journal. From 1991 to 1992, she served as a judicial law clerk to the Honorable Maurice A. Hartnett, III, Vice Chancellor of the Delaware Court of Chancery.

LISA CHANOW DYKSTRA is admitted to practice before the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the District of New Jersey, the Supreme Court of Pennsylvania, and the Supreme Court of New Jersey. She is a 1992 cum laude graduate of the Villanova University School of Law where she served as Managing Editor of Student Work on the Villanova Law Review. She is a 1989 cum laude graduate of New York University, where she received a B.A. in Russian language [*169] and political science.

FRANCIS J. FARINA is admitted to practice in the States of New York and Pennsylvania. He is a graduate of Georgetown University Law Center (J.D., 1983), The George Washington University (M.B.A., 1975), and Suffolk University (B.S., 1973). Prior to becoming associated with the Firm in 1986, Mr. Farina held positions as Deputy Auditor for Goldome Federal Savings Bank and Director, Internal Audit for Georgetown University and Medical Center. From 1975 to 1978, Mr. Farina was a Senior Auditor for a Big Eight accounting firm in Washington, D.C. He is licensed as a Certified Public Accountant in Virginia, New York and Pennsylvania and, in addition, is a Chartered Bank Auditor. Mr. Farina has served on the Editorial Advisory Board of the Journal of Accountancy and the Editorial Board of the Pennsylvania CPA Journal. He has served on numerous committees of state and national professional accounting organizations and been a frequent lecturer on accounting and audit matters. Mr. Farina has also been a member of the business school faculties at George Washington University and Georgetown University, teaching numerous courses at both undergraduate and graduate levels.

[*170] BARBARA M. FRIEND is admitted to practice before the Bar of the State of New York. She is a graduate of Brooklyn Law School (J.D., 1975) and Georgetown University (B.S. in Japanese, 1970). Before becoming associated with the Firm, Ms. Friend worked on a broad variety of legal matters, including acting as counsel to the Lake Placid Olympic Organizing Committee in 1979-80 and Director of the U.S. Bobsled & Skelton Federation, 1984-85. She continues to be very active, as both an interpreter and legal advisor, in United States Olympic

activities; State Committee Person, New York State Republican Committee; past Chairperson, Saranac Lake Republican Committee. Since she joined the Firm, Ms. Friend has worked on a number of securities class actions.

J. PAUL GIGNAC is an associate in the firm's Los Angeles office. Mr. Gignac is admitted to practice in the State of California and before the United States Court of Appeals for the Ninth Circuit as well as the United States District Courts for the Northern, Central and Southern Districts of California. Mr. Gignac is a 1983 cum laude graduate of Dartmouth College where he majored in government and a 1986 graduate of the UCLA School of Law. [*171] While at UCLA, Mr. Gignac served as a judicial extern to the Honorable A. Wallace Tashima, United States District Court Judge for the Central District of California.

Prior to joining the firm, Mr. Gignac was an associate with a major Los Angeles law firm. As an associate there, Mr. Gignac was certified as a trial attorney project ("tap") attorney by the Los Angeles County Bar and prosecuted three felony trials as a deputy district attorney in Los Angeles Superior Court. Mr. Gignac is a member of the Los Angeles County Bar Association and the State Bar of California.

MICHAEL D. GOTTSCH is admitted to practice before the Supreme Courts of Pennsylvania and New Jersey, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit. He is a graduate of Temple University School of Law (J.D. 1983) and Marquette University (B.S. 1977). From 1986 to 1987 he served as a Law Clerk to the Honorable Joseph H. Rodriguez, Judge of the United States District Court for the District of New Jersey.

PATRICK J. GRANNAN is an associate in the Firm's Los Angeles office. [*172] Mr. Grannan is admitted to practice in the state of California and before the United States Court of Appeals for the Ninth Circuit and the United States District Courts for the Central, Northern and Southern Districts of California and the District of Arizona. Mr. Grannan is a 1981 graduate of Haverford College where, as a Magill-Rhoads Scholar, he majored in psychology. Mr. Grannan is a 1984 magna cum laude graduate of New York Law School, where he was a John Ben Snow Scholar and served as an Articles Editor of the New York Law School Law Review. Mr. Grannan is the author of "California ex rel. State Lands Commission v. United States - Riparian Rights - Competing State and Federal Claims to Coastal Accretions" appearing at 29 N.Y.L. Sch. L. Rev. 491. Prior to joining the Firm, Mr. Grannan was employed by a Los Angeles firm practicing in the area of civil RICO and securities fraud litigation. While at his prior firm, Mr. Grannan was counsel for petitioner in a successful petition for extraordinary writ clarifying the law in the State of California relating to the use of evidence related to one party consensual tape recordings in civil trials. Frio v. Superior Court, 203 Cal. App. 3d 1480, 250 Cal. Rptr. 819 (1988). [*173] Since joining Greenfield & Chimicles in 1989, Mr. Grannan has been actively involved in the prosecution of a number of class and derivative actions on behalf of investors and consumers, including acting as a member of the plaintiff trial team in In re American Continental Corporation/Lincoln Savings and Loan Securities Litigation, MDL 834, which resulted in a substantial verdict for plaintiffs and Almeida v. Peat Marwick, No. 668436-9, a class action pending in the Superior Court of Alameda, State of California, which resulted in an \$ 8 million settlement with Peat Marwick believed to be among the first post-Bily settlements of a California state law claim with a major accounting firm.

TRUDY D. JOHNSON is an associate in the Firm's Los Angeles office, and is admitted to practice before all California State Courts and the United States District Courts for the Central, Northern and Southern Districts of California. Ms. Johnson is a 1986 graduate of Buena Vista College, Storm Lake, Iowa, where she majored in Business Management and graduated summa cum laude. Ms. Johnson received her law degree from the University of Iowa College of Law, where she was elected to the Order [*174] of the Coif. Prior to joining the Firm, Ms. Johnson practiced with a major Los Angeles firm in the areas of Environmental and General Commercial Litigation. Ms. Johnson is a member of the American Bar Association, the Los Angeles County Bar Association and the State Bar of California.

ANDREW H. KAYTON, is an associate in the Firm's West Palm Beach office. He is admitted to practice in the States of California and Florida, and for the United States Court of Appeals for the Ninth Circuit as well as the United States District Courts for the Central District of California, Southern District of Florida and Middle District of Florida. Mr. Kayton received his bachelor's degree from Amherst College in 1983 and is a 1988 graduate of the Law School at the University of Chicago. From 1988 to 1989, he served as a law clerk to the Honorable Charles L. Levin

of the Michigan Supreme Court. Prior to joining the Firm, Mr. Kayton was an associate at a downtown Los Angeles law firm, where he worked on a wide range of civil litigation matters, including securities fraud, civil RICO, construction, employment and general corporate litigation.

ROBERT J. KRINER, JR. is an associate in the Firm's Wilmington, [*175] Delaware office. He is admitted to practice before the Supreme Court of Delaware and the United States District Court for the District of Delaware. Mr. Kriner is a 1983 graduate of the University of Delaware with a degree in chemistry, and a 1988 graduate of the Delaware Law School of Widner University, where he was managing editor of The Delaware Journal of Corporate Law. From 1988 to 1989, Mr. Kriner served as law clerk to the Honorable James L. Latchum, Senior Judge of the United States District Court for the District of Delaware. Following his clerkship and until joining the Firm, Mr. Kriner was an associate with a major Wilmington, Delaware law firm, practicing in the areas of corporate and general litigation.

FREDRIC I. LAZARUS is admitted to practice in the States of Pennsylvania and New Jersey, and before the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the Eastern District of Pennsylvania. He is a graduate of the University of Pennsylvania Law School (J.D. cum laude 1990) and Drexel University (B.S. 1987) (electrical engineering). Mr. Lazarus is [*176] a member of Tau Beta Pi (the National Engineering Honor Society) as well as several local, state and national bar associations. Prior to joining the Firm, Mr. Lazarus practiced with a major Philadelphia law firm concentrating in the areas of creditors' rights litigation and real estate law.

JORDAN L. LURIE received his law degree in 1987 from the University of Southern California Law Center where he was Notes Editor of the University of Southern California Law Review. He received his undergraduate degree from Yale University in 1984 (Cum Laude). Prior to joining the Firm, Mr. Lurie practiced with a major Los Angeles law firm and specialized in complex litigation. Mr. Lurie is the author of "Rx for Pharmacy Malpractice: California's New Duty to Consult," CEB Civil Litigation Reporter, December 1991; co-author of "Chapter 54 - Consent Judgment" and "Chapter 55 - Submitted Case" Civil Procedure Before Trial (1990) published by California Continuing Education of the Bar; and co-author of "Postponing a Municipal Court Election: The November Election Provision of Government Code Section 71180(b)," California Courts Commentary, November 1989. Mr. Lurie is a member of the [*177] Los Angeles County Bar Association, the American Bar Association and the State Bar of California and is admitted to practice before all California state courts and the United States District Court for the Central District of California.

CAROLYN D. MACK, an associate in the Firm's Wilmington, Delaware office, is admitted to practice before all of the courts located in the State of Delaware and before the United States Court of Appeals for the Third Circuit. She was graduated from the University of Maryland in College Park, Maryland in 1981, where she received a Bachelor of Arts degree cum laude in Government and Politics and was elected to the Phi Kappa Phi and Phi Beta Kappa national honor societies. In 1984, Ms. Mack was graduated from the National Law Center of George Washington University and received her Juris Doctor degree with honors. From 1984 to 1985, Ms. Mack served as judicial law clerk to Vice Chancellor Maurice A. Hartnett, III of the Delaware Court of Chancery. Since completion of her clerkship, she has engaged in significant shareholder litigation practice.

MARY KATHERINE MEERMANS graduated cum laude from the Law School of University of Pennsylvania in 1982. [*178] She served as a law clerk to the Honorable Paul M. Chalfin, Philadelphia Court of Common Pleas, from September 1982 to January 1984, and to the Honorable Phyllis W. Beck from January 1984 to October 1984. She is a member of the Pennsylvania Bar.

KATHLEEN E. MORAN is an associate in the Firm's Los Angeles office. She is admitted to practice before all California state courts and the United States District Court for the Central District of California. Ms. Moran is a 1983 graduate of the University of Southern California, where she majored in Business Administration and graduated magna cum laude. Prior to attending law school, Ms. Moran worked as a Senior Auditor at a Big Eight accounting firm in Los Angeles, California and is licensed as a Certified Public Accountant in California. In 1990, Ms. Moran received her law degree from the University of California at Davis, where she was elected to the Order of the Coif and served as the Business Editor of the U.C. Davis Law Review. Prior to joining the Firm, Ms. Moran practiced

with a major Los Angeles law firm where she worked on venture capital and securities transactions as well as bankruptcy matters. Ms. Moran is a member of the State [*179] Bar of California.

DEBRA N. NATHANSON is admitted to practice in the states of Pennsylvania and Georgia. She is a 1988 graduate of the University of Pennsylvania School of Law and received a Bachelor of Arts Degree from Bryn Mawr College in 1984. Prior to becoming associated with the Firm in October 1989, Ms. Nathanson was an associate with the Atlanta office of a major Chicago law firm where she handled bankruptcy and commercial litigation matters.

TINA BAILER NIEVES is an associate in the Firm's Los Angeles office. Ms. Nieves is admitted to practice in the State of California and before the United States Court of Appeals for the Ninth Circuit as well as the United States District Court for the Central District of California. Ms. Nieves is a 1983 graduate of the University of California Berkeley, where she majored in Rhetoric. Ms. Nieves is a 1987 graduate of the University of California, Davis School of Law. While at U.C. Davis, Ms. Nieves participated in the trial practice program and was an active member in Law Students for the Arts. Prior to joining the firm, Ms. Nieves was an associate with a major Los Angeles law firm, where she practiced in the areas of Civil RICO, Maritime, [*180] Insurance Coverage, and Contract Litigation.

MELANIE PIECH, an associate with the Firm's Los Angeles Office, is admitted to practice before all California State Courts, the United States Court of Appeals for the Ninth Circuit, and United States District Court for the Northern and Central Districts of California. Ms. Piech was graduated magna cum laude with a Bachelor of Arts Degree in Political Science from Loyola Marymount of Los Angeles in 1986. She received her law degree from Hastings College of the Law in San Francisco in 1989, having attended Vermont Law School for one semester. Prior to joining the Firm, she practiced with a major Los Angeles firm in the areas of Maritime, Employment and Insurance Litigation. Ms. Piech is a member of the American Bar Association and the State Bar of California.

ROBIN RESNICK is admitted to practice before the Supreme Court of Pennsylvania. Ms. Resnick is a 1986 cum laude graduate of the Law School of the University of Pennsylvania where she was elected to the Order of the Coif and a 1983 summa cum laude graduate of the College of Arts and Sciences of the University of Pennsylvania. She served as a law clerk to the Honorable Frank [*181] A. Kaufman, Senior Judge of the United States District Court for the District of Maryland. Ms. Resnick is also affiliated with the Disabilities Law Project, a non-profit law firm in Philadelphia.

CHRISTOPHER T. REYNA graduated from the Law School of the University of Pennsylvania in June, 1986. Mr. Reyna received his Bachelor's Degree from Harvard University in 1983. He is admitted to practice before the Supreme Court of Pennsylvania, the United States Courts of Appeals for the Third and Ninth Circuits and the Eastern District of Pennsylvania.

IRA NEIL RICHARDS is admitted to practice in the states of New York and Pennsylvania and in the United States District Courts for the Eastern District of Pennsylvania and the Southern District of New York, as well as the United States Court of Appeals for the Third Circuit. He is a graduate of the University of Pennsylvania School of Law (J.D. magna cum laude, 1986) where he served as special Project Director of the University of Pennsylvania Law Review. He was elected to the Order of the Coif and received the Philadelphia Trial Lawyers Association Award and the Wapner, Newman & Associates Award, both for trial advocacy. He is a 1983 graduate [*182] of Cornell University, where he received a B.S. in industrial and labor relations. Prior to joining the Firm, he practiced with a major Philadelphia law firm concentrating in complex civil litigation.

MARK C. RIFKIN is admitted to practice before the United States Supreme Court, the Supreme Court of Pennsylvania, the Supreme Court of New Jersey, the United States Court of Appeals for the Third Circuit, and the United States District Courts for the Eastern and Western Districts of Pennsylvania and the District of New Jersey. Mr. Rifkin received his A.B. degree from Princeton University, where he was awarded the Roper Trophy for academic excellence and athletic proficiency. He received his J.D. degree from the Villanova University School of Law, where he was a contributor to Packel and Poulin, Pennsylvania Evidence (1987). Prior to joining the Firm, Mr. Rifkin was associated with a major Philadelphia law firm, practicing complex commercial litigation. Since joining the firm, Mr. Rifkin has been actively involved in the prosecution of several class and derivative actions, including In re FPL Group Consolidated Litigation, C.A. No. 90-8461 (S.D. Fla.), and In re Midlantic Corp. [*183] Shareholder

Litigation, C.A. No. 90-1275 (D.N.J.). Recently, he was one of plaintiff's trial counsel in Upp v. Mellon Bank, N.A., C.A. No. 91-5229 (E.D.Pa.), where the class was awarded more than \$ 60 million in damages. Mr. Rifkin has represented clients in a wide variety of litigation involving financing, real estate, and business matters. He has also represented clients in disciplinary and administrative proceedings. Mr. Rifkin is a member of the American, Pennsylvania, and Philadelphia Bar Associations and the Association of Trial Lawyers of America.

MILES B. RITTMMASTER is admitted to practice in Pennsylvania, the District of Columbia, the United States District Courts for the Eastern and Western Districts of Pennsylvania, and the United States District Court for the District of Columbia. Mr. Rittmaster is a 1980 graduate of Yale Law School and a 1977 summa cum laude graduate of the University of Missouri in Columbia, Missouri, where he was elected to the Phi Beta Kappa honor society. Prior to joining the Firm in January 1990, Mr. Rittmaster was associated with a major Philadelphia law firm where he concentrated in antitrust and commercial litigation. From 1980 to 1983, [*184] Mr. Rittmaster was a Trial Attorney in the Honors Program of the Antitrust Division, United States Department of Justice in Washington, D.C., where he specialized in civil, criminal and regulatory matters involving transportation companies.

STEVEN A. SCHWARTZ is admitted to practice before the Supreme Court of Pennsylvania, the United States District Court for the Eastern District of Pennsylvania, and the United States Court of Appeals for the Third Circuit. He is a graduate of the Duke University School of Law (J.D. 1987) where he served as senior editor of Law & Contemporary Problems. He is a 1984 cum laude graduate of the University of Pennsylvania, where he received a B.A. in political science. Prior to joining the Firm, he practiced with a major Philadelphia firm concentrating in complex civil litigation.

DENISE DAVIS SCHWARTZMAN is admitted to practice in Pennsylvania, Florida, Texas and the District of Columbia. She is admitted to practice before all the State Courts in these jurisdictions and is admitted to the United States Courts of Appeals for the Third, Fifth, Eleventh and District of Columbia Circuits as well as United States District Courts within each Circuit. [*185] Ms. Schwartzman is a graduate of the Law School of the University of Pennsylvania (L.L.B. 1969) and Temple University (A.B. 1966). She holds a Master of Laws in Taxation from the Villanova University Law School. Ms. Schwartzman has practiced extensively at the trial and appellate levels before Federal and State Courts and before various administrative agencies. Ms. Schwartzman was appellate counsel on the brief in In re Charter Company, 876 F.2d 866 (11th Cir. 1989), a case which established that class proofs of claim are allowable in bankruptcy proceedings. Prior to relocating in Philadelphia, she was associated with a major law firm in San Antonio, Texas.

JONATHAN SHUB is admitted to practice in Pennsylvania and in the District of Columbia. He is a 1983 graduate of The American University with a degree in public communications, and a 1988 graduate of the Delaware Law School of Widener University (cum laude), where he was an articles editor of The Delaware Journal of Corporate Law. Mr. Shub served as a law clerk to the Honorable Joseph T. Walsh of the Supreme Court of Delaware while a student at Widener University. Prior to joining the Firm, he practiced [*186] in the Washington, D.C. office of a major New York law firm concentrating in civil litigation.

JEFFREY T. SPANGLER is admitted to practice before the Supreme Court of Pennsylvania, the United States District Courts for the Middle and Eastern Districts of Pennsylvania and the Third Circuit Court of Appeals. Mr. Spangler is a 1973 graduate of Lehigh University (B.A. in Biology) and a 1978 graduate of The Dickinson School of Law. Mr. Spangler has served as a Prosecuting Attorney for Pennsylvania's Medical Board and as a law clerk for The Honorable William W. Lipsitt of the Dauphin County Court of Common Pleas in Harrisburg. He is a member of the Philadelphia Bar Association.

J. DAVID STONER is admitted to practice before the United States Court of Appeals for the Third Circuit, the United States District Courts for the Eastern District of Pennsylvania and the District of New Jersey. He is also admitted to practice in the state courts of Pennsylvania, New York, New Jersey and Indiana. Mr. Stoner is a graduate of Harvard College (A.B. 1951, cum laude) and of Harvard Law School (J.D. 1955, cum laude), where he was a member of the Board of Student Advisers and an oralist on the [*187] moot court team that won the Harvard Moot Court Competition. After three years as an associate at a major Philadelphia law firm and three years teaching at Rutgers Law School, Camden, New Jersey, he worked in the Legal Adviser's Office in the United States

Department of State, first serving the Bureau of Economic Affairs and then as Assistant Legal Adviser for Administration. He has also worked as an attorney in the Philadelphia poverty law program and in the legal departments of the Federal Reserve Bank of Philadelphia, a Philadelphia bank holding company, the Bell Telephone Company of Pennsylvania and AT&T. While at AT&T he participated in the antitrust defense of AT&T in United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983) (settled after trial); Southern Pacific Communications Company v. AT&T, 556 F. Supp. 825 (D.D.C. 1982) (as amended Jan. 10, 1983), aff'd, 238 U.S. App. D.C. 309, 740 F.2d 980 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005, 84 L. Ed. 2d 380, 105 S. Ct. 1359 (1985); and 567 F. Supp. 326 (D.D.C. 1983), aff'd, 238 U.S. App. D.C. 340, 740 F.2d 1011 (D.C. Cir. 1984); [*188] and in the multidistrict In re Long Distance Telephone Service Antitrust Litigation, MDL No. 550 S.W. (N.D. Cal.).

JAMES C. STRUM, an associate in the Firm's Wilmington, Delaware office, is admitted to practice before the Supreme Court of Delaware, the United States District Court for the District of Delaware, and the Third Circuit Court of Appeals. Mr. Strum is a 1982 graduate of Brown University and a 1986 graduate of Marshall-Wythe School of Law, the College of William and Mary. Prior to joining the Firm in November 1990, Mr. Strum practiced for four years in a major Wilmington, Delaware law firm in the area of corporate litigation, primarily in mergers and acquisitions.

JOHN N. ZARIAN is an associate in the Firm's Los Angeles Office. Mr. Zarian is admitted to practice in the State of California and in all of the United States District Courts located in California, as well as in the United States Court of Appeals for the Ninth Circuit. Mr. Zarian is also admitted to practice in the District of Columbia. Mr. Zarian is a 1989 graduate of the University of Southern California Law Center, where he was a member of the Southern California Law Review. While at USC, Mr. Zarian participated [*189] in numerous moot court competitions and was elected Class President. Mr. Zarian is also a graduate of the University of Utah, from which he received a bachelor's degree in Political Science (1984) and a master's degree in Finance (1989). While at Utah, Mr. Zarian was active in a number of civic and fraternal organizations, and was elected Student Body President in 1982. Prior to joining the Firm, Mr. Zarian was an associate in the Los Angeles office of a major New York City law firm. Mr. Zarian currently serves as a member of the Legion Lex Board of Directors and as president emeritus of the University of Utah Alumni Association, Los Angeles Chapter. Mr. Zarian is a member of the State Bar of California and the District of Columbia Bar.

WENDY H. ZOBERMAN is an associate in the Firm's West Palm Beach, Florida office. She is admitted to practice before the United States District Court for the Middle and Southern Districts of Florida, as well as all Florida State Courts. Ms. Zoberman is a 1981 graduate of Wellesley College, where she was a Durant Scholar, and was elected to the Phi Beta Kappa Society. She received her law degree from Columbia University in 1984. At Columbia she served [*190] as an Articles Editor of the Columbia University-Volunteer Lawyers for the Arts Journal of Art and the Law, and is a co-author of "An Introduction to the New York Artists' Authorship Rights Act," appearing at Vol. 8, No. 3 Columbia - VLA Journal of Art and the Law 369.

KATHLEEN P. BALON, ASA, the Firm's Financial Specialist, is a graduate of Drexel University (B.S. Finance 1983) and Villanova University (Master of Taxation 1992). Ms. Balon is a Senior Member of the American Society of Appraisers. Prior to joining the Firm, Ms. Balon was a Vice President of the investment bank, Howard, Lawson & Co., where she had responsibility for a broad range of corporate finance assignments. Ms. Balon has co-authored several articles, including "Giving the Company Away (While Keeping the Benefits)," Lawyer's Digest, March 1987 and "Leveraged ESOPs - Buyers of Companies," Lawyer's Digest, May 1988. Ms. Balon has also served as a panelist at various seminars and conventions regarding financing and valuation issues.

Exhibit "D"

BURT & PUCILLO

Time Chart

TIMEKEEPER	*	HOU RS	HOURLY RATE	TOTAL LODESTAR
Michael J. Pucillo	P	3.25	325.00	1,056.25
Janis D. Herzig	PL	3.00	75.00	225.00
TOTALS		6.25		1,281.25

[*191] * Idicates: P=Parnter; A=Associate; and PL=Paralegal

Exhibit "E"

CHIMICLES BURT & JACOBSEN

Time Chart

TIMEKEEPER	*	HOU RS	HOURLY RATE	TOTAL LODESTAR
Michael J. Pucillo	P	2.25	325.00	731.25
Wendy H. Zoberman	P	18.00	225.00	4,050.00
Judith L. Putnam	PL		75.00	56.25
		0.75		
TOTALS		21.00		4,837.50

* Idicates: P=Parnter; A=Associate; and PL=Paralegal

Exhibit "F"

GREENFIELD & CHIMICLES

Time Chart

TIMEKEEPER	*	HOUR S	HOURLY RATE	TOTAL LODESTAR
Michael J. Pucillo	P	31.50	325.00	10,237.50
Carol M. Brewer	A	119.00	215.00	25,585.00
C. Oliver Burt	P	1.25	400.00	500.00
Nicholas Chimicles	P	0.50	400.00	200.00
Richard Greenfield	P	1.00	450.00	450.00
Wendy H. Zoberman	A	21.75	225.00	4,893.75

TIMEKEEPER	*	HOUR S	HOURLY RATE	TOTAL LODESTAR
Dawn M. Mehler	PL	24.25	75.00	1,818.75
Judy L. Putnam	PL	1.50	75.00	112.50
TOTALS		200.75		43,797.50

* Indicates: P=Partner; A=Associate; and PL=Paralegal

Exhibit "G"

BURT & PUCILLO

Expense Chart

EXPENSE	AMOUNT
Federal Express	14.00
Telephone	7.62
Photocopying - Firm	22.50
TOTAL	44.12

Exhibit "H"

[*192] CHIMICLES, BURT & JACOBSEN

Expense Chart

EXPENSE	AMOUNT
Federal Express	12.72
Telephone/Telecopy	109.86
Photocopying - Firm	95.00
Photocopying - Outside	47.82
Travel, Food, Lodg.	1,222.81
TOTAL	1,488.21

Exhibit "I"

GREENFIELD & CHIMICLES

Expense Chart

EXPENSE	AMOUNT
Telephone/Telecopy	704.32
Photocopying - Firm	312.50
Photocopying - Outside	386.50
Clerical Overtime	120.00
Filing Fees	360.00
Lexis/Comp. Research	316.20
Messenger/Courier	140.10
Postage/Express Mail	8.20
Subpoena Witness Fee	36.00
Subpoena Service	60.00
Travel, Food, Lodg.	5.60
TOTAL	2,449.42

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

SUSAN STERN, Plaintiff,

vs.

JEAN-FRANCOIS ROSSIGNOL, MARC AYERS, and BELMAC CORP., Defendants.

Case No. 92-1823-Civ-T-21(B)

AFFIDAVIT OF CHRIS S. COUTROULIS IN SUPPORT OF JOINT PETITION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES FILED ON BEHALF OF BERGER & MONTAGUE, P.C.

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH:

I, CHRIS S. COUTROULIS, being duly sworn, deposes and says:

1. I am a shareholder of the law firm of [*193] Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. I am submitting this Affidavit in support of Goodkind, Labaton, Rudoff & Schochet's application for an award of attorneys'

fees in connection with services rendered to the Plaintiff class and the reimbursement of that firm for fees paid to my firm for expenses incurred by my firm in the course of this litigation.

2. This firm, as special local counsel of record for Plaintiff, Susan Stern, provided limited assistance in the prosecution of this action in cooperation with other plaintiffs' counsel. Specifically, we agreed to act as local counsel in this matter to shepherd the initial filing and service of this suit in Federal Court in Tampa.

3. The chart attached hereto as Exhibit A presents a detailed summary indicating the time expended by the attorneys and paralegals of this firm on the litigation, at applicable rates. The chart includes the name of the attorneys who worked on the case, the hourly billing rates and number of hours expended by the attorneys and paralegals on this matter. The chart was prepared from contemporaneous daily time records maintained by my firm. The hourly rates for the attorneys and paralegals in my [*194] firm are the regular rates charged for their services in similar litigation such as this one. In my opinion, the rates charged by the various attorneys and the paralegals in my firm are reasonable. Time expended in preparing this Affidavit in support of my firm's application for fees and reimbursement of expenses has not been included in this request.

4. The total number of hours expended on this litigation by my firm is 13.6 hours. The total bill for my firm is 2295.62, consisting of \$ 1,963.00 for attorneys' time and \$ 48.00 for paralegals' time.

5. With respect to the standing of counsel in this case, attached hereto as Exhibit B is a brief biography of my firm and the attorneys of my firm who worked on this litigation.

6. My firm expended a total of \$ 284.62 in expenses in connection with the prosecution of this litigation broken down as follows:

Disbursements	Amount
Service of Process -- Rossignol and Ayers Summons	\$ 24.00
Service of Process -- Robert McKee Summons	\$ 18.00
Messenger Services	\$ 8.33
Secretary Overtime	\$ 18.00
Copies	\$ 15.50
Postage	\$ 7.84
Telephone Charges	\$ 8.95
Telecopy Charges	\$ 64.00
Complaint Filing Fee	\$ 120.00
TOTAL	\$ 284.62

[*195] 7. The expenses incurred pertaining to this case are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source material and are an accurate recordation of the expenses incurred.

CHRIS S. COUTROULIS

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

The foregoing instrument was acknowledged before me this 25TH day of February, 1994, by CHRIS S. COUTROULIS, who is personally known to me or has produced as identification.

My Commission Expires

Yvonne M. Putzek

Notary Public (Signature)

Yvonne M. Putzek

(Printed Name)

(Serial Number, if any)

SUSAN STERN V. BELMAC

Firm: **CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.**

ATTORNEY	HOURLY RATE	TOTAL HOURS	TIME VALUE
M.S. Scriven (A)	\$ 135.00	7.2	\$ 972.00
N.J. Faggianelli (P)	\$ 170.00	4.4	\$ 748.00
M.V. McKay (P)	\$ 195.00	.4	\$ 78.00
A.B. Livingston (P)	\$ 215.00	.4	\$ 86.00
C.S. Coutroulis (P)	\$ 197.50	.4	\$ 79.00
TOTAL ATTORNEYS:		12.8	\$ 1,963.00

(P) = Partner, (A) = Associate

PARALEGAL	HOURLY RATE	TOTAL HOURS	TIME VALUE
D. Dickey	\$ 60.00	.8	\$ 48.00
FIRM TOTAL:		13.6	\$ 2,011.00

[*196] EXHIBIT A

FIRM PROFILE

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.

INTRODUCTION

Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. was established in 1901 and is one of Florida's oldest and largest law firms. Since our inception, the firm has grown to 160 lawyers with a nationwide practice featuring offices in Tampa, Orlando, Tallahassee, Pensacola, West Palm Beach, and St. Petersburg.

The firm has an extensive client base of national and local corporations, state and local public bodies as well as individuals. Our practice encompasses all aspects of civil law in local, state, national and international jurisdictions.

SERVICES

Carlton, Fields' practice includes all the fields traditionally provided by large general civil practice firms. The firm also maintains specific areas of practice, including: Admiralty, Antitrust, Banking, Business and Real Estate Financing, Business Transactions, Construction, Employment Law, Environmental and Land Use Planning, General Litigation and Dispute Resolution, Governmental Representation, Health Care, Insolvency and Creditors Rights, International Trade and Transactions, Real Property, Taxation, Transactions, Workouts [*197] and Reorganizations.

EXHIBIT B

When the services of more than one practice area are required by a client, one designated attorney coordinates and supervises these activities. The attorney is aware of the capabilities of each area as well as his client's particular needs. Depending upon the client's individual requirements, we have the flexibility to work individually or in teams. This approach enables us to address clients' needs in the most timely, efficient manner while giving the most attention to quality.

LAWYERS

Our lawyers share outstanding academic backgrounds and the sincere desire to improve the communities in which they practice law. The firm's approach to superior client service has attracted people of the highest caliber to our team.

In addition, firm attorneys have served in positions of responsibility in federal and state governments, as well as civic, community and bar leadership positions. Carlton, Fields lawyers proudly participate in work for a variety of pro bono projects.

PHILOSOPHY

The attorneys of Carlton Fields devote their professional energies not only to solving clients' problems but to anticipating them. We continually develop the creative [*198] solutions required to turn present circumstances to future advantage. Our focus is long term, going beyond the matter at hand to emerging trends and opportunities that may affect our clients for many years to come.

We practice preventative law that helps our clients avoid problems before they arise. We not only seek to be an adviser, counsellor, and advocate for our clients, but also a team member dedicated to achieving mutual goals. Whether providing counsel to an individual or putting together an international corporate transaction, our attorneys have one overall goal: to get results for our clients by providing the best possible job in terms of quality work, timely service and sensitivity to cost.

CARLTON FIELDS ATTORNEY BIOGRAPHY

Mary S. Scriven

Mary S. Scriven (Tampa) graduated cum laude from Duke University in 1984 with an A.B. degree in Political Science. She was on the Dean's List and received the President's Leadership Award. In 1987, she graduated with high honors from the Florida State University College of Law where she was a member of the Moot Court and a recipient of the William Blank-David Miller Scholarship. She was also the First Annual Student Graduation [*199] Speaker.

Ms. Scriven joined Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. in 1987. Her practice has been focused on the areas of failed banking, fidelity bond litigation, title insurance litigation, general corporate, antitrust, local government, and civil forfeiture. She has had experience working with the FDIC/RTC and has developed a thorough working knowledge of applicable provisions of the FDIC Act as amended by FIRREA. She has prosecuted a major

accountant's malpractice case for FDIC and is familiar with relevant statutory and applicable common law principles. She has also been a lead team member in the prosecution of directors and officers and attorney malpractice actions for FDIC and RTC arising from the failure of Florida Centre Bank, Park Bank of Florida and Nile Valley Savings & Loan. In addition, she has garnered substantial knowledge in insurance coverage issues.

She has also done extensive research in defending 1983 allegations against local government bodies. She has successfully defended against a civil forfeiture action brought by the U.S. Attorney against a bank holding security interest in property seized in connection with a narcotics prosecution. Ms. Scriven [***200**] has litigated in Federal Court and has an extensive familiarity with Federal Discovery Practice as it relates to both non-parties and parties and with major document discovery.

In addition to practicing law, Ms. Scriven is active in community and professional organizations. She is on the Board of Directors, Executive Committee and the Law Student Assistance Committee of The Florida Bar Foundation, the Board of the Tampa Bay Regional Planning Council. She is President-Elect of the Hillsborough Association for Women Lawyers; a member of the Florida Association for Women Lawyers; secretary of the George Edgecomb Bar Association; a member of the American Bar Association; The Florida Bar; and the Hillsborough County Bar Association, Inc.; a member of The Athena Society and a member of the Junior League of Tampa and the First Baptist Church of West Tampa. Ms. Scriven is married to Lansing C. Scriven and has three children: Tyler, age 11, Jessica, age 3, and Sarah, age 1.

Ms. Scriven is admitted to practice in state of Florida and the United States District Court for the Middle District of Florida.

Nancy J. Faggianelli

Nancy J. Faggianelli (Tampa) graduated in 1976 from the [***201**] University of Florida with a bachelor of arts degree in History and Education. In 1982, she received her juris doctor degree with honors from the University of Florida where she was member of the Order of the Coif and was student works editor for the University of Florida Law Review.

Ms. Faggianelli joined Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. in 1982. She practices in the area of general corporate litigation with an emphasis in business torts, civil theft, fraud, and interference with contract. She has also had experience in cases involving securities fraud and accountant's liability.

Ms. Faggianelli is also active in community and professional organizations. Her community activities include being on the Board of Trustees of the Leukemia Society and volunteering for Metropolitan Ministries. She is also a member of The Florida Bar.

She is admitted to practice in Florida.

Malcolm V. McKay

Malcolm V. McKay (Tampa) graduated from Duke University with an A.B. degree in History in 1963. After four years of service in the United States Air Force, he attended Columbia University Law School. In 1970 he received his juris doctor degree, graduating cum laude, [***202**] with honors.

Prior to joining Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. in 1989, Mr. McKay clerked for a United States Circuit Judge in the United States Court of Appeals, Fifth Circuit. Mr. McKay practices in the areas of general commercial litigation and commercial real estate transactions. He has extensive experience in both areas. His litigation experience includes: major involvement in environmental matters, claims arising under both state and federal securities laws, and employment matters concerning mostly employment contracts and covenants not to compete. His commercial real estate practice includes: the representation of both developers and lending

institutions. He also has broad experience in eminent domain litigation and in the representation of shopping center owners and managers.

In the environmental area of his commercial litigation practice, Mr. McKay has developed an expertise in the prosecution and defense of claims arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). He is also experienced in handling environmental claims under Florida state law. In the securities area of his commercial litigation practice, [*203] he has handled a variety of securities law matters in federal and state courts as well as in front of the New York Stock Exchange and the NASD.

Mr. McKay's commercial real estate practice is also quite broad. He has many years of experience representing developers, syndicators, condominium builders, and office park developers. He has also represented financial institutions, both banks and insurance companies, in complex real estate financing transactions. Mr. McKay has appeared frequently before city and county governmental agencies in connection with land use and zoning matters.

In addition to practicing law, Mr. McKay dedicates his time to the community. He volunteers at the public schools and for the Chi Chi Rodriguez Youth Foundation, a Clearwater, Florida organization that aids disadvantaged youths.

Mr. McKay is also a member of the American Bar Association, The Florida Bar, and the Hillsborough County Bar Association, Inc. He is admitted to practice in the United States District Court for the Middle District of Florida, the Eleventh Circuit Court of Appeals, and in all Florida State Courts.

A. Broaddus Livingston

A. Broaddus Livingston (Tampa) graduated from Vanderbilt [*204] University in 1952 with a bachelor of arts degree. In 1955, he graduated from the University of Florida College of Law with an LL.B. He converted his degree to a juris doctor in 1967.

Mr. Livingston joined Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. in 1955. He has engaged in civil trial practice in state and federal courts throughout Florida. His trial practice has been broad, and has included, in part, the following areas: contracts, product liability, professional negligence, environment, defamation, discrimination, eminent domain, and selected insurance fields. He has tried jury cases in every metropolitan area in Florida in addition to many small communities. He has also tried non-jury cases of almost every type.

In the product liability field, Mr. Livingston has represented a variety of clients including a number of pharmaceutical companies, soft drink companies, brewing companies, and cigarette manufacturers. His work in the professional negligence field has involved such clients as law firms, doctors, clinical laboratories, hospitals, and accountants. He has extensive experience in the medical malpractice field primarily representing claims against hospitals. In [*205] the area of attorney malpractice, he has defended many cases and is often called as an expert witness on the standard of care for attorney conduct.

While representing major oil companies, he has defended cases arising from claims concerning torts, mineral rights, the environment, and eminent domain. He has also been involved in cigarette litigation.

In addition to practicing law, Mr. Livingston, a fifth generation Floridian, is an active and respected member of his community.

Mr. Livingston is also a devoted member of many professional organizations. In 1979, he was elected to fellowship in the American College of Trial Lawyers and in 1972 to membership in the Federation of Insurance and Corporate Counsel. He is also a past president of the Florida Defense Lawyers Association and a former chairman of the Trial Lawyers Section of The Florida Bar. In addition, the Trial Lawyers Section of The Hillsborough County Bar Association, Inc. honored him in 1988 with the Herbert G. Goldburg Memorial Award for his demonstration of legal acumen, fairness, integrity, courtesy, respect for fellow lawyers, and his devotion to the legal system.

Mr. Livingston is a member of the Hillsborough County [*206] Bar Association, Inc., The Florida Bar, and the American Bar Association. He is admitted to practice in the United States District Courts of Florida, and the Eleventh Circuit Court of Appeals.

Chris S. Coutroulis

Chris S. Coutroulis (Tampa) graduated magna cum laude and Phi Beta Kappa with a bachelor of arts degree in Economics from Wesleyan University in 1975. While at Wesleyan, he was twice awarded the University's White Prize for Proficiency in Economics. In 1979, he earned his juris doctor degree from Columbia University where he was named a Harlan Fiske Stone Scholar and then a James Kent Scholar for highest academic distinction. Prior to entering Columbia, he worked for a year as a research economist with National Economic Research Associates, New York, New York.

Mr. Coutroulis joined Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. in 1980, and currently is the co-chairman of the firm's Business Litigation and Trade Regulation Department in Tampa. Prior to joining the firm, he was an associate at Milbank, Tweed, Hadley, & McCloy (New York). His areas of practice currently include: antitrust litigation and counseling, accountants and professional malpractice [*207] litigation on behalf of federal regulatory agencies stemming from the failure of financial institutions, and general business disputes. He has had significant involvement in arbitration and alternative dispute resolution, as well as jury and bench trials.

In the antitrust context, Mr. Coutroulis is experienced in litigation involving horizontal and vertical restraints of trade, monopolization, price discrimination, federal state investigations, and antitrust counseling. Some of the industries in which he has experience include fast food, credit cards, replacement batteries, advertising, sports telecasting, professional bridge, electric utilities, maritime, and petroleum. He has represented both plaintiffs and defendants at the trial and appellate levels in both federal and state courts.

In the accountants malpractice area, Mr. Coutroulis has worked extensively on litigation brought on behalf of public entity investors in the failed firm, ESM Government Securities, against their former auditors. In the failed financial arena, Mr. Coutroulis' work has involved litigation against financial institutions' former auditors, consultants, directors, and officers.

Mr. Coutroulis is also an [*208] active member of the Antitrust Section of the American Bar Association and a member of the American Bar Foundation. He has lectured, served on faculty panels, and written on various aspects of antitrust law. He is the co-author of the ABA Antitrust Section's Treble Damage Monograph, the author of articles entitled "The Increasingly Pivotal Competitive Injury Requirement in Secondary Line Cases Under the Robinson-Patman Act: Relevant Factors in Today's Environment," 57 Antitrust L.J. 935 (1989), "Developments in Robinson-Patman Law," 58 Antitrust L.J. 443 (1989), and "Collaboration Prompted by Competitive Concerns," 61 Antitrust L.J. 391 (1993), and a contributing writer to Antitrust Law Developments (Third).

Mr. Coutroulis is a member of the American Bar Association, The Florida Bar, and the Hillsborough County Bar. Mr. Coutroulis is admitted to practice in the United States Supreme Court, the United States District Courts for the Middle and Southern Districts of Florida, the Eighth and Eleventh Circuits Courts of Appeal, and all the state courts of Florida.

UNITED STATES DISTRICT COURT MIDDLE DIVISION OF FLORIDA

TAMPA DIVISION

[*209] FOGEL, et al., Plaintiffs,

- v. -

BELMAC CORPORATION, et al., Defendant.

Case No. 92-1814-Civ-T-23C

AFFIDAVIT OF IRA A. SCHOCHET IN SUPPORT OF JOINT PETITION FOR ATTORNEYS' FEES AND
REIMBURSEMENT OF EXPENSES FILED ON BEHALF OF GOODKIND LABATON RUDOFF & SUCHAROW

STATE OF NEW YORK

COUNTY OF NEW YORK

ss.

I, IRA A. SCHOCHET, being duly sworn, depose and say:

I am a member of the law firm of Goodkind Labaton Rudoff & Sucharow ("GLRS").

1. I am submitting this Affidavit in support of my firm's application for an award of attorneys' fees in connection with services rendered to the Plaintiff class and the reimbursement of expenses incurred by my firm in the course of this litigation.

2. This firm, as counsel of record for Plaintiff Hal Fogel, commenced an action in this Court. Thereafter, we participated in the prosecution of this action as co-lead counsel in cooperation with other Plaintiffs' counsel. The work performed by GLRS included factual investigation into Mr. Fogel's claims, drafting and serving a complaint and request for documents on behalf of Mr. Fogel; conferences with source and attending a meeting of securities analysts regarding Belmac; drafting pre-trial order; [*210] participating in drafting the amended complaint, drafting class certification brief, analysis of damage calculation, negotiation of settlement, participating in drafting of memorandum of understanding and settlement papers, reviewing and analyzing documents produced by defendants, and taking deposition of defendant Rossignol.

3. The chart attached hereto as Exhibit A presents a detailed summary indicating the time expended by the attorneys and paralegals of this firm on the litigation, at current rates. The chart includes the name of the attorneys who worked on the case, the hourly billing rates and number of hours expended by the attorneys and paralegals on this matter. The chart was prepared from contemporaneous daily time records maintained by my firm. The hourly rates for the attorneys and paralegals in my firm are the regular rates charged for their services in similar litigation such as this one. In my opinion, the rates charged by the various attorneys and the paralegals in my firm are reasonable. Time expended in preparing this Affidavit in support of my firm's application for fees and reimbursement of expenses has not been included in this request.

4. The total number of [*211] hours expended on this litigation by my firm is 386.8 hours. The total lodestar for my firm is \$ 99,255.50, consisting of \$ 88,952.50 for attorneys' time and \$ 10,303.00 for paralegals' time.

5. With respect to the standing of counsel in this case, attached hereto as Exhibit B is a brief biography of my firm and the attorneys of my firm who worked on this litigation.

6. My firm expended a total of \$ 37,111.71 in unreimbursed expenses in connection with the prosecution of this litigation broken down as follows:

Description	
Duplicating	\$ 480.40
Fax/Telephone	223.88
Word Processing	969.65
Dow Jones	1,844.36
Service of Process	20.00
Disclosure	712.81

Description	
Meals/Carfare/Local Taxis	228.55
Messengers	143.50
Federal Express/AirBorne Express	163.70
Lexis/Westlaw	408.70
Expert Fee	31,045.26
Court Reporter Fee	870.90
 TOTAL	 \$ 37,111.71

7. The expenses incurred pertaining to this case are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source material and are an accurate recordation of the expenses [***212**] incurred.

IRA A. SCHOCHET

SWORN TO AND SUBSCRIBED before me this 25th day of February 1994

-Notary Public

RANDY S.A. RAZACK

Notary Public, State of New York

No. 41-4928750

Qualified in Queens County

Commission Expires April 25, 1994

EXHIBIT A

FOGEL, ET AL. V. BELMAC CORP. ET AL.

Firm - GOODKIND LABATON RUDOFF & SUCHAROW

ATTORNEY		HOURLY	TOTAL	
		RATE	HOUSRS	LODESTAR
Labaton, E.	(P)	\$ 440.00	2.0	\$ 880.00
Sucharow, L.	(P)	410.00	30.1	12,341.00
Plasse, J.	(P)	385.00	1.1	423.50
Brachtl, H.	(P)	375.00	14.6	5,475.00
Schochet, I.	(P)	320.00	177.9	56,928.00
Chittur, K.	(A)	265.00	2.0	530.00
Komlossy, E.	(A)	250.00	40.0	10,000.00
Khaghan, M.	(A)	210.00	2.0	420.00
Baum, J.	(A)	170.00	11.5	1,955.00
 *2*TOTAL ATTORNEYS		281.2	\$ 88.95 2.50	

(P) Partner (A) Associate

PARALEGAL

Pariselli, A.	125.00	8.4	\$ 1,050.00
Goldberg, H.	100.00	1.2	120.00
Guilio, L.	100.00	2.6	260.00
Razack, R.	95.00	93.4	8,873.00
 TOTAL PARALEGALS:		105.6	10,303.00
 FIRM TOTAL:		386.8	\$ 99,255.50

EXHIBIT B**RESUME OF GOODKIND LABATON RUDOFF & SUCHAROW**

Goodkind [*213] Labaton Rudoff & Sucharow ("GLR&S") is a firm consisting of 36 lawyers and 8 paralegals located in New York, New York. Formed in 1963, the firm is now in its thirty-first year of practice. Since its inception GLR&S has been engaged in major complex litigation throughout the country. GLR&S has successfully prosecuted and is presently actively prosecuting representative actions (principally class and derivative actions in the securities area) -- usually as lead counsel or member of the Executive Committee -- in such major matters as litigation involving Dun & Bradstreet Corporation, General Motors Corporation, PepsiCo, Sambos's, NYC Housing Development Corporation, Equity Funding Corporation of America, Boeing Company, International Telephone & Telegraph Corporation, LTV Corporation, Financial Corporation of America, Petro-Lewis Corporation, Time Warner, Inc., Square D Corporation and Revlon Inc., among many others.

Numerous courts have had occasion to comment upon the expertise and experience of the firm. Among these is the decision of Judge Lasker in Rosengarten v. International Telephone & Telegraph Corp., summarized at [1981 Transfer Binder] 1981 U.S. Dist. LEXIS 11047, Fed. Sec. L. Rep. (CCH) P97,876 (S.D.N.Y. 1981). [*214] In the full text of his opinion, Judge Lasker says, with respect to the firm, "Counsel are attorneys of experience and of good repute in the fields of stockholder actions . . ." and "they served the corporation and its stockholders with professional competence as well as admirable diligence, imagination and tenacity". Another such decision is by Judge Haight in Greene v. Emersons Ltd., 86 F.R.D. 47, 62 (S.D.N.Y. 1981) (wherein the court had occasion to characterize the firm as "effective, vigorous and experienced in the field . . ."). In his order in 1987 approving the settlement of a class action brought against Gambio AB (Abbey v. Gambio AB, 85 Civ. 1717(EW) (S.D.N.Y. 1987) the "Gambio action"), the late Judge Edward Weinfeld of the Southern District of New York commented favorably on the high quality of the work performed by GLR&S.

Similarly, in approving a settlement, which was arrived at after seven weeks of trial before a jury and resulted in a recovery of \$ 7 million on behalf of purchasers of stock of Sambo's Restaurants, Inc., Judge Whitman Knapp of the Southern District of New York characterized the work of GLR&S in that case as "spectacular." [*215] Kreindler v. Sambo's Restaurants, Inc., 79 Civ. 4538(WK) (S.D.N.Y.). On the record of the public hearing on the proposed settlement in Peter Stuyvesant, Ltd. v. Druz, 89 Civ. 3611(MCG), held October 31, 1991, Judge Miriam Goldman Cedarbaum of the Southern District of New York took the occasion to compliment the work of both GLR&S and Edward Labaton, a partner of the firm, commenting "you have done a fine and effective job of representing the class here."

In Park Lane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979), a class action, GLR&S succeeded in obtaining the landmark Supreme Court decision relating to the offensive use of the collateral estoppel. GLR&S obtained another landmark decision in the area of class actions in Boeing Company v. Van Gemert, 444 U.S. 472, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980). GLR&S acted as lead counsel in the General

Motors Diesel Litigation, 81 Civ. 1252(HB) (E.D.N.Y.), which was prosecuted on behalf of owners of certain diesel automobiles manufactured by General Motors Corporation. That action resulted in a settlement of more than \$ 18 million, one of the largest settlements [*216] ever obtained in a consumer class action. As co-lead counsel in the class actions involving Petro Lewis Corp., 84 Civ. 326 (D. Colo.), GLR&S succeeded in obtaining a settlement valued by the court at \$ 113.5 million. GLR&S also served as co-lead counsel in a class action brought on behalf of purchasers of the common stock of PepsiCo, Inc., 82 Civ. 8403(ADS) (S.D.N.Y.). The class recovered \$ 21.5 million as a result of the vigorous prosecution of that action. In Weckstein v. Breitbart, Index No. 19639/83, GLR&S tried an action in the Supreme Court of the State of New York, County of New York, on behalf of limited partners alleging gross breaches of fiduciary duty by the general partner. After the trial, the court rendered a verdict removing the general partners, appointing a receiver and awarding damages of more than \$ 7.5 million. GLR&S chaired the Executive Committee of Plaintiffs' Counsel which prosecuted the In re Todd Shipyards Securities Litigation, Master File No. 88-2580(DRD) (D.N.J.), to a \$ 12.6 million settlement on behalf of the class.

GLR&S has discharged its responsibilities as lead and co-lead counsel in complex cases in an efficient, effective and cooperative [*217] manner. In In re Energy Systems Equipment Leasing Securities Litigation, MDL-637(LDW) (E.D.N.Y.), a multi-faceted, multi-district litigation in which GLR&S acted as co-lead counsel for the plaintiffs, Judge Wexler of the Eastern District of New York, complimented the firm for the efficient manner in which the complex litigation proceeded and has cited the cooperation and efficiency of plaintiffs' counsel as an example to be emulated by counsel in other actions.

GLR&S is presently prosecuting numerous representative actions in a leadership capacity on behalf of investors. Class actions in which GLR&S currently has an active role include: In re Zenith Laboratories Securities Litigation, 86 Civ. 3241A(DRD) (D.N.J.); Trief, et al. v. The Dun & Bradstreet Corp., et al., Master File No. 89-1741(DNE) (S.D.N.Y.); In re ZZZZ Best Securities Litigation, 87 Civ. 3574(RSWL) (C.D. Cal.); CMH Capital Management Corp. v. Eljer Industries Inc. Securities Litigation, CA 3-91-1273-G (N.D. Tex.); In re Prudential-Bache Energy Income Partnerships Securities Litigation, MDL-888(ML) (E.D. La.); In re Nord Resources Corporation Securities Litigation, Master File No. C-3-90-380 (Rice, [*218] J.) (S.D. Ohio); and In re Granada Partnerships Securities Litigation, MDL-837(MH) (S.D. Tex.).

Among the attorneys at GLR&S who are involved in the litigation area are:

Edward Labaton is admitted to practice in the State of New York, the United States District Courts for the Southern and Eastern District of New York, the United States Court of Appeals for the Second Circuit, and the United States Court of Appeals for the Fifth, Sixth, Seventh, Ninth and Tenth Circuits, and the Supreme Court of the United States. Mr. Labaton graduated from Yale Law School in 1955 and has specialized in the areas of securities and corporate litigation since 1957. He has prosecuted numerous securities actions as well as other class and derivative actions, and was lead attorney and chief trial counsel in Kriendler v. Sambo's and Weckstein v. Breitbart and acted as lead counsel on behalf of GLR&S in the Financial Corporation of America, Petro Lewis, PepsiCo, Jim Walter, American Brands, GAF Co., and Revlon law suits.

Prior to joining GLR&S in February 1979, Mr. Labaton had participated as lead counsel in a number of other securities class and derivative actions, including [*219] Lyons v. Marrud, 66 Civ. 415 (S.D.N.Y.) (in which Chief Judge Edelstein of the Southern District of New York characterized plaintiffs' counsel as both "experienced and competent" - Lyons v. Marrud, Inc., [1972-73 Transfer Binder] *Fed. Sec. L. Rep. (CCH)* P 93,525 (S.D.N.Y. 1972)), and Feder v. Harrington, 67 Civ. 1531 (S.D.N.Y.) (in which Judge Tenney certified the class, finding that vigorous prosecution was assured by the qualified counsel - Feder v. Harrington, 52 F.R.D. 178, 183 (S.D.N.Y. 1970) - and in which Judge MacMahon approved the settlement citing the existence of experienced counsel who he knew to be able and respected members of the bar of the court whose integrity and professional skill were unquestioned and who had successfully appeared in many actions brought under Section 10(b) of the Securities Exchange Act - 58 F.R.D. 171, 175 (S.D.N.Y. 1972)). In approving the settlement in Feder, and in overruling an objection, Judge MacMahon noted that there was no hint that counsel would shy away from going to trial if that were in the best interest of the class. Id.

Also prior to joining GLR&S, Mr. Labaton briefed [*220] and argued the motion in [Tucker v. Arthur Andersen, 67 F.R.D. 468 \(S.D.N.Y. 1975\)](#), in which the Court approved the fraud on the market theory. The [Tucker v. Arthur Andersen](#) decision was, in large part, relied upon by [Blackie v. Barrack, 524 F.2d 891, 906 \(9th Cir. 1975\)](#), in which the Court of Appeals for the Ninth Circuit adopted the fraud on the market theory.

Mr. Labaton has had substantial trial experience including experience in the class and derivative actions noted above. He was chief trial counsel in the [Sambo's](#) litigation tried in January and February 1986 before Judge Whitman Knapp and a jury. He has also acted as trial counsel in other cases in the Southern District of New York, Western District of Oklahoma and in the state courts of New York. Mr. Labaton has argued numerous appeals including appeals in the Second, Sixth, Seventh, Ninth and Tenth Circuits and in the New York State appellate courts. Two of the appeals which he argued in the Second Circuit Court of Appeals involved particularly important issues, in securities law in one case and federal procedure in the other. These issues were ultimately resolved by the Supreme Court [*221] of the United States, which adopted the rationale of or substantially relied upon the cases in which Mr. Labaton had argued and prevailed: [Parkinson v. April Industries, 520 F.2d 650 \(2d Cir. 1975\)](#), and [Golden v. Garafalo, 678 F.2d 1139 \(2d Cir. 1982\)](#).

Mr. Labaton has served as lecturer in the Federal Civil Practice and Corporate Governance programs for ALI/ABA and PLI programs on the subjects of federal civil practice, securities litigation, and class actions. He served as a member of the Board of Directors of the New York County Lawyers' Association from 1984 through 1987 and was Chairman of its Federal Courts Committee from 1980 through 1984. Mr. Labaton has served as a member of the Federal Courts Committee (1971-1974 and 1987-1990) and the Federal Legislation Committee of the Association of the Bar of the City of New York. He is presently a member of the Committee on Second Circuit Courts of the Federal Bar Council and a member of the Committee on Securities Regulation of the Association of the Bar of the City of New York. Former Chief Judge Weinstein of the Eastern District of New York appointed Mr. Labaton a member of the Court's Discovery [*222] Oversight Committee. Former Chief Judge Motley appointed him to serve on a special committee of the Southern District of New York chaired by Judge Goettel dealing with the problems of discovery abuse. Mr. Labaton is also a member of the American Law Institute.

[Lawrence A. Sucharow](#) was admitted to practice in the states of New York and New Jersey, the United States District Courts for the Southern and Eastern Districts of New York, the District of New Jersey, and the United States Court of Appeals for the Second Circuit. Mr. Sucharow graduated cum laude from the City College of New York in 1971, and cum laude from Brooklyn Law School in 1975 and has specialized in complex securities and consumer class action litigation since that date. He has prosecuted and is currently prosecuting numerous securities actions and other class and derivative actions both as sole lead counsel and as a member or co-chair of executive committees of plaintiffs' counsel. Mr. Sucharow has successfully prosecuted actions on behalf of shareholders of PepsiCo, Gambio AB, Time Warner, Emersons Ltd., Todd Shipyards, Computer Microfilm, Vernitron and others, and on behalf of bondholders of New York City [*223] Housing Development Corporation. He is currently leading the prosecution of claims against American Express, Dun & Bradstreet, Eljer Industries, Inc., Ames Department Stores, El Paso Refinery, L.P., NCR Corporation, and Guaranty Security Life Insurance Company.

Mr. Sucharow is chairman of the Class Action Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, a long-time active member of the Federal Courts Committee of the New York County Lawyers Association, a member of the Litigation Committee of the American Bar Association, and a member of the Securities Law Committee of the New Jersey State Bar Association. Mr. Sucharow lectures on class actions and related topics and has received an "a v" rating from Martindale Hubbell Law Directory.

[Henry A. Bracht](#), who joined the firm as a partner in early 1991, was admitted to practice in 1968 and has been involved throughout his career in complex litigation, including more than a decade conducting class and corporate derivative actions representing investors. Mr. Bracht received a Bachelor of Science degree from the University of Wisconsin at Madison in 1964 and a Juris Doctor degree from [*224] the U. of W. Law School in 1968. In 1971-1976, Mr. Bracht was Assistant U.S. Attorney and Deputy Chief of the Civil Division, Office of the U.S. Attorney, in the Eastern District of New York. He served as an adjunct instructor at New York University School of Law 1974-1979, and as a member (1973-1981) and as Chairman (1982-1984) of the Committee on Federal Courts of the Association of the Bar of the City of New York.

Ira A. Schochet graduated from the Duke University School of Law in 1981 and has had extensive experience in securities and corporate litigation during his career. Mr. Schochet played an active role in litigating the class action, Steiner v. Becor Western, Inc., Del. Ch., Civ. Action No. 8859, which resulted in a shareholder class receiving \$ 33 million in enhanced merger consideration, as well as in many others, including In re American Brands, Inc. Shareholders Litigation, Del. Ch., Consolidated Civ. Action No. 9586, Mindich v. Walbro Corp., Del.Ch., Civ. Action No. 9315, and Lubliner v. Maxtor Corp., No. C-89-1807-WHO (N.D. Cal.). Presently, Mr. Schochet is actively litigating, as either sole or lead counsel, Klotz v. PCS Data Processing, Inc., [*225] Index No. 12688/90 (N.Y. Sup. Ct.), and Kamarasy v. Coopers & Lybrand, No. 591 Civ. 00124(TFGD) (D. Conn.), and, as co-lead counsel, Margolis v. Caterpillar, Inc., No. 90-1242 (C.D. Ill.), and Fernicola v. Mizlou, No. 91 Civ. 1624(JES) (S.D.N.Y.).

Emily C. Komlossy graduated from New York Law School in 1989 and has devoted substantially all of her time to the practice of securities and class actions. Prior to her association with GLR&S, Ms. Komlossy was an associate at Abbey & Ellis. She is admitted to practice in the State of New York and the United States District Courts for the Southern District of New York and the Western District of Michigan.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

IN RE BELMAC CORP.

SECURITIES LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

MASTER FILE No. 92-1814-CIV-T-23-(C)

AFFIDAVIT OF NADEEM FARUQI IN SUPPORT OF JOINT PETITION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES FILED ON BEHALF OF KAUFMAN MALCHMAN KIRBY & SQUIRE

STATE OF NEW YORK

COUNTY OF NEW YORK

ss.

I, NADEEM FARUQI, being duly sworn, depose and say:

1. I am a partner of the law firm of Kaufman Malchman [*226] Kirby & Squire. I am submitting this Affidavit in support of my firm's application for an award of attorneys' fees in connection with services rendered to the Plaintiff class and the reimbursement of expenses incurred by my firm in the course of this litigation.
2. This firm, as counsel of record for Plaintiff Susan Stern, commenced an action in this Court. Thereafter, we participated in the prosecution of this action in cooperation with other Plaintiffs' counsel. Specifically, my firm contributed with participation in the area of assisting lead counsel in formulating the theory and assisting in developing the facts of Plaintiffs' case. Initially, the attorneys of my firm were involved in investigation, factual analysis and drafting and filing the complaint on behalf of Plaintiff Stern.
3. The chart attached hereto as Exhibit A presents a detailed summary indicating the time expended by the attorneys and paralegals of this firm on the litigation, at current rates. The chart includes the name of the attorneys who worked on the case, the hourly billing rates and number of hours expended by the attorneys and paralegals on this matter. The chart was prepared from contemporaneous daily [*227] time records maintained by my firm. The hourly rates for the attorneys and paralegals in my firm are the regular rates charged for their services in similar

litigation such as this one. In my opinion, the rates charged by the various attorneys and the paralegals in my firm are reasonable. Time expended in preparing this Affidavit in support of my firm's application for fees and reimbursement of expenses has not been included in this request.

4. The total number of hours expended on this litigation by my firm is 21.25 hours. The total lodestar for my firm is \$ 6,736.25, consisting of \$ 6,641.25 for attorneys' time and \$ 95.00 for paralegals' time.

5. With respect to the standing of counsel in this case, attached hereto as Exhibit B is a brief biography of my firm.

6. My firm expended a total of \$ 604.65 in unreimbursed expenses in connection with the prosecution of this litigation, broken down as follows:

Description	Amount
Copies, Fax &	
Velabind	\$ 87.00
Dow Jones &	
Lexis Research	\$ 342.65
Secretarial Overtime &	
Word Processing	\$ 175.00
TOTAL	\$ 604.65

7. The expenses incurred pertaining to this case are reflected on the books [*228] and records of my firm. These books and records are prepared from expense vouchers, check records and other source material and are an accurate recordation of the expenses incurred.

Nadeem Faruqi

SWORN TO AND SUBSCRIBED before me this 11th day of February, 1994.

Notary Public

RABINDRA N. MAHABIR

Notary Public, State of New York

No. 41-4961924

Qualified in Queens County

Commission Expires Feb. 5, 1996

EXHIBIT A

**KAUFMAN MALCHMAN KIRBY & SQUIRE BELMAC TIME REPORT FROM INCEPTION THROUGH
FEBRUARY 10, 1994**

Attorney	Hours	Rate	Lodestar
Roger W. Kirby	.75	\$ 385	\$ 288.75
Jeffrey H. Squire	7.50	\$ 375	2,812.50
Nadeem Faruqi	12.00	\$ 295	3,540.00
Paralegal:			
Diantie Persaud	1.00	\$ 95	95.00
*3*TOTAL LODESTAR		\$ 6,736.25	

EXHIBIT B

KAUFMAN MALCHMAN KIRBY & SQUIRE

Kaufman Malchman Kirby & Squire specializes in class action and other shareholder litigation. A biographical sketch of its partners and schedule of some of its achievements follow.

Irving Malchman graduated from Harvard College and Harvard Law School, class of 1950. He was on the Editorial Board of the Harvard Law Review. Upon graduation [*229] from law school, Mr. Malchman worked for several years as an attorney in the General Litigation Section of the Civil Division of the United States Department of Justice in Washington, D.C. Mr. Malchman has had extensive experience in stockholders and class action litigation.

As an example, Mr. Malchman successfully litigated the appeal in [*Green v. Wolf Corporation, 406 F.2d 291 \(2d Cir. 1969\)*](#), cert. denied, 395 U.S. 977, 23 L. Ed. 2d 766, 89 S. Ct. 2131 (1969), a landmark decision upon the maintainability of class actions in federal securities actions. Mr. Malchman obtained a jury verdict for \$ 18.2 million in November 1983 in [*Stepak v. Heineman*](#) (N.D. Ill.). More recently, Mr. Malchman successfully litigated the question of standing under Section 16(b) of the Exchange Act of 1934 through the United States Supreme Court, expanding the standing of a shareholder to sue under Section 16(b). [*Gollust v. Mendell, 501 U.S. 115, 111 S. Ct. 2173, 115 L. Ed. 2d 109 \(1991\)*](#).

Roger W. Kirby graduated from Columbia College and Columbia Law School, class of 1972. He attended The Hague Academy of International Law in 1971 and was an International [*230] Fellow at Columbia Law School. Thereafter, he was law clerk to Honorable Hugh H. Bownes, then judge for the United States District Court for New Hampshire, now on the Court of Appeals for the First Circuit. Mr. Kirby has written articles on litigation and the Federal Rules of Civil Procedure that have been published by the ALI-ABA course of study on litigation under the federal securities laws and by Class Action Reports, of which he is on the Board of Editors. He has also given lectures on aspects of securities litigation at seminars sponsored by ALI-ABA and PLI.

Jeffrey H. Squire graduated from Amherst College (B.A. *cum laude*, 1973) and the University of Pennsylvania Law School (J.D., 1976). Following graduation, Mr. Squire was associated with a large New York City law firm. In 1985, he became associated with Wolf Popper Ross Wolf & Jones, specializing in shareholder litigation, and in 1988, became a member of that firm. In February, 1990 he joined Kaufman Malchman Kirby & Squire as a partner in the firm. Mr. Squire has actively participated in numerous cases in federal and state courts which have resulted in significant recoveries for shareholders. Mr. Squire is the co-author [*231] of "The *Cenco Defense*", included in *Accountants Liability: 1988*, published by the Practicing Law Institute.

-Prior to joining the Kaufman firm, Mr. Squire actively participated in such cases as, *In re Standard Oil Company/British Petroleum Litigation*, Consolidated Case No. 126760, Court of Common Pleas, Cuyahoga County,

Ohio, in which plaintiffs' counsel negotiated and obtained a benefit to the class in excess of \$ 600 million, a result the Court described as "unprecedented"; Traub v. Barber, No. 25341/80 (Sup. Ct., N.Y.Co.) (Asarco, Inc.), settled by certain defendants for \$ 5.65 million; and Seidman v. Stauffer Chemical Co., Civil No. B-84-543 (TFGD), settled for \$ 11.6 million. In 1982, Mr. Squire was co-trial counsel in an action on behalf of Bethlehem Steel Corporation against Universal Gas & Oil Co., in Supreme Court, New York County, New York. Following trial, Bethlehem was awarded judgment in its favor in excess of \$ 2.7 million, and all counterclaims against it were dismissed. That judgment was unanimously affirmed on appeal. In November and December 1987, Mr. Squire served as co-trial counsel for a plaintiff class for seven weeks in Odmark v. Westide [*232] Bancorporation, Inc. No. C85-1099R (W.D. Wa.). Chief Judge Rothstein characterized the results achieved for the class as "excellent" and wrote that "because of the extensive pretrial motions and discovery, along with seven weeks of trial, the court had a first-hand opportunity to observe that class counsels' reputation for high quality legal work is well deserved."

Nadeem Faruqi has been with the firm since 1988, and a partner since January 1, 1993. Mr. Faruqi graduated from McGill University (B.Sc., 1981), York University (M.B.A., 1984) and New York Law School (J.D., cum laude, 1987). He was on the Editorial Board of New York Law School's Journal of International and Comparative Law.

The Kaufman Malchman Kirby & Squire firm has repeatedly demonstrated its expertise in the field of securities litigation and its expertise has been repeatedly recognized. For example:

- Colaprico v. Sun Microsystems, No. C-90-20710 (SW) (N.D. Cal. 1993), co-lead counsel (\$ 5 million settlement).
- Steinfink v. Pitney Bowes, Inc., No. B90-340 (JAC) (D. Conn. 1993), lead counsel (\$ 4 million settlement).
- In re Jackpot Securities Enterprises, Inc. Securities Litigation, CV-S-89-805-LDG [*233] (RJJ) (D. Nev. 1993), lead counsel (\$ 3 million settlement).
- In re Nordstrom Inc. Securities Litigation, No. C90-295C (W.D. Wa. 1991), co-lead counsel (\$ 7.5 million settlement).
- United Artists Litigation, No.CA 980 (Sup. Ct., L.A., Cal.), trial counsel (\$ 35 million settlement).
- In re A.L. Williams Corp. Shareholders Litigation, Consolidated, C.A. No. 10881 (Del. Ch. 1990), lead counsel (benefits in excess of \$ 11 million).
- In re Triangle Inds., Inc., Shareholders' Litigation, C.A. No. 10466 (Del. Ch. 1990), co-lead counsel (recovery in excess of \$ 70,000,000).
- Schneider v. Lazard Freres, (N.Y. Sup. 1990), co-lead counsel (landmark decision concerning liability of investment bankers in corporate buyouts; \$ 55 million settlement).
- Rothenberg v. A.L. Williams, C.A. No. 10060 (Del. Ch. 1989), sole counsel (benefits of at least \$ 25,000,000 to the class).
- Kantor v. Zondervan Corporation, C.A. No. 88 C5425 (W.D. Mich. S.D. 1989), sole counsel (recovery of \$ 3.75 million).
- King v. Advanced Systems, Inc., C.A. No. 84 C10917 (N.D. Ill. E.D. 1988), lead counsel (recovery of \$ 3.9 million representing 90% of damages).
- Straetz v. Cordis, [*234] 85-343 Civ. (SMA) (USDC, S.D. Fla., September 23, 1988), lead counsel:

"I want to commend counsel and each one of you for the diligence with which you've pursued the case and for the results that have been produced on both sides. I think that you have displayed the absolute optimum in the method and manner by which you have represented your respective clients, and you are indeed a credit to the legal profession, and I'm very proud to have had the opportunity to have you appear before the Court in this matter."

-In re Flexi-Van Corporation, Inc. Shareholders Litigation, C.A. No. 9672 (Del. Ch. 1988), Co-lead counsel (\$ 18.4 million settlement).

-In re Carnation Company Securities Litigation, No. CV84-6913 (FW) (C.D. Cal. 1987), Co-lead counsel (\$ 13 million settlement).

-In re Data Switch Securities Litigation, B84 585 (RCZ) (USDC CT July 2, 1985) Co-lead counsel (\$ 7.5 million settlement).

-Malchman, et al. v. Davis, et al., 77 Civ. 5151 (SDNY, June 8, 1984) (TPG):

"It is difficult to overstate the far-reaching results of this litigation and the settlement. Few class actions have ever succeeded in altering commercial relationships of such magnitude. [*235] Few class action settlements have even approached the results achieved herein.... In the present case, the attorneys representing the class have acted with outstanding vigor and dedication.... Although the lawyers in this litigation have appeared considerably more in the state courts than in the federal court, they have appeared in the federal court sufficiently for me to attest as to the high professional character of their work. Every issue which has come to this court has been presented by both sides with a thoroughness and zeal which is outstanding.... In sum, plaintiffs and their attorneys undertook a very large and difficult litigation in both the state and federal courts, where the stakes were enormous. This litigation was hard fought over a period of four years. Plaintiffs achieved a settlement which altered commercial relationships involving literally hundreds of millions of dollars."

-Stern v. Steans, 80 Civ 3903 (GLG), the Court characterized the result for the class obtained during trial to jury as "unusually successful" and "incredible" (Jun 1, 1984).

-In re Datapoint Securities Litigation, SA 82 CA 338 (WD Tex): Designated Lead Counsel for a Class, December 29, 1983. \$ [*236] 22.5 million aggregate settlement.

-In re Compact Video Securities Litigation, C 82 4782 AWT (Bx) (CD Cal): Designated Co-Lead Counsel, December 19, 1983. \$ 7.5 million settlement.

-Stepak v. Heineman, 82 C 1599 (ND Ill ED): favorable jury verdict, November 21, 1983 and settlement for \$ 10,000,000 during appeal (September 1984).

-Judge Thomas P. Griesa, United States District Judge, Southern District of New York: "The important thing is that thoroughly competent counsel have been retained to act as attorneys for the plaintiff class". Kahn v. Wien, 81 Civ 4818 (TPG) (Dec 29, 1982).

-Judge Robert J. Ward, United States District Judge, Southern District of New York, characterized the firm as being "among the most skillful in its field" and described Mr. Kirby of the firm as a "bright and tenacious" trial lawyer. Weisman v. Darneille, 77 Civ 2110 (RJW) (Sept 20 1982).

-Judge Mishler, United States District Judge, Eastern District of New York, said of the Kaufman firm: "Plaintiff's counsel has demonstrated skill, expertise and diligence in the preparation and presentation of the papers so far submitted in this action". Kamerman v. Miyahara, 82 Civ 0689 (JM) (June 11, 1982).

[*237] -Judge Brieant, United States District Judge, Southern District of New York, said of the Kaufman firm: "In view of the novel theory on which the case was brought and all relevant factors, this Court believes that counsel have been highly successful in their prosecution of the lawsuit to settlement". Feiler v. Sonderling, 79 Civ. 6826 (CLB) (Feb 26, 1981).

-The Kaufman firm was on The Executive Committee of the In re Ocean Shipping Antitrust Litigation. MDL 395, M21 26 (CES) (SDNY), which achieved a \$ 51 million settlement in 1983.

TAMPA DIVISION

IN RE BELMAC CORP. SECURITIES LITIGATION

THIS DOCUMENT RELATES TO:

MASTER FILE NO. 92-1814-CIV-T-23-(C)

AFFIDAVIT OF RICHARD S. SCHIFFRIN IN SUPPORT OF JOINT PETITION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES FILED ON BEHALF OF SCHIFFRIN & CRAIG, LTD.

Commonwealth of Pennsylvania

County of Montgomery

ss.

I, Richard S. Schiffrin, being duly sworn, depose and say:

1. I am a partner of the law firm of Schiffrin & Craig, Ltd. I am submitting this Affidavit in support of my firm's application for an award of attorneys' fees in connection [*238] with services rendered to the plaintiff class and the reimbursement of expenses incurred by my firm in the course of this litigation.
2. This firm, as counsel of record for plaintiff Paul Hocheiser, commenced an action in this Court. Thereafter, we participated in the prosecution of this action in cooperation with other plaintiffs' counsel. Specifically, my firm participated in drafting the consolidated amended complaint and in document discovery.
3. The chart attached hereto as Exhibit "A" presents a detailed summary indicating the time expended by the attorneys and paralegals of this firm on the litigation, at current rates. The chart includes the names of the attorneys who worked on the case, the hourly billing rates and number of hours expended by the attorneys and paralegals on this matter. The chart was prepared from contemporaneous daily time records maintained by my firm. The hourly rates for the attorneys and paralegals in my firm are the regular rates charged for their services in similar litigation such as this one. In my opinion, the rates charged by the various attorneys and the paralegals in my firm are reasonable. Time expended in preparing this Affidavit in support [*239] of my firm's application for fees and reimbursement of expenses has not been included in this request.
4. The total number of hours expended on this litigation by my firm is 153 hours. The total lodestar for my firm is \$ 39,025.00.
5. With respect to the standing of counsel in this case, attached hereto as Exhibit "B" is a brief biography of my firm and the attorneys of my firm who worked on this litigation.
6. My firm expended a total of \$ 1,558.16 in unreimbursed expenses in connection with the prosecution of this litigation broken down as follows:

Description	Amount
Travel	\$ 287.00
Telephone/Telecopier	212.40
Duplicating	180.00
Database charges	357.86
SEC filings	215.90
Overtime/clerical	230.00
Postage/Federal Express	75.00

Description	Amount
TOTAL:	\$ 1,558.16

7. The expenses incurred pertaining to this case are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source material and are an accurate recordation of the expenses incurred.

RICHARD S. SCHIFFRIN

Sworn and subscribed to before me this 15th day of February, 1993.

Mary Claire Wright

Notary Public

ANALYSIS [*240] OF TIME

CATEGOR	HOURS BY	RSS	MDC	ALB	TOTAL S
1	15	5	39	59	
2			2	2	
3			10	10	
4	21	3	42	66	
5	2		14	16	
6					
7					
8					
9					
TOTAL					
HOURS	38	8	107	153	
TOTAL					
LODESTA R	12,350	2,600	24,075	39,025	

ATTORNEYS:

RSS - Richard S. Schiffrin

\$ 325 p/hour

MDC - Michael D. Craig

\$ 325 p/hour

ALB - Andrew L. Barroway

\$ 225 p/hour

TIME CATEGORIES:

- 1 - Pleadings and Briefs, including research
- 2 - Taking and defense of depositions; including preparation
- 3 - Preparing responses to discovery; including class discovery
- 4 - Taking document discovery from defendants and third parties
- 5 - Factual investigations; consultations with client and experts
- 6 - Settlement
- 7 - Class and settlement administration
- 8 - Court appearances
- 9 - Preparation for court appearances

EXHIBIT "A"

EXHIBIT "B"

SCHIFFRIN & CRAIG, LTD.

FIRM BIOGRAPHY

Schiffrin & Craig, Ltd. was formed in 1987 by two attorneys engaged in stockholder class and derivative actions, as well as general business litigation. Since its inception, Schiffrin & Craig, Ltd. has been engaged in major complex litigation throughout the country, **[*241]** consisting of class and derivative corporate and securities litigation, as well as class litigation involving misleading business practices. The firm now operates out of offices in Pennsylvania and Illinois.

The firm has, in the past five years, in a lead or liaison position, successfully prosecuted or settled cases involving E.F. Hutton Group, Inc., Northwestern Steel & Wire Co., Trans-Lux Corp., Charter Medical Corp., Interactive Technologies, Inc., Envirodyne Industries, Inc., Hart Holdings, Inc., Apple Computer, Inc., Telesphere International, Inc., Commodore Computer, Inc., Home Shopping Network, Inc. and Stotler Group, Inc.

Each of these cases has provided shareholder-class members with substantial relief. In Rosen, et al. v. E.F. Hutton Group, Inc., et al., Del. Ch., C.A. No. 9467 (settlement approved Aug. 18, 1988), following discovery and while a motion for preliminary injunction was pending, the defendants agreed to settle plaintiffs' claims of unfair price and breach of the duty of candor in the Hutton-Shearson merger by increasing the value of certain debentures issued as part of the tender offer consideration by approximately \$ 3.5 million and issuing a supplemental **[*242]** disclosure statement revealing the prices proposed by the principals during previous negotiations.

In Shantzer, et al. v. Charter Medical Corp., et al., Del. Ch., C.A. No. 9530 (settlement approved Aug. 5, 1988), the plaintiffs challenged a going-private transaction by the company's chairman/controlling shareholder and other members of senior management. The plaintiffs agreed to settle their claims of unfair dealing in exchange for improvements in the offering price totalling over \$ 85 million. In a separate action against Charter, its directors and

its auditors, In re Charter Medical Bondholder Litigation, C.A. No. 90-221-1-MAC (JRE) (settlement approved April 30, 1992), the plaintiffs alleged that the defendants misstated certain material facts in connection with the transaction for the purpose of selling debt in the company to the public. The plaintiffs settled this case for \$ 3.25 million in cash, plus improvements in Charter's plan of reorganization worth approximately \$ 40 million to bondholder class members.

In Dana v. Trans-Lux Corp., et al., Del. Ch., C.A. No. 9755 (settlement approved Aug. 4, 1988), aff'd sub nom., Nottingham Partners v. Dana, 564 A.2d 1089 (Del. 1989), [*243] the plaintiff challenged the board of directors' adoption of anti-takeover provisions in the company's by-laws and certificate of incorporation. The plaintiff agreed to settle his claims that the by-laws violated specific provisions of Delaware law, and their adoption constituted a breach of fiduciary duty, in exchange for a nullification of certain certificate amendments, a change in the by-laws, and an expansion of the company's stock repurchase program. The Chancery Court noted that "a good part of the Dana lawsuit is being settled on a hundred percent basis . . . It wouldn't be inaccurate to say that the settlement would represent a complete victory for the Dana plaintiffs."

In Baden, et al. v. Northwestern Steel & Wire Co., et al., Ill. Cir., No. 88 CH 55 (settlement approved Oct. 31, 1988), the plaintiffs challenged a going-private transaction by management, pursued with the agreement of the company's majority shareholders. Following discovery and denial of defendants' motion to dismiss, the defendants agreed to settle plaintiffs' claims of unfair dealing in exchange for an increase of nearly \$ 18 million in the merger consideration (one of the largest shareholder [*244] class action settlements in Illinois history). Plaintiffs also obtained legal recognition, for the first time by an Illinois court, of remedies other than statutory shareholder appraisal for shareholders subjected to a cash-out merger.

In Schickler, et al. v. Interactive Technologies, Inc., et al., Minn. Dist., File No. C7-88-8254 (temporary restraining order issued January 15, 1989), the plaintiffs were responsible for creating new and favorable law in Minnesota in support of procedural and substantive rights for minority shareholders when the majority shareholder attempts to cash out the minority. The plaintiffs temporarily restrained completion of a tender offer until the majority owner substantially amended its false and misleading disclosures in the Offer to Purchase.

In re Envirodyne Industries, Inc. Shareholder Litigation, Del. Ch., C.A. No. 10702 (preliminary injunction issued April 20, 1989), the plaintiffs successfully enjoined a tender offer on the grounds that the offeror had access to material, confidential information which it used in structuring its offer and which was not available to shareholders. The Court enjoined the tender offer until the defendants amended [*245] their tender offer and disclosed this information.

In Zeid, et al. v. Apple Computer, Inc., et al., N.D. Cal., C-89-2827-WHO (settlement approved Sept. 12, 1990), the plaintiffs alleged that all purchasers of Apple Computer, Inc. common stock during a ten-day period were misled by certain company statements subsequently determined to be untrue. After over a year of motions and discovery, defendants agreed to settle the case for \$ 5.65 million.

In Michael and Sandra Chalfin, et al. v. Hart Holding Company, Incorporated, et al., Del. Ch., C.A. No. 11611 (transaction terminated July 9, 1990), plaintiffs successfully challenged as unfair an attempted 1-for-100 reverse stock split and cash-out of certain minority stockholders. In awarding attorneys' fees to plaintiffs' counsel, the court favorably referred to counsels' "professional standing and ability."

In re Telesphere International Securities Litigation, N.D. Ill., No. 89 C 1875 (settlement approved Oct. 23, 1990), the plaintiffs alleged that the defendants materially understated uncollectible receivables -- income from (900)-line telephone calls which the telephone company refused to collect. After over a year-and-a-half [*246] of motion practice and discovery, defendants agreed to settle the case for \$ 1.3 million. In approving an award of attorneys' fees and expenses, the court specifically referred to this firm's credentials as "impressive," found the firm's historical (1989) hourly rate of \$ 250 per hour to be "reasonable," and used its hourly rates as a basis for setting the rates of all attorneys in the case.

In Squitieri v. Gould, et al., E.D. Pa., No. 89-6832 (settlement approved March 1, 1991), the plaintiff alleged that Commodore Computer, Inc. and certain top officers issued positive earnings forecasts despite knowledge of

materially negative facts making such forecasts unattainable. Following extensive motion practice and completion of discovery, this action settled two weeks before trial for \$ 3.25 million.

In re Home Shopping Network Securities Litigation -- Action II, M.D. Fla., No. 89-1084 Civ.-T-15(b) (settlement approved October 15, 1991), the plaintiffs alleged that Home Shopping Network, Inc. had misled investors as to the nature and extent of certain adverse developments. Following the completion of substantial discovery, this action settled for \$ 4 million.

In Guthrie County [*247] State Bank, et al. v. Mahlmann, et al., N.D. Ill., 90 C 4901 (settlement approved January 22, 1993), the plaintiffs alleged that the principals and accounting firm of the commodities trading company Stotler Group, Inc. had purposely engaged in unlawful transactions designed to hide Stotler's failure to meet the minimum capital requirements of the Chicago Board of Trade. Although Stotler was forced to liquidate after the CBOT learned that the company was not complying with regulations, plaintiffs were able to obtain a settlement of \$ 4.5 million for purchasers of common stock, commercial paper and debentures.

In addition, the firm's hours, expenses and lodestar have been approved in full on numerous occasions, including the following: Dana v. Trans-Lux Corp., et al., Del. Ch., C.A. No. 9755 (approved August 4, 1988); Rosen, et al. v. E.F. Hutton Group, Inc., et al., Del. Ch., C.A. No. 9467 (approved August 18, 1988); Baden, et al. v. Northwestern Steel & Wire Co., et al., Ill. Cir., No. 88 Ch. 55 (approved October 31, 1988); In re Envirodyne Industries, Inc. Shareholder Litigation, Del. Ch., C.A. No. 10702 (approved October 5, 1989); Zeid, et al. v. [*248] Apple Computer, Inc., et al., N.D. Cal., C-89-2827-WHO (approved September 14, 1990); In re Telesphere International Securities Litigation, 753 F. Supp. 716 (approved November 28, 1990); Squitieri v. Gould, et al., E.D. Pa., No. 89-6832 (approved March 1, 1991); In re Home Shopping Network Securities Litigation -- Action II, M.D. Fla., No. 89-1084 Civ.-T-15(b) (approved October 15, 1991); In re VMS Securities Litigation, N.D. Ill., No. 89 C 9448 (approved November 19, 1991); In re Charter Medical Bondholder Litigation, C.A. No. 90-221-1-MAC (JRE) (approved April 30, 1992); Guthrie County State Bank, et al. v. Mahlmann, et al., 1993 U.S. Dist. LEXIS 1962 (approved February 22, 1993).

Schiffrin & Craig, Ltd. consists of the following attorneys:

Richard S. Schiffrin received his law degree from DePaul University College of Law in 1979, where he was a member of the DePaul Law Review. He is licensed to practice law in Illinois and Pennsylvania and has been admitted to practice before the United States District Courts for the Northern District of Illinois, the Central District of Illinois, the Middle District of Pennsylvania and the Eastern District of Pennsylvania. [*249] He obtained seven years of experience in bench trials, jury trials and appeals with the Office of the Public Defender of Cook County, Illinois. He has taught legal writing at John Marshall Law School.

Michael D. Craig received his law degree from the University of Michigan Law School, where he was Editor-in-Chief of the University of Michigan Journal of Law Reform. He is licensed to practice law in Illinois, in the United States District Courts for the Northern District of Illinois and the Central District of Illinois and in the United States Court of Appeals for the Seventh Circuit. He has taught legal writing at Chicago-Kent College of Law.

Andrew L. Barroway received his law degree from the University of Pennsylvania Law School, where he was a member of the ABA Negotiation team. He is licensed to practice law in Pennsylvania and New Jersey, and has been admitted to practice before the United States District Court for the Eastern District of Pennsylvania.

Steven L. Popuch received his law degree from Loyola University of Chicago in 1977. He is licensed to practice law in Illinois and in the United States District Court for the Northern District of Illinois. He obtained five years [*250] of experience in bench trials, jury trials and appeals with the Office of the Public Defender of Cook County, Illinois. Mr. Popuch is Of Counsel to the firm, and he also maintains a civil and criminal litigation practice.

FIRM	HOURS	LODESTAR	EXPENSES
MICHAEL C. ADDISON	78.80	\$ 14,793.50	\$ 48.42
BERGER & MONTAGUE, P.C.	384.80	82,804.50	3,647.10
BURT & PUCILLO & PREDECESSOR FIRMS	228.00	49,916.23	3,981.75
CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.	13.60	2,011.00	284.62
GOODKIND LABATON RUOFF & SUCHAROW	386.80	99,255.50	37,111.71
KAUFMAN, MALCHMAN, KIRBY & SQUIRE	21.25	6,736.25	604.65
SCHIFFRIN & CRAIG, LTD.	153.00	39,025.00	1,558.16
TOTAL	1,266.25	\$ 294,541.98	\$ 47,236.41

End of Document

Schueller v. Norman

United States District Court for the Western District of Arkansas, El Dorado Division

April 6, 1994, Decided ; April 8, 1994, FILED, ENTERED

Civil No. 92-1075

Reporter

1994 U.S. Dist. LEXIS 20969 *; 1995-2 Trade Cas. (CCH) P71,064

DR. STEVEN C. SCHUELLER, M.D., PLAINTIFF v. CLAIR NORMAN et al., DEFENDANTS

Disposition: [*1] Defendants' motion for summary judgment granted and this action is dismissed.

Core Terms

peer review, antitrust, conspiracy, staff, proceedings, monopolize, medical staff, antitrust claim, contends, immunity, patients, Sherman Act, anti-competitive, recommendations, defendants', clinical privileges, relevant market, competitors, federal court, counterclaim, disruptive, conspire, reasons, medical practice, summary judgment, emergency room, res judicata, effects, allegations, privileges

LexisNexis® Headnotes

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

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

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

HN1[] Entitlement as Matter of Law, Genuine Disputes

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds. The inquiry performed is the threshold inquiry of determining whether there is a need for trial - whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

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

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

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

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

[**HN2**](#) Entitlement as Matter of Law, Appropriateness

The burden on the party moving for summary judgment is only to demonstrate, that is, to point out to the district court that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.

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

[**HN3**](#) Summary Judgment, Entitlement as Matter of Law

The court, in ruling on the motion for summary judgment, must give the non-moving party the benefit of the reasonable inferences that can be drawn from the underlying facts.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

Governments > Federal Government > Employees & Officials

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

[**HN4**](#) Full Faith & Credit, Full Faith & Credit Statutes

The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings shall have the same full faith and credit in every court within the United States as they have by law or usage in the courts of such state from which they are taken. [28 U.S.C.S. § 1738](#). This statute directs a federal court to refer to the preclusion law of the state in which judgment was rendered. [Section 1738](#) does not allow federal courts to employ their own rules of res judicata in determining the effects of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

[**HN5**](#) Jurisdiction Over Actions, Exclusive Jurisdiction

With respect to matters that were not decided in a state proceedings, claim preclusion generally does not apply where the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts. Thus, if state preclusion law includes this requirement of jurisdictional competency a state judgment will not have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN6 [down] **Preclusion of Judgments, Res Judicata**

Res judicata, or claim preclusion, bars subsequent action on the same claim where a final judgment has been rendered by a court of competent jurisdiction. Four elements must be met for res judicata to apply: (1) the first suit must have resulted in a final judgment on the merits, (2) the first suit must be based on proper jurisdiction, (3) both suits must involve the same cause of action, and (4) both suits must involve the same parties or their privies.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN7 [down] **Estoppel, Collateral Estoppel**

Collateral estoppel, or issue preclusion, bars relitigation of issues, law or fact, actually litigated in the first suit. For collateral estoppel to apply, the following elements must be met: (1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) that issue must have been actually litigated, (3) the issue must have been determined by a valid and final judgment, and (4) the determination must have been essential to the judgment.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN8 [down] **Preclusion of Judgments, Res Judicata**

If, under Arkansas law, a plaintiff is precluded from litigating his claims in state court, he cannot pursue them in federal court unless the prior state proceeding did not provide plaintiff with a full and fair opportunity to present his claims. A party receives a fair opportunity to present the claims allegedly precluded if the party could have brought the claims in a proceeding that would satisfy the minimal procedural requirements of the due process clause.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN9 [down] **Preclusion of Judgments, Res Judicata**

Arkansas' preclusion law requires that the state court have proper jurisdiction over a claim before an adjudication of that claim precludes subsequent litigation.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN10 [blue icon] Sherman Act, Jurisdiction

Jurisdiction over Sherman Antitrust Act claims lies exclusively within federal court.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Public Health & Welfare Law > Healthcare > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN11 [blue icon] Governmental & Nonprofit Liability, Health Care Quality Improvement Act

The Health Care Quality Improvement Act of 1986 provides only for limited immunity from civil damages incurred as the result of professional peer review action and does not provide for an independent, private right of action.

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Hospital Privileges > Professional Review

HN12 [blue icon] Business Administration & Organization, Peer Review

"Professional review action" is defined as an action or recommendation of a professional review body which is taken or made in the conduct of a professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or

make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. [42 U.S.C.S. § 11151\(9\)](#).

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

[HN13](#) [blue icon] **Business Administration & Organization, Peer Review**

"Professional review body" is defined as a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body is a professional review activity. [42 U.S.C.S. § 11151\(11\)](#).

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

[HN14](#) [blue icon] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

A defendant can qualify for immunity under the Health Care Quality Improvement Act of 1986 (HCQIA) if he can demonstrate that the (1) professional review actions complied with the standards set forth in [42 U.S.C.S. § 11112](#), (2) results of the peer review were reported properly to the state authorities in compliance with [42 U.S.C.S. §§ 11131\(c\)\(1\), 11151\(2\)](#), and (3) professional review actions occurred after November 14, 1986, the effective date of the HCQIA.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

[HN15](#) [blue icon] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

For a professional review body to be protected by the Health Care Quality Improvement Act of 1986's immunity, the action of that body must be taken, (1) in the reasonable belief that the action was in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3). A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in [42 U.S.C.S. § 11111\(a\)](#) of this title unless the presumption is rebutted by a preponderance of the evidence. [42 U.S.C.S. § 11112\(a\)](#).

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Public Health & Welfare Law > Healthcare > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN16 [blue icon] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

The immunity available under the Health Care Quality Improvement Act of 1986 is limited to protection from damages under any law of the United States or of any state, excepting any civil rights proceedings. [42 U.S.C.S. § 11111\(a\)\(1\)](#).

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN17 [blue icon] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

The objective "reasonable belief" standard is satisfied if the peer reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN18 [blue icon] **Business Administration & Organization, Hospital Privileges**

Failure to comply with the specific notice and hearing requirements of [42 U.S.C.S. § 11112\(b\)\(1\)](#), without more, does not constitute failure to meet the standards of [42 U.S.C.S. § 11112 \(a\)\(3\)](#).

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN19 [blue icon] **Antitrust & Trade Law, Sherman Act**

[Section 1](#) of the Sherman Antitrust Act, states, in part, that every contract, combination, or conspiracy, in restraint of trade or commerce among the several states, is hereby declared illegal. [15 U.S.C.S. § 1](#). Proof of two essential

elements is required in any action under [§ 1](#): (1) a contract, combination, or conspiracy, which results in (2) an unreasonable restraint of trade.

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

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN20**](#) [] **Conspiracy to Monopolize, Sherman Act**

A conspiracy imports a plurality of persons acting in concert to attain a common goal or purpose. [Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), prohibits only unreasonable restraints of trade effected by a contract, combination, or conspiracy between separate entities. Thus, [§ 1](#) applies only to concerted action; unilateral action is excluded from its purview. Proof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN21**](#) [] **Antitrust & Trade Law, Sherman Act**

The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for the purposes of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > General Overview

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Unauthorized Acts

[**HN22**](#) [] **Antitrust & Trade Law, Sherman Act**

When the interests of principal and agents diverge, and the agents at the time of the conspiracy are acting beyond the scope of their authority or for their own benefit rather than that of the principal, they may be legally capable of engaging in an antitrust conspiracy with their corporate principal.

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

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

[HN23](#) [] **Conspiracy to Monopolize, Elements**

Section 2 of the Sherman Act subjects to prosecution 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.S. § 2. To establish monopolization in violation of § 2 the plaintiffs must show: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident.

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

Antitrust & Trade Law > Sherman Act > General Overview

[HN24](#) [] **Regulated Practices, Monopolies & Monopolization**

Monopoly power is defined as the power to control prices and exclude competition with respect to a particular product and within a particular geographic market. Thus, a plaintiff must show that the defendants have dominant market share in a well-defined relevant market. The court is required, therefore, to define the relevant market by reference to both the product market and the geographic market. The essential test for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendants' products or services. This comparative analysis has been characterized as the "reasonable interchangeability" standard. Furthermore, a competitor may possess monopoly power in a sub-market. A market can be divided into sub-markets and may be determined by examining (1) the industry or public recognition of the sub-market as a separate economic entity; (2) the product's peculiar characteristics and uses; (3) unique production facilities; (4) distinct customers; (5) distinct prices; (6) sensitivity to price changes and (7) specialized vendors.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

[HN25](#) [] **Market Definition, Relevant Market**

A mere showing of monopoly power in the relevant market, unaccompanied by evidence of anti-competitive behavior, is insufficient to support a claim for monopolization.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN26**](#) [L] Sherman Act, Claims

The second element of a [15 U.S.C.S. § 2](#) claim requires proof of either (1) specific intent to monopolize or (2) anticompetitive effects that result from the monopolist's actions. One need not prove both specific intent and anticompetitive effects; either alone is sufficient basis for the imposition of liability for an actor possessing monopoly power. However, liability based upon specific intent may be negated where valid business justifications exist for the monopolist's actions.

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN27**](#) [L] Antitrust & Trade Law, Sherman Act

Anti-competitive conduct is conduct without a legitimate business purpose. Acts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct violative of [15 U.S.C.S. § 2](#). The exercise of business judgment cannot be found to be anti-competitive. To be labeled anti-competitive, the conduct involved must be such that its anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power. Rather, acts which would constitute an unlawful use of monopoly power are those derived from the monopolist's power in the market or its size, acts which could have been performed by one with the requisite power.

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

[**HN28**](#) [L] Monopolies & Monopolization, Attempts to Monopolize

An antitrust plaintiff, alleging an attempted monopolization, must prove the existence of methods, means, and practices which would, if successful, accomplish monopolization, and which, falling short, nevertheless approach so close as to create a dangerous probability of it.

Judges: H. Franklin Waters, United States District Judge

Opinion by: H. Franklin Waters

Opinion

MEMORANDUM OPINION

Currently before the court for consideration is defendants' joint motion for summary judgment and plaintiff's response and supplement response thereto. Also before the court is defendants' reply to those responses. As counsel is aware, the court is considering this case upon the district reassignment from Judge Hendren to Judge Barnes and Judge Barnes' subsequent recusal in the matter. The court carefully has considered the motion and is now ready to rule. For the reasons set forth below, the court finds that the motion for summary judgment should be and hereby is granted.

A. Statement of Facts

The undisputed material facts reveal the following: The plaintiff, Steven C. Schueller, is a board certified member of the American College of Surgeons who was granted staff privileges at Ashley Memorial Hospital in April, 1983. Defendants Clair Norman, Herman Hamilton, Jr., William S. Arnold, Ned Hastings, and Roosevelt Early are members and trustees of the Crossett Health Foundation, an unincorporated, [*2] non-profit organization which owns and operates Ashley Memorial Hospital. Defendant Ashley Memorial is a primary care hospital located in Crossett, Arkansas, which serves as the only hospital within a circular geographic area within twenty-five miles of Crossett. Defendants doctors Burt, Gresham, Garcia, Rankin, Ripley (deceased), Walsh and Toon all practice, or at relevant times, practiced in Ashley County, Arkansas. Defendant Dr. Birriel joined the Ashley Memorial staff in 1989.

The events giving rise to this cause of action were initiated in June, 1985, when Mr. Norman Reynolds, who was then the hospital administrator at Ashley Memorial, told Al Smith, a nurse anesthetist, that the hospital intended to let Dr. Schueller "die on the vine" and bring in another surgeon, Dr. Posey. Sometime later in 1985, this statement was related by Smith to Dr. Schueller. In 1986, Ashley Memorial sued Dr. Schueller on a debt in Ashley County Circuit Court, and on April 24, 1987, Dr. Schueller filed a counterclaim, alleging, *inter alia*, that the agents, servants, and employees of Ashley Memorial tried to force him out of the gainful employment of his medical practice and force him to abandon [*3] his medical practice by putting unreasonable and restrictive restraints on his practice of medicine and use of the hospital. On October 13, 1987, Dr. Schueller amended his counterclaim, adding that to evidence this unlawful conduct on behalf of Ashley Memorial, he would show that Smith was told by the hospital administrator "don't worry about Schueller. The plan is to let him die on the vine and bring in Dr. Posey." Thereafter, on November 14, 1988, a judgment was entered in the case in favor of Ashley Memorial on both its complaint and Dr. Schueller's counterclaim. The counterclaim was dismissed with prejudice and costs were assessed against Dr. Schueller.

It is then alleged by defendants that on or about January 24, 1991, Dr. Schueller notified Jim Watters, administrator of Ashley Memorial that he would no longer examine or treat patients of defendant physicians in the hospital's emergency room and on January 28, 1991, Dr. Schueller allegedly refused to see a patient of Dr. Garcia in the emergency room. The following day Dr. Schueller was informed by Mr. Watters and Dr. Toon, chief of staff, that his refusal to see patients of other physicians was a deviation from accepted on-call [*4] practices and a special meeting of the medical staff was held on January 31, 1991, to address the emergency room physician on-call policy.

It is alleged that on March 20, 1991, Dr. Schueller sent a letter to Thomas Bartlett, Ashley Memorial administrator at that time, in which he stated his opinion that based on his review of a chart, another physician had made an incorrect diagnosis that led to "negative unnecessary exploratory laparotomy." On May 20, 1991, a committee of the medical staff met to consider eleven allegations of possible disruptive conduct by Dr. Schueller which might adversely affect patient care. Dr. Schueller was present for a portion of that hearing. In June, the medical staff adopted the findings of the committee and recommended to the Board of Governors that Dr. Schueller be reprimanded for conducting an unauthorized and inaccurate peer review and for making unauthorized disclosures of patients' names. The Board of Governors approved the recommendations and admonished Dr. Schueller to cooperate more closely with the staff and the board, be less divisive in his behavior and to follow staff guidelines for emergency room duties. Dr. Schueller was advised of this [*5] reprimand by letter on June 19, 1991.

Then on August 6, 1991, Dr. Schueller and Dr. Garcia had an altercation at Ashley Memorial which stemmed from Dr. Garcia's removal of beehives owned by Dr. Schueller from Dr. Garcia's premises.¹ [*6] Each doctor swore out arrest warrants against each other with the Crossett police. On August 7, 1991, Dr. Schueller was advised by letter from Dr. Toon and Mr. Bartlett that his staff privileges at Ashley Memorial had been summarily suspended.² Five

¹ It is alleged by Dr. Schueller that Dr. Garcia was carrying a weapon and "pulled it" on Dr. Schueller during this confrontation.

² Dr. Garcia was also suspended and subsequently reinstated.

days later, at a specially called meeting, the medical staff voted to recommend to the Board of Governors that Dr. Schueller's clinical privileges be revoked. On August 14, 1991, Dr. Schueller requested a hearing before the executive committee of the medical staff to review his summary suspension. In August 28, 1991, the medical staff voted to recommend a continuation of Dr. Schueller's suspension and a letter was mailed by Mr. Bartlett to Dr. Schueller advising him of this action and his right to a hearing. On September 3, 1991, Dr. Schueller requested a hearing.

On September 20, 1991, a committee of the medical staff met to address six charges of improper conduct and disruptive behavior brought against Dr. Schueller. Dr. Schueller was in attendance during a portion of that meeting. Subsequent to the hearing, the committee voted to continue the summary suspension and revocation of Dr. Schueller's clinical privileges. The medical staff adopted these recommendations and referred the recommendations to the Board of Governors. On December 16, 1991, the Board of Governors at Ashley Memorial conducted a hearing to consider whether Dr. Schueller's privileges should be revoked at which Dr. Schueller was present with counsel. At the completion of the hearing, the Board voted to revoke Dr. Schueller's clinical privileges.

Plaintiff filed his action on June 16, 1992, alleging, *inter alia*, that defendants (1) have engaged in a continuing contract, combination, conspiracy, and/or concert of action to unreasonably restrain interstate trade and commerce in the area served by Ashley Memorial Hospital [*7] and have engaged in, or aided and abetted, a collective boycott of and refusal to deal with plaintiff, including the "professional peer review" proceedings instituted against plaintiff, in a successful attempt to deny surgical services to consumers in the geographic market in violation of § 1 of the Sherman Antitrust Act; and (2) have engaged in the monopolization of the practice of medicine at Ashley Memorial, denying plaintiff access to a facility which is essential to plaintiff's continued practice of medicine in violation of section two of the Sherman Antitrust Act. Plaintiff also contends that defendants have revoked plaintiff's clinical privileges at Ashley Memorial in violation of the Health Care Quality Improvement Act of 1986. Plaintiff contends that these actions have an adverse effect on competition in the geographic area and have completely and totally destroyed the value of plaintiff's medical practice. Plaintiff seeks damages, a permanent injunction enjoining defendants from further action, and reinstatement of his rights and privileges at Ashley Memorial.

B. Summary Judgment

HN1[] Summary judgment is appropriate only when there is no genuine issue of material fact, [*8] so that the dispute may be decided on purely legal grounds. *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); *Fed. R. Civ. P. 56*. The Supreme Court has issued the following guidelines for trial courts to determine whether this standard has been satisfied.

The inquiry performed is the threshold inquiry of determining whether there is a need for trial--whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). See also *Agristor Leasing v. Farrow*, 826 F.2d 732 (8th Cir. 1987); *Niagara of Wisconsin Paper Corp. v. Paper Industry Union-Management Pension Fund*, 800 F.2d 742, 746 (8th Cir. 1986).

The Eighth Circuit Court of Appeals has advised trial courts that summary judgments should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues. *Inland Oil & Transport Co. v. United States*, 600 F.2d 725 (8th Cir. 1979), cert. denied, 444 U.S. 991, 62 L. Ed. 2d 420, 100 S. Ct. 522 (1979). The Court [*9] has recently reviewed the burdens of the respective parties in connection with a summary judgment motion. In *Counts v. M.K.-Ferguson Co.*, 862 F.2d 1338 (8th Cir. 1988), the court stated:

HN2[] The burden on the party moving for summary judgment is only to demonstrate, i.e., '[to] point[] out to the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the

movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.

Id. at 1339, quoting, *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988) (citations omitted) (brackets in original).

However, the Court of Appeals for this circuit has also held that [HN3](#) the court, in ruling on the motion [*10] for summary judgment, must give the non-moving party "the benefit of the reasonable inferences that can be drawn from the underlying facts." *Fischer v. NWA, Inc.*, 883 F.2d 594, 598 (8th Cir. 1989) (citing *Trnka v. Elanco Products*, 709 F.2d 1223 (8th Cir. 1983)).

1. Crossett Health Foundation

As a preliminary matter with respect to defendant Crossett Health Foundation, defendants assert that plaintiff's complaint is fatally deficient as to the trustees of the foundation on several grounds. First, defendants contend that none of the above individuals are physicians or medical care providers. Second, defendants assert that plaintiff's complaint makes no specific allegations with respect to these individuals and that discovery has not uncovered any such evidence. And last, defendants contend that none of the foundation trustees had any involvement with respect to the revocation of plaintiff's medical staff privileges. Thus, defendants contend that the trustees of the Crossett Health Foundation are entitled to judgment as a matter of law.

In response, plaintiff first contends that there is no law requiring that conspirators be physicians to incur liability under the Sherman [*11] Act as defendants have implied. Plaintiff also notes that if their status is relevant, there is no evidence that the trustees either are or are not physicians or medical care providers and thus a question of fact remains as to their status. Plaintiff then contends that the trustees are capable of conspiring with the hospital under the theory that a corporation can conspire with directors, officers or employees when they act on their own behalf rather than in their capacities as agents for the corporation.

In reply, defendants contend that plaintiff has churned up "unsubstantiated, self-serving facts to suggest" that the trustees were involved in the alleged misconduct, missing the point that his complaint states no facts, claims or causes of action against these individuals. Since all of plaintiff's claims seem to be aimed at Ashley Memorial and the defendant physicians, defendants contend that the trustee defendants should be dismissed.

The court agrees with defendants, finding no facts pled by plaintiff in his complaint and no evidence in the record that the named trustees of the Crossett Health Foundation were in any way involved in the alleged unlawful conduct. Moreover, there [*12] has been no allegation that the trustees of the unincorporated, non-profit organization have incurred liability under any other theory. The court finds, therefore, that defendants Clair Norman, Herman Hamilton, Jr, William S. Arnold, Ned Hastings and Roosevelt Early should be and hereby are dismissed from this action.

2. Collateral Estoppel and Res Judicata

Defendants then contend that plaintiff's antitrust claims are barred by collateral estoppel and *res judicata*, stating that on April 24, 1987, plaintiff filed a counterclaim in the Ashley County Circuit Court case of *Crossett Health Foundation d/b/A Ashley Memorial Hospital v. Steven C. Schueller*, No. 86-249-1 (the "state court action"). Defendants contend that plaintiff's allegations in this lawsuit are plainly identical to those issues raised in the state court action, as reflected in plaintiff's amended counterclaim filed on October 13, 1987. Defendants further contend that on November 14, 1988, an Ashley County jury found against plaintiff on his breach of contract counterclaim, noting that the Ashley County Circuit Court previously had directed a verdict against plaintiff on the remainder of his

counterclaims. [*13] Thus, defendants argue that plaintiff has done nothing more than "window dress" his prior state law claims as violations of the Sherman Antitrust Act in a blatant attempt to relitigate his claims. Defendants request that plaintiff's claims be dismissed under the theory of either collateral estoppel or *res judicata*.³

In his response, plaintiff contends that his counterclaim and participation in the 1987 state court action has no preclusive effect upon his current antitrust claims as these claims could not have been raised in the state court action as a matter of the "jurisdictional competency requirement." Plaintiff argues that in light of Supreme Court precedent, Arkansas' preclusionary law is inapplicable to plaintiff's Sherman Antitrust Act claims because [*14] jurisdiction over those claims is vested exclusively within federal courts. Plaintiff argues that as the Ashley County Circuit Court never had jurisdiction of plaintiff's antitrust claims, any ruling in the underlying state court action could have no preclusive effect in this action.

Defendants have replied to this response, citing a decision of the Court of Appeals for the Eighth Circuit as support for their conclusion that plaintiff cannot simply restyle as federal claims the claims which he previously lost in state court. Requesting that the court put form over substance when reviewing plaintiff's federal complaint and state law counterclaims, defendants again argue that plaintiff's action should be dismissed under the doctrines of *res judicata* and collateral estoppel.

In *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985), the Supreme Court stated that

HN4[] the preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings "shall have the same full faith and credit in every court within the [**15] United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." [28 U.S.C. § 1738](#). This statute directs a federal court to refer to the preclusion law of the State in which judgment was rendered. "It has long been established that [§ 1738](#) does not allow federal courts to employ their own rules of *res judicata* in determining the effects of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82, 72 L. Ed. 2d 262, 102 S. Ct. 1883, (1982); see also *Allen v. McCurry*, 449 U.S. 90, 96, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980).

[470 U.S. at 380](#). Like the case presently before the court, *Marrese* involved federal antitrust claims and the *Marrese* opinion directly addressed plaintiff's contention that since exclusive jurisdiction over antitrust claims lies within federal court, such claims cannot be barred, as a matter of law, by previous state court judgments:

The fact that petitioner's antitrust claim is within the exclusive jurisdiction of the federal courts does [*16] not necessarily make [§ 1738](#) inapplicable to this case. Our decisions indicate that a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts. . . . [§ 1738](#) requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment.

Id. at 380-81. However, the Court found that **HN5**[] "with respect to matters that were not decided in the state proceedings, we note that claim preclusion generally does not apply where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts.'" *Id. at 382*, citing *Restatement (Second) of Judgments* § 26(1)(c) (1982). Thus, "if state preclusion law includes this requirement of jurisdictional competency, which is generally true, a state judgment will not have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts." *Id. at 382*.

³ Defendants note that although the individual defendants in this case were not parties to the previous state court action, defendants argue that the doctrines still apply because the other defendants were in privity with the Ashley Memorial Hospital.

In determining what Arkansas' preclusion law provides, the court looks to the decision of [Crockett & Brown, P.A. v. J*17 Wilson, 314 Ark. 578, 864 S.W.2d 244 \(1993\)](#), where the Arkansas Supreme Court discussed *res judicata* and collateral estoppel as follows:

HN6[] *Res judicata*, or claim preclusion, bars subsequent action on the same claim where a final judgment has been rendered by a court of competent jurisdiction. [Toran v. Provident Life & Accident Ins. Co., 297 Ark. 415, 764 S.W.2d 40 \(1989\)](#) (citing [Restatement of Judgments, 2d, § 19](#) (1982)). Four elements must be met for *res judicata* to apply: (1) the first suit must have resulted in a final judgment on the merits, (2) the first suit must be based on proper jurisdiction, (3) both suits must involve the same cause of action, and (4) both suits must involve the same parties or their privies. [Robinson v. Buie, 307 Ark. 112, 817 S.W.2d 431 \(1991\)](#).

HN7[] Collateral estoppel, or issue preclusion, bars relitigation of issues, law or fact, actually litigated in the first suit. See [Toran v. Provident Life & Accident Ins. Co. supra](#). For collateral estoppel to apply, the following elements must be met: (1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) that issue must have been actually [*18] litigated, (3) the issue must have been determined by a valid and final judgment, and (4) the determination must have been essential to the judgment. [Fisher v. Jones, 311 Ark. 450, 844 S.W.2d 954 \(1993\)](#).

HN8[] If under Arkansas law, plaintiff is precluded from litigating his claims in state court, he cannot pursue them in federal court unless the prior state proceeding did not provide plaintiff with a full and fair opportunity to present his claims. [Gahr v. Trammel, 796 F.2d 1063, 1066 \(8th Cir. 1986\)](#) (citations omitted). A party receives a fair opportunity to present the claims allegedly precluded if the party could have brought the claims in a proceeding that would satisfy the minimal procedural requirements of the due process clause. [Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481, 102 S. Ct. 1883, 72 L. Ed. 2d 262 \(1981\)](#).

The court agrees with plaintiff that he cannot be precluded from pursuing a claim that he neither could nor did raise in the prior state proceeding. The doctrine of *res judicata* seeks to put an end to vexatious litigation; it does not seek to prevent an injured party from reaching the courthouse doors on a claim neither litigated nor litigable [*19] in the prior lawsuit. See [Gahr, 796 F.2d at 1067](#). **HN9[]** Arkansas' preclusion law requires that the state court have proper jurisdiction over a claim before an adjudication of that claim precludes subsequent litigation. Clearly, as **HN10[]** jurisdiction over Sherman Antitrust Act claims lies exclusively within federal court, the state court did not have proper jurisdiction and thus plaintiff's antitrust claims were not litigable in the prior lawsuit. The court finds, therefore, that plaintiff's claims are not barred by either *res judicata* or collateral estoppel and summary judgment on this theory is hereby denied.

3. Health Care Quality Improvement Act of 1986

The court notes that this appears to be a case of first impression in the Eighth Circuit in which defendants in a federal antitrust action seek judgment by asserting immunity under provisions of the Health Care Quality Improvement Act of 1986 ("HCQIA"). Stating that the HCQIA was enacted as a means of encouraging professional peer review by protecting participants from private civil litigation - specifically federal antitrust claims - defendants contend that the basis of plaintiff's antitrust lawsuit is the peer review which [*20] ultimately resulted in the revocation of plaintiff's hospital privileges. Alleging that the professional peer review action met all of the standards specified by the HCQIA as required for immunity and alleging further that the peer review is entitled to a statutory presumption of compliance with the standards, defendants contend that they are immune from any potential antitrust liability under provisions of the HCQIA.⁴

⁴ Defendants also contend that count four of plaintiff's complaint, brought against only Ashley Memorial Hospital, asserting that the hospital violated the HCQIA, fails to state a claim for which relief can be granted because the HCQIA does not provide for an

[*21] Plaintiff's first contention in response is that the immunity provided by the HCQIA is limited only to liability for money damages and does not bar plaintiff's request for injunctive relief. Plaintiff then contends that under the facts and circumstances of this case there is no immunity under HCQIA for liability for money damages, stating that the basis of his claims are not "peer review" as characterized by defendants.

Instead, plaintiff urges that the basis for his complaint is defendants' continuing, uninterrupted pattern of unlawful conduct from 1985-1991 in violation of the Sherman Antitrust Act. Plaintiff contends that the "peer review" conducted in 1991 was nothing more than the final step in a series of mutually dependent acts beginning in 1985 with the "die on the vine" statement. Plaintiff further argues that defendants may not use the HCQIA to insulate themselves from antitrust liability for unlawful conduct occurring in 1985-1991 by conducting the professional "peer review" proceedings in 1991. In support, plaintiff refers the court to the legislative history of the HCQIA, stating the HCQIA provides immunity only for those instances where physicians injure their patients [*22] through incompetent or unprofessional service and does not provide immunity from prior unlawful conduct. Plaintiff argues that the alleged "peer review" was nothing more than a part of a continuing, integrated pattern and plan of unlawful conduct in violation of the antitrust laws. Plaintiff contends that this unlawful conduct on behalf of defendants cannot, under the facts and circumstances of this case, be immunized by the HCQIA.

Plaintiff also challenges defendants' assertion that the alleged "peer review" proceedings were adequate under the provisions of the HCQIA, stating that the hearing procedures must be "fair under the circumstances." Plaintiff contends that the panel which recommended revocation of plaintiff's clinical privileges was composed of his direct economic competitors, persons with the ability to take significant amounts of business away from each other, and was therefore tainted. Thus, plaintiff argues that he has more than adequately satisfied the standards to overcome the statutory presumption of professional peer review legitimacy. Plaintiff concludes that there are genuine issues of fact regarding whether plaintiff's clinical privileges were terminated by his [*23] direct economic competitors for reasons of professional competency or for anti-competitive purposes.

By way of reply, defendants again contend that the HCQIA bars plaintiff's request for relief, restating their position that plaintiff's action rests upon the "peer review" proceedings and that those proceedings, first entitled to a presumption of validity, met each of the statutory requirements for immunity. Defendants contend that plaintiff has presented no facts which rebut the statutory presumption of validity with respect to those proceedings. Additionally, defendants criticize plaintiff's characterization of the peer review panel as "direct economic competitors," noting plaintiff's prior argument that he was the only member of the Ashley Memorial staff board certified in surgery. Nevertheless, assuming that other physicians at Ashley Memorial performed limited surgical procedures, defendants contend that these physicians are not "direct economic competitors" of plaintiff and thus the peer review panel was not tainted. Even if the panel had contained such competitors, defendants contend that this alone does not bar the immunity found within the HCQIA.

First, the court finds plaintiff's [*24] argument that his action is not based upon the professional peer review conducted by members of the Ashley Memorial staff to be completely without merit. Examination of plaintiff's complaint immediately reveals that plaintiff is challenging not only the peer review process and proceedings but also the final decision of the Board of Governors to revoke his clinical privileges at Ashley Memorial, characterizing

independent, private cause of action. Defendants contend that the HCQIA merely provides for immunity from suit and therefore count four should be dismissed. Plaintiff argues that count four should not be dismissed because plaintiff properly and adequately has pled pendent state law claims of interference with a business or economic enterprise. In their reply, defendants contend that a plain reading of count four of plaintiff's complaint fails to state a claim for interference with business expectancies or contractual relationships as plaintiff has argued, again contending that this count should be dismissed.

The court agrees that count four should be dismissed. HN11 [↑] The HCQIA provides only for limited immunity from civil damages incurred as the result of professional peer review action and does not provide for an independent, private right of action. The court also finds the complaint deficient of any state law claims for interference with a business or economic enterprise. Count four is entitled "Schueller v. AMH __ Suspension of Privileges violation of Health Care Quality Improvement Act __ Denial of Due Process" and nowhere within the six paragraphs of count four does plaintiff allege a claim under state law or even hint at alleging any claim other than one under the HCQIA. Accordingly, count four is dismissed for failure to state a claim against Ashley Memorial Hospital for which relief can be granted.

each as illustrative of antitrust violations. This conclusion is supported by plaintiff's repeated references to the "peer review" proceedings as well as the suspension and termination of his medical privileges; this includes but is not limited to, references in paragraphs 18, 19, 37, 38, 39, 40, 42, 43, 44, 47, 52, 53, 54, 55 and 57 of his complaint. Thus, the court finds that plaintiff's action is based, at least in part, upon the professional peer review proceedings conducted by Ashley Memorial and therefore the provisions of the HCQIA are relevant and applicable to this matter.

When it promulgated the HCQIA in 1986, Congress made the following findings:

1. The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become [*25] nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.
2. There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.
3. This nationwide problem can be remedied through effective professional peer review.
4. The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.
5. There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 U.S.C. § 11101. To address the concerns identified in its findings, Congress provided for limited liability ⁵ [*26] in connection with professional peer review action ⁶ taken by a professional review body ⁷ provided that the action meets specified standards. See 42 U.S.C. § 11112(a).

HN14 [↑]

The defendants [*27] can qualify for immunity under the HCQIA if they can demonstrate that the (1) professional review actions complied with the standards set forth in 42 U.S.C. § 11112, (2) results of the peer review were reported properly to the state authorities in compliance with 42 U.S.C. §§ 11131(c)(1), 11151(2), and (3) professional review actions occurred after November 14, 1986, the effective date of the HCQIA. See Austin v. McNamara, 731 F. Supp. 934, 939 (C.D.Cal. 1990), aff'd, 979 F.2d 728 (9th Cir. 1992). There is no dispute that the professional peer review at issue in this matter occurred after November 14, 1986, and there has been no assertion by plaintiff that the results of the peer review were not reported to the appropriate state authorities. In fact, plaintiff has challenged the fact that information regarding his suspension was released to the National Practitioner Data Bank. The only issue for application of immunity, therefore, is whether defendants complied with the statutory requisites for immunity found in § 11112(a).

Specifically, HN15 [↑] for a professional review body to be protected by the HCQIA's immunity ⁸, the action of that body must be taken,

⁵ See 42 U.S.C. § 11111.

⁶ HN12 [↑] "Professional review action" is defined as "an action or recommendation of a professional review body which is taken or made in the conduct of a professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action." 42 U.S.C. § 11151(9).

⁷ HN13 [↑] "Professional review body" is defined as "a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body is a professional review activity." 42 U.S.C. § 11151(11).

- (1) in the [*28] reasonable belief that the action was in the furtherance of quality health care,
- (2) after a reasonable effort to obtain the facts of the matter,
- (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
- (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in [section 11111\(a\)](#) of this title unless the presumption is rebutted by a preponderance of the evidence.

[42 U.S.C. § 11112\(a\).](#)

After examining the Ashley Memorial documents submitted by the [*29] parties, the court believes that, as a matter of law, the professional peer review proceedings conducted with respect to the plaintiff meet the statutory requirements for immunity. Inquiries into plaintiff's practice which eventually led to revocation of plaintiff's clinical privileges were initiated because of plaintiff's alleged "disruptive behavior and conduct not consistent with that of the professional staff of the hospital." Report of Board of Governors Meeting, April 17, 1991. Apparently, this inquiry in 1991 followed a series of conflicts between plaintiff and members of the hospital board and staff which began sometime after plaintiff joined the Ashley Memorial staff. See Report of Special Board Meeting, July 30, 1986; Report of Executive Committee Meeting, August 4, 1986; Report of Board of Governors Meeting, August 27, 1986; Letter to Dr. Steven Schueller, August 28, 1986.

On May 8, 1991, Steve McAdams, Chairman of the Board of Governors, directed Dr. Toon, at that time Chief of Staff for Ashley Memorial, to take corrective action pursuant to the medical staff Bylaws to investigate conduct which McAdams labeled as "potentially adversely affecting patient care." Examples [*30] of such disruptive and unprofessional activities included plaintiff's acceptance of a. referral for vascular surgery which was beyond the capabilities of the hospital; evidence of unauthorized impromptu peer review of other physicians' patients' files and unauthorized public disclosure of patient information; unilateral revision of emergency room procedures inconsistent with the practices of the medical staff; refusal to attend emergency room patients while on emergency room call; declaration of policy with respect to unassigned patients in emergency room; disruptive conduct at medical staff meetings; written demands to hospital administrator demanding changes in emergency room schedule; publicizing efforts to jeopardize the hospital's tax-exempt status; publicizing through press releases differences in opinions with hospital personnel; accusation of criminal conduct by hospital publicized in press releases; and attempts to perform surgery in hospital without appropriate equipment and personnel.

Thereafter, on May 13, 1991, Dr. Toon appointed Drs. Rankin, Gresham, Walsh, Thompson and Garcia to an ad hoc committee to interview Dr. Schueller and make recommendations pertinent to the [*31] numerous allegations contained in McAdam's letter. Plaintiff received notice of this action. See Letter of Dr. Toon, May 13, 1991. On May 20, 1991, Dr. Rankin reported to the hospital the results of the interview with Dr. Schueller and recommended that a letter be sent to Dr. Schueller encouraging closer cooperation with the staff and the Board in the functions of the hospital, less divisive behavior, and adherence to the hospital's emergency room policies. On May 28, 1991, Dr. Toon notified McAdams and the Board of Governors of the committee's recommendation. At a meeting of the Board of Governors on June 19, 1991, the Board accepted the recommendation. During this meeting, the Board also reviewed a letter by Dr. Schueller to the Joint Commission on Accreditation of Healthcare Organizations dated May 14, 1991. On July 30, 1991, the Board requested that the staff review the letter and determine whether this letter should be viewed as "disruptive behavior."

At a meeting on August 6, 1991, the medical staff executive committee met and determined that the letter was inappropriate and disruptive. The meeting also addressed the altercation between Drs. Schueller and Garcia which

⁸ [HN16](#) [↑] The immunity available is limited to protection from "damages under any law of the United States or of any State," excepting any civil rights proceedings. [42 U.S.C. § 11111\(a\)\(1\)](#).

had [*32] occurred that day. On August 12, 1991, the medical staff met to discuss these matters and recommended to the Board that Dr. Schueller's clinical privileges be revoked based on the following: the letter to the accreditation commission; the inability to locate Dr. Schueller while on emergency room call on May 20, 1991; the altercation between Drs. Schueller and Garcia on August 6, 1991; two instances by Dr. Schueller of disruptive and offensive videotaping in the hospital; attempts to disrupt hospital recruiting; and other various instances of disruptive behavior. On August 14, 1991, Dr. Schueller requested a hearing on the clinical privilege suspension.

The hearing was held on August 28, 1991, and Dr. Schueller was in attendance for approximately fifteen minutes. At the conclusion of the hearing, the committee made the recommendation to the Board to continue Dr. Schueller's suspension. A review of the committee's action was requested by Dr. Schueller and this was conducted on September 20, 1991. The ad hoc committee reviewed the documentation and evidence was presented which was made a part of the record. At the conclusion of the meeting, the decision to continue Dr. Schueller's suspension [*33] and revocation of clinical privileges was reached and the staff also voted to terminate Dr. Schueller from the medical staff. Then, on December 16, 1991, the Board of Governors voted to accept the recommendations that Dr. Schueller's clinical privileges be suspended and that he no longer be allowed to practice at Ashley Memorial.

This professional peer review is entitled to a statutory presumption of compliance with the HCQIA until rebutted by a preponderance of the evidence and the court believes that plaintiff has neglected to present evidence which overcomes this presumption. Moreover, the court finds that the staff members which conducted the peer review did so with the "reasonable belief that the action was in the furtherance of quality health care." See [42 U.S.C. § 11112\(a\)\(1\)](#). [HN17](#) This objective "reasonable belief" standard is satisfied if the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients. H.R. Rep. No. 903, 99th Cong., 2d Sess. 10, reprinted in 1986 U.S. Code Cong. & Admin. News 6393. The court finds that the [*34] ad hoc committee, the medical staff and the Board of Governors, armed with the information available to them at the time of the professional review action, "reasonably concluded that their action would restrict incompetent behavior or would protect patients." Thus, the court finds that subsection (a)(1) of [§ 11112](#) has been satisfied.

The court is also satisfied that defendants made a reasonable effort to obtain the facts with respect to Dr. Schueller's disruptive conduct. The inquiry which was initiated in April of 1991 did not culminate in a final decision until December of that year. During that time, the ad hoc committee, composed of staff members in accordance with the hospital's bylaws, internally investigated the matter, interviewed Dr. Schueller and conducted numerous meetings and hearings at which Dr. Schueller was given the opportunity to discuss the allegations against him. The court believes that the evidence is supportive of the conclusion that every effort was made to obtain the facts of this matter. See [42 U.S.C. § 11112\(a\)\(2\)](#).

For similar reasons, the court likewise believes that adequate notice and hearing procedures are afforded to Dr. Schueller which were [*35] fair under the circumstances and thus finds that subsection (a)(3) has been satisfied. Although [HN18](#) failure to comply with the specific notice and hearing requirements of [§ 11112\(b\)\(1\)](#), without more, does not "constitute failure to meet the standards of subsection (a)(3) of this section," the court believes that there is sufficient evidence to conclude that Dr. Schueller received due process. Dr. Schueller was given notice that professional review action had been proposed along with the reasons for such action and was afforded the opportunity to request a hearing and to appear with counsel. Dr. Schueller requested a hearing and one was conducted. There is even evidence in the record meetings of the ad hoc committee were rescheduled to accommodate Dr. Schueller. The court is satisfied that plaintiff was given the opportunity to adequate process and evidence in the record that plaintiff opted not to exercise his full rights thereto by leaving proceedings prior to their conclusion does not render the proceedings defective. See [§ 11112\(b\)\(3\)\(B\)](#).

The court also finds that it was the reasonable belief of the medical staff and Board of Governors of Ashley Memorial that the action taken [*36] with respect to Dr. Schueller "was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3)." Accordingly, immunity

extends to defendants under the HCQIA in their capacity as a professional review body with regard to the professional review action culminating in revocation of plaintiff's clinical privileges at Ashley Memorial.

4. Sherman Antitrust Act

a. Statute of Limitation

As immunity under the HCQIA extends only to liability for damages which may be incurred in plaintiff's antitrust case and as plaintiff is also seeking injunctive relief, the court must continue its discussion under the Sherman Antitrust Act. With respect to plaintiff's antitrust claims, defendants first contend that these claims are barred by the applicable four (4) year statute of limitation as provided by the Clayton Act. Stating that this action was filed on June 16, 1992, defendants contend that any claims asserted by plaintiff which accrued prior to June 16, 1988, are barred. Specifically, defendants contend that plaintiff was aware of the purported conspiracy to violate the Sherman Antitrust Act as early as 1985 when Mr. [*37] Al Smith, a nurse anesthetist, allegedly told plaintiff that there was a "plan" at the hospital to let the plaintiff "die on the vine" and then to bring in another surgeon. Mr. Smith allegedly learned of this "plan" from Mr. Norman Reynolds, the administrator at that time of Ashley Memorial Hospital. Defendants characterize this act as the "only cognizable overt act" upon which plaintiff can base his antitrust claims.

Moreover, defendants urge that plaintiff was aware of his antitrust claims by 1987 when he filed his counterclaim in the state court action asserting essentially the same allegations and including the alleged "die on the vine" statement. Additionally, defendants contend that plaintiff's allegations that his income was diminished from 1986 to 1990 as a result of the alleged misconduct on the part of defendants is further evidence that plaintiff was aware, prior to June 16, 1988, that his potential antitrust claims were accruing. Alternatively, defendants argue that these losses suffered by plaintiff are simply "continuing effects" or "merely the abatable but unabated inertial consequences of some pre-limitations" conduct. Thus, defendants argue that since all of plaintiff's [*38] antitrust claims accrued prior to June 16, 1988, with only "continuing effects" of a previous overt act rather than "fresh instances" of overt acts since that time, each of plaintiff's antitrust claims are barred by the statute of limitation.

Plaintiff admits that the period for which he can recover damages is limited to that period June 17, 1988, forward. Plaintiff, however, challenges defendants' characterization of the losses suffered by plaintiff as simply the "continuing effects" of some pre-limitations conduct. Rather, plaintiff contends that fresh acts of Conspiracy and a continuing implementation of the boycott and refusal to deal with the plaintiff occurred between June 17, 1988, and June 16, 1992, the date upon which plaintiff filed his complaint. Plaintiff alleges that the defendants implemented the "die on the vine" plan during each of the years since 1988, providing as evidence the alleged decrease in referrals from the 1985 level, by eighty percent in 1988, ninety-two percent in 1989, and ninety-five percent in 1990. Plaintiff then contends that his surgical practice received permanent injury in 1991 when his credentials were revoked and plaintiff was unfairly associated [*39] with incompetent physicians through inclusion of his name in the National Practitioner Data Bank. Unlike the cases argued by defendants, plaintiff asserts that a business relationship was maintained between plaintiff and defendants throughout 1990, and that each act of boycott and refusal to deal created a new cause of action. Plaintiff then cites several examples of "fresh acts" within the limitations period which, if believed and aggregated with previous acts, allegedly indicative of a continuing conspiracy on behalf of defendants.

Defendants' reply is that plaintiff has presented insufficient evidence of overt acts occurring after June 17, 1988, to support his antitrust claims. Defendants contend that plaintiff's evidence, which points only to an alleged reduction in the number of referrals during the relevant period of time, without more, does not constitute an overt act, arguing again that the Sherman Act protects competition and not competitors. Then defendants assume, for the sake of argument, that even if referral reduction was experienced, plaintiff has failed to demonstrate that the referrals were part of any antitrust conspiracy or collective boycott. Defendants contends [*40] that the hospital administrator's alleged "die on the vine" statement, even if true, is not evidence that the defendants participated, or were even aware of, any plan of conspiracy to boycott plaintiff.

The court believes that plaintiff has presented little evidence which can be construed as overt acts of conspiracy by defendants occurring since June, 1988. However, as the court finds that plaintiff's antitrust claims are barred for substantive reasons discussed herein, the court finds it unnecessary to participate in any lengthy statute of limitations discussion and summary judgment on this basis is hereby denied.⁹

[*41] b. Merits of the Antitrust Claims

Defendants argue that plaintiff cannot prevail on the merits of his antitrust claims, contending primarily that plaintiff has failed to demonstrate any actual injury to competition as required. Turning first to plaintiff's boycott claims under [§ 1](#) of the Sherman Act, defendants state that as a threshold matter plaintiff is required to demonstrate that the alleged misconduct had a detrimental effect on competition in the relevant market or that defendants had "market power" in the relevant market. Defendants contend, however, that plaintiff cannot show that Ashley Memorial Hospital had the requisite "market power" in the relevant market or that the alleged misconduct of defendants had any detrimental impact on competition. According to defendants, there can be no injury because there was no competition in the relevant market, a twenty-five mile radius of Crossett, Arkansas.

Defendants then address plaintiff's monopolization and attempted monopolization claims under [§ 2](#) of the Sherman Act, stating first that, for the purposes of the motion for summary judgment, defendants admit the existence of a "natural" monopoly but deny its illegality. [*42] Defendants contend that although Ashley Memorial Hospital is the sole provider of surgical services as a primary care facility within the 25 mile radius of Crossett, the hospital's monopoly status is the result of economies of scale since the relevant market can accommodate only one provider of these services. Defendants argue, therefore, that the hospital meets the Eighth Circuit's definition of a "natural" monopoly and for that very reason, cannot be held liable under [§ 2](#) of the Sherman Act.

Defendants next argue that the "essential facility" doctrine is inapplicable to the facts of this case. Stating that plaintiff narrowly defined the relevant market so as to assert that Ashley Memorial is an "essential facility" and thus must make its facilities available to the plaintiff as the only means by which plaintiff can practice his profession, defendants contend that the practice of medicine in Arkansas is a privilege subject to regulation and revocation and is not a physician's right. Defendants thus contend that it would be inappropriate to apply a doctrine which would prevent hospitals from restricting unqualified doctors from the practice of medicine.

Defendants' final contention [*43] with respect to plaintiff's antitrust claims is that even if Ashley Memorial has market power or a monopoly in the relevant market, this status does not extend to surgical services. Defendants assert that strictly speaking the hospital does not offer surgical services but rather permits doctors to offer these services at its facility. Characterizing plaintiff's argument as one in which the hospital leverages its power in the market for hospital facilities by controlling the market for surgical services, defendants contend that this theory should be rejected. Defendants contend that Ashley Memorial cannot monopolize or attempt to monopolize the surgical services market because the hospital does not provide these services, only the space in which the services may be performed. Furthermore, the hospital does not prevent a doctor from obtaining privileges at another facility; doctors tend to practice in the most convenient hospital. Thus, defendants contend that Ashley Memorial cannot participate or realistically control the market for surgical services and therefore the antitrust claims against the hospital should be dismissed.

Responding to these contentions, plaintiff criticizes defendants [*44] for characterizing his [§ 1](#) Sherman Antitrust Act claims as based simply upon the peer review or hospital credentials. Plaintiff reiterates that his claims are ones for continuing conspiracy to boycott and refusal to deal with the plaintiff, conspiracy to monopolize the practice of medicine within the market served, and actual collective boycott and refusal to deal with the plaintiff. Recognizing that an indispensable element of these claims is "harm to competition" or an "anticompetitive injury," plaintiff

⁹ Defendants make a similar argument under the equitable doctrine of laches, contending that plaintiff's claims are barred even if the applicable statute of limitations has not expired. Based upon the rulings contained herein, the court also finds it unnecessary to delve into any substantive discussion with respect to the doctrine of laches and summary judgment based upon laches is hereby denied.

contends that the output of surgical services in the market has been restricted as the result of defendants' anticompetitive activities. Plaintiff also contends that there is clear evidence of non-competitive prices for health care services as defendants have the power to control prices in the market.

Plaintiff cites as evidence the endoscopy procedures performed in the hospital operating room at Ashley Memorial by Dr. Birriel which were determined by a peer review organization of board certified surgeons and gastroenterologists to generally be a waste of medical resources. In 1993, the Georgia-Pacific Health Care Plan also commented upon the high costs of gastric procedures prevailing [*45] at Ashley Memorial. Plaintiff contends that he has performed the same procedures outside of the hospital operating room with minimal assistance resulting in lower charges to the patient and the insurer. The result of lower output and higher prices, according to plaintiff, is that surgical patients in this market are deprived of the least expensive, yet adequate treatment, which is suitable for the needs of the patients. Thus, consumers of medical services must either pay the increased cost or go outside the relevant market to obtain the services.

Turning to his § 2 Sherman Antitrust Act claims, plaintiff first points out that defendants' argument urging dismissal of count two against Ashley Memorial was without merit because Ashley Memorial not charged in count two and thus plaintiff does not object to such a dismissal. Plaintiff contends, therefore, that defendants' argument with respect to Ashley Memorial's status as a natural monopoly for purposes of count two was a waste of valuable resources. Plaintiff notes, however, that the same analysis does not apply to count three, the conspiracy to monopolize claim, in that Ashley Memorial's status as a natural monopolist has nothing [*46] to do with whether the physician defendants and others, including the hospital, conspired to monopolize the practice of medicine at Ashley Memorial.

Contrary to defendants, plaintiff then argues that the "essential facility" doctrine applies to the facts of this case. Plaintiff contends that the doctrine would be inapplicable in a simple "peer review" case, reiterating his contention that the basis of his claims is not "peer review" but rather conspiracy to boycott, monopolize and refusal to deal under the Sherman Act. Plaintiff points out that nothing in defendants' motion for summary judgment addresses conspiracy.

i. Section One Claims

Plaintiff has asserted that defendants violated HN19 [↑] § 1 of the Sherman Antitrust Act, which states, in pertinent part, that

every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states, . . . is hereby declared illegal.

15 U.S.C. § 1 (1982). Not surprisingly, the courts of this circuit have required proof of two essential elements in any action under § 1: (1) a contract, combination, or conspiracy, which results in (2) an unreasonable restraint of trade. Eureka Urethane, Inc. [*47] v. PBA, Inc., 746 F. Supp. 915 (E.D. Mo. 1990), aff'd, 935 F.2d 990 (8th Cir. 1991).

Plaintiff contends that defendants engaged in a conspiracy to harm plaintiff's medical practice. HN20 [↑] A Conspiracy imports a plurality of persons acting in concert to attain a "common goal or purpose." Eureka Urethane, 746 F. Supp. at 930. Accordingly, the Supreme Court, in Fisher v. City of Berkeley, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986), recently reiterated that § 1 of the Sherman Act prohibits only unreasonable restraints of trade "effected by a 'contract, combination . . . , or conspiracy' between separate entities." 106 S. Ct. at 1049 quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) (emphasis in original). Thus, § 1 applies only to concerted action; unilateral action is excluded from its purview. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984).

Proof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities. The court, therefore, must proceed to determine whether defendants and their [*48] agents and employees are separate entities for the purpose of a § 1 conspiracy. Under the facts of this matter, the court believes that the staff of Ashley Memorial is acting as an agent of Ashley Memorial during the peer review process and as such is distinct from the hospital.

This view is premised upon the 1984 Supreme Court case of *Copperweld Corp. v. Independence Tube Corp.*, *supra*, which set forth a principle of intracorporate immunity to be applied in § 1 cases. In *Copperweld*, the issue before the Court was whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy. The "intra-enterprise conspiracy" doctrine, recognized by the Court to have been derived from earlier Supreme Court decisions, had provided that § 1 liability was not foreclosed merely because a parent and its subsidiary are subject to common ownership.

Recognizing that "the Sherman Act contains a 'basic distinction between concerted and independent action,'" and that "the conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization," [*49] the Court proceeded to analyze whether a parent and subsidiary could act only in concert, thus giving rise to a § 2 action, or whether they could act independently or unilaterally, and thus providing a cause of action under only § 1 of the Act. The Court stated that "the distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms 'contract, combination. . . or conspiracy' in § 1." *Id. at 769*.

The court then proceeded to address the nature of actions taken by corporate officers and employees, corporate divisions and subsidiaries. Finding that internal agreements and actions of corporate officers and employees pursuant to a single firm's policies do not raise the antitrust dangers which § 1 was designed to prevent, the court stated that

the officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from a single effort to stifle competition. In the marketplace, such coordination may be necessary [*50] if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.

Id. at 769. The Court likewise recognized that the conduct of an unincorporated division of a corporation was to be considered, for purposes of § 1, as the conduct of a single actor:

The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.

Id. at 770-71. The court then, for similar reasons, held that *HN21*[↑] "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for the [*51] purposes of § 1 of the Sherman Act." *Id. at 771*. The court found that the parent and its subsidiary have a "complete unity of interest," with common objectives. *Id.*

They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A § 1 agreement may be found when the "conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." [citation omitted]. But in reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design."

Because there is nothing inherently anticompetitive about a corporation's decision to create a subsidiary, the intra-enterprise conspiracy doctrine [*52] "imposes grave Consequences upon organizational distinctions that are of *de minimis* meaning and effect." [*Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29, 8 L. Ed. 2d 305, 82 S. Ct. 1130 \(1962\)](#).

456 U.S. at 771, 773. Thus, the Court held that while a corporation's initial acquisition of control is subject to scrutiny under § 1, thereafter, a corporation and its wholly owned subsidiary are fully subject only to § 2 of the Sherman Act and cannot conspire within the meaning of § 1.

The court thinks that a similar unity of interest is present in the relationship between the hospital and its staff with both seeking to upgrade the quality of patient care through physician review. Examining the substance rather than the form of the relationship between hospital and staff, the court finds itself aligned with those circuits recognizing the applicability of intracorporate immunity to professional peer review proceedings. [*Oksanen v. Page Memorial Hospital*, 945 F.2d 696 \(4th Cir. 1991\)](#), cert. denied, 502 U.S. 1074, 112 S. Ct. 973, 117 L. Ed. 2d 137 (1992); [*Nurse Midwifery Assoc. v. Hibbett*, 918 F.2d 605 \(6th Cir. 1990\)](#), cert. denied, [*53] 502 U.S. 952, 112 S. Ct. 406, 116 L. Ed. 2d 355 (1991); [*Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96 \(3d Cir. 1988\)](#), cert. denied, 489 U.S. 1078, 109 S. Ct. 1528, 103 L. Ed. 2d 834 (1989). Like a corporation delegating authority to its officers, the Board of Governors at Ashley Memorial delegated peer review decisionmaking in the first instance to the medical staff, and thus, with respect to those decisions, the medical staff operated as an officer of a corporation. See [*Weiss v. York Hospital*, 745 F.2d 786, 817 \(3d Cir. 1984\)](#), cert. denied, 470 U.S. 1060, 105 S. Ct. 1777, 84 L. Ed. 2d 836 (1985). In effect, the medical staff was acting as an agent of the Board in evaluating the conduct and competence of those to whom the hospital extended privileges. At all times, the Board had ultimate control over the peer review and could modify the staff's recommendations, retaining the ultimate responsibility for the conduct of the hospital. And as the staff is a component part of the hospital and not its competitor, the court finds that this decision to conduct peer review proceedings does not implicate the concerns of § 1 of the Sherman Act. See [*Nurse Midwifery*, I^{54\]} 918 F.2d at 614 \("There are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and medical staff are not competitors.\) Thus, as a matter of law, the court believes that plaintiff's § 1 Sherman Act claims are barred.](#)

Although plaintiff's response to defendants' summary judgment motion fails to address a recognized exception to the *Copperweld* doctrine of intracorporate conspiracy, plaintiff hints at conflicts of interests among defendants, characterizing them throughout his motion as his "direct economic competitors." Thus, the court feels compelled to discuss the decision of [*Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313 \(8th Cir. 1986\)](#), in which the Eighth Circuit recognized an exception to the general principle of *Copperweld* that agents of a corporation cannot conspire within the meaning of § 1:

HN22[↑] When the interests of principal and agents diverge, and the agents at the time of the conspiracy are acting beyond the scope of their authority or for their own benefit rather than that of the principal, they may be legally capable of engaging in an antitrust conspiracy with their corporate principal.

[*55] [*Id. at 1317*](#). Recognizing the availability of such an exception, the court finds that there has been no evidence presented which would allow the court to conclude that members of the hospital staff were "acting beyond the scope of their authority or for their own benefit rather than that of the principal" when conducting the professional peer review proceedings. To the contrary, the evidence illustrates that members of the Ashley Memorial staff acted, at all relevant times, pursuant to the instruction of the Board of Governors and further, that the Board retained ultimate control over the investigation and hearing proceedings directed at plaintiff. Moreover, the court is unpersuaded that defendants were "direct economic competitors" of plaintiff as plaintiff elsewhere argues that he

was the single board certified surgeon on staff at Ashley Memorial. Thus, the court concludes that the physician defendants were legally incapable of engaging in a [§ 1](#) antitrust conspiracy with Ashley Memorial.

The court believes that such a conclusion makes for good public policy. Penalizing coordinated conduct in the health care context would not only discourage hospitals from investigating [*56] their medical staffs but also discourage members of the staff from participating in such proceedings. One of the benefits of peer review is that physicians may be evaluated to determine if they have achieved a certain level of professional competence, benefiting both individual patients and the community at large. This is one of the reasons Congress passed the HCQIA, discussed at length above, and any potential antitrust threat to the peer review process is at odds with Congress' intent to encourage the process by granting immunity to participants.

ii. Section Two Claims

The plaintiff has also alleged violations of [§ 2](#) of the Sherman Act. [HN23](#) [↑] [Section 2](#) of the Act subjects to prosecution

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 \(1988\)](#). To establish monopolization in violation of 52, the plaintiffs must show: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, [*57] or historic accident." [Eastman Kodak Co. v. Image Technical Servs., Inc.](#), 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992), citing [United States v. Grinnell Corp.](#), 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966) (other citations omitted).

[HN24](#) [↑] Monopoly power is defined as the "power to control prices and exclude competition with respect to a particular product and within a particular geographic market." [Eureka Urethane, Inc. v. PBA, Inc.](#), 746 F. Supp. 915, 924 (E.D. Mo. 1990), aff'd, 935 F.2d 990 (8th Cir. 1991), citing [United States v. E.I. du Pont de Nemours & Co.](#), 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). Thus, plaintiff must show that the defendants have "dominant market share in a well-defined relevant market." [Assam Drug Co. v. Miller Brewing Co.](#), 798 F.2d 311, 318 (8th Cir. 1986). The court is required, therefore, to define the relevant market by reference to both the product market and the geographic market. [Brown Shoe Co. v. United States](#), 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962); [Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n](#), 938 F.2d 846, 850 (8th Cir. 1991). The essential test [*58] for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendants' products or services. [United States v. E.I. du Pont de Nemours & Co.](#), 351 U.S. at 377. This comparative analysis has been characterized as the "reasonable interchangeability" standard. [Eureka Urethane](#), 746 F. Supp. at 922.

Furthermore, a competitor may possess monopoly power in a submarket. A market can be divided into submarkets and may be determined by examining (1) the industry or public recognition of the submarket as a separate economic entity; (2) the product's peculiar characteristics and uses; (3) unique production facilities; (4) distinct customers; (5) distinct prices; (6) sensitivity to price changes and (7) specialized vendors. [Brown Shoe Co.](#), 370 U.S. at 325.

While the court tends to believe that Ashley Memorial, the only hospital within a twenty-five mile radius of Crossett, Arkansas, possesses a dominant market share in a well-defined, if small, market for hospital services, [HN25](#) [↑] a mere showing of monopoly power in the relevant market, unaccompanied by evidence of anti-competitive [*59] behavior, is insufficient to support a claim for monopolization. [Trace X Chemical](#), 738 F.2d 261, 266. Thus, [HN26](#) [↑] the second element of a [section 2](#) claim requires proof of "either (1) specific intent to monopolize or (2) anticompetitive effects that result from the monopolist's actions." [Paschall v. Kansas City Star Co.](#), 727 F.2d 692, 696 (8th Cir. 1984), cert. denied, 469 U.S. 872, 83 L. Ed. 2d 152, 105 S. Ct. 222 (1984), citing [United States v. Griffith](#), 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948). One need not prove both specific intent and anticompetitive effects; either alone is sufficient basis for the imposition of liability for an actor possessing monopoly

power. *Id.* However, liability based upon specific intent may be negated where valid business justifications exist for the monopolist's actions. *Id. at 697.*

HN27[] Anti-competitive conduct is conduct without a legitimate business purpose. *Becker v. Egypt News Co., 713 F.2d 363, 366 (8th Cir. 1983)*. Acts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct violative of Section 2. *Telex Corp. v. IBM, 510 F.2d 894, 925-26* (10th [*60] Cir.), cert. dismissed, 423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975).

The exercise of business judgment cannot be found to be anti-competitive. To be labeled anti-competitive, the conduct involved must be such that its "anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of' monopoly power."

Trace X Chemical, 738 F.2d at 266. Rather, acts which would constitute an unlawful use of monopoly power are those "derived from [the monopolist's] power in the market or its size, . . . acts which could have been performed by one with the requisite power." *Id. at 266*, citing *Telex Corp. v. IBM, 510 F.2d at 926*.

An examination of the documentation submitted to the court reveals that no genuine issues of fact exist with respect to the presence of specific intent to monopolize the market or of anti-competitive conduct on behalf of defendants. Defendants contend that all actions taken with respect to the plaintiff were taken for a legitimate business and professional purpose - to recommend the appropriate action to be taken pursuant to the hospital's [*61] bylaws and professional peer review proceedings. Plaintiff has presented no evidence of anti-competitive behavior by defendants except for his assertion that defendants stopped making physician referrals to plaintiff. However, as there is no market for referrals, the court finds that even if true, a reduced number of referrals is not evidence of anti-competitive behavior which violates federal antitrust laws; the Sherman Act serves to protect competition in the marketplace and not individual competitors. See *Flegel v. Christian Hospital, 4 F.3d 682 (8th Cir. 1993)*. Thus, the court finds no evidence of actionable anticompetitive conduct.

Plaintiff also alleges that defendants conspired to monopolize or attempted to monopolize commerce and trade under 52 of the Act and have the burden of proving the following elements: (1) defendants' specific intent to control prices or destroy Competition in some part of commerce; (2) predatory or anticompetitive conduct on behalf of defendants directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. See *Trace X. Chemical, 738 F.2d at 265*. **HN28**[] An antitrust plaintiff, alleging an attempted monopolization, must [*62] prove the existence of "methods, means and practices which would, if successful, accomplish monopolization, and which, falling short, nevertheless approach so close as to create a dangerous probability of it" *American Tobacco Co. v. United States, 328 U.S. 781, 785, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*.

For the same reasons discussed above with respect to plaintiff's § 1 claims, the court finds that defendants could not, as a matter of law, conspire or attempt to conspire to monopolize trade and commerce. Thus, the court finds that summary judgment for defendants on all of plaintiff's § 2 claims is also appropriate and is hereby granted.

5. Conclusion

For the reasons discussed above, the court finds that (1) defendants Clair Norman, Herman Hamilton, Jr., William S. Arnold, Ned Hastings and Roosevelt Early are hereby dismissed from this action, finding no facts pled by plaintiff in his complaint and no evidence in the record that the named trustees of the Crossett Health Foundation were in any way involved in the alleged unlawful conduct; (2) count four of plaintiff's complaint should be and hereby is dismissed as against Ashley Memorial Hospital as it fails [*63] to state a claim for relief; (3) immunity from liability for Sherman Antitrust Act damages be granted for defendants Ashley Memorial Hospital and Drs. Birriel, Burt, Gresham, Garcia, Rankin, Ripley, Toon and Walsh pursuant to the Health Care Quality Improvement Act of 1986; and (4) summary judgment should be and hereby is granted for defendants Ashley Memorial Hospital and Drs. Birriel, Burt, Gresham, Garcia, Rankin, Ripley, Toon and Walsh on plaintiff's § 1 and § 2 Sherman Antitrust Act claims. Summary judgment is granted and this action is hereby dismissed.

IT IS SO ORDERED.

H. Franklin Waters

United States District Judge

JUDGMENT

On this 6th day of April, 1994, the court finds, for reasons set forth in its memorandum opinion, that defendants' motion for summary judgment should be and hereby is granted and this action dismissed.

IT IS SO ORDERED.

H. Franklin Waters

United States District Judge

End of Document



Oki Distrib. v. Amana Refrigeration, Inc.

United States District Court for the Southern District of Ohio, Western Division

April 11, 1994, Decided ; April 12, 1994, Filed

C-1-92-192

Reporter

850 F. Supp. 637 *; 1994 U.S. Dist. LEXIS 5399 **

OKI DISTRIBUTING, INC., Plaintiff, v. AMANA REFRIGERATION, INC., et al., Defendants.

Core Terms

Distributor, summary judgment, modification, crossover, termination, modified, parties, promises, at-will, appliance, dealers, terms, integration clause, course of conduct, territory, written contract, representations, contractual, two-step, antitrust, reasonable juror, genuine issue, unambiguous, memorandum, trailing, credits, prices, conclusory allegation, promissory estoppel, material fact

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

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

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

HN1[] Entitlement as Matter of Law, Appropriateness

The narrow question that a court must decide on a motion for summary judgment is whether there exists a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The appropriate standard in deciding a motion for summary judgment is as follows: The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and on motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

850 F. Supp. 637, *637IÁ1994 U.S. Dist. LEXIS 5399, **5399

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

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

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

HN2 [down] **Entitlement as Matter of Law, Genuine Disputes**

The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. If the moving party meets this burden, then the non-moving party must set forth specific facts showing there is a genuine issue for trial. [Fed. R. Civ. P. 56\(e\)](#).

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

HN3 [down] **Summary Judgment, Burdens of Proof**

The non-moving party must designate specific facts showing there is a genuine issue for trial. Although the burden might not require the non-moving party to designate facts by citing page numbers, the designated portions must be presented with enough specificity that the district court can readily identify the facts on which the non-moving party relies.

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

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

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

HN4 [down] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is not appropriate if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Conclusory allegations, however, are not sufficient to defeat a motion for summary judgment.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Modifications > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Execution & Delivery

HN5 [down] **Types of Contracts, Covenants**

Under Iowa law, at-will termination clauses are enforceable, and terminations under such clauses breach neither the express terms of the agreement nor the implied covenant of good faith and fair dealing. Furthermore, under Iowa law, where a signed contract contains a clause excluding modification or revision except by a signed writing, the contract cannot be otherwise modified or rescinded. [Iowa Code § 554.2209\(2\)](#). Thus, where a contractual clause prohibits any modification which is not embodied in a signed writing, the parties are barred under Iowa law from modifying the contract either orally, or through course of dealing or course of conduct.

850 F. Supp. 637, *637I^A1994 U.S. Dist. LEXIS 5399, **5399

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Criminal Law & Procedure > Postconviction Proceedings > Parole

Commercial Law (UCC) > ... > Form, Formation & Readjustment > Parol Evidence Rule > General Overview

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Parol Evidence

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

HN6 [down] **Contract Conditions & Provisions, Integration Clauses**

Pre-formation evidence is barred by the Iowa parole evidence rule which states that terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of any contemporaneous oral agreement. [Iowa Code § 554.2202](#).

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN7 [down] **Contract Conditions & Provisions, Integration Clauses**

To allow pre-agreement discussions to modify a final written agreement with an integration clause would nullify the integration clause, render meaningless the express and unambiguous terms of the contract, and eviscerate [Iowa Code § 554.2202](#). Accordingly, such statements are not appropriately considered.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

HN8 [down] **Contract Interpretation, Parol Evidence**

Where a contract is a final integration of the parties' agreement, and the contract expressly allows termination at-will, parol evidence may not be offered to vary the written terms of the contract.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Contracts Law > Contract Modifications > General Overview

HN9 [down] **Types of Contracts, Oral Agreements**

Consideration of post-contract oral agreements do not violate the parole evidence rule. In order for extra-contractual statements or conduct to operate as a valid modification, the expressions, interpreted in light of the surrounding facts, must make the plaintiff's understanding that the modification that occurs is a reasonable one. The defendants' understanding that no modification occurs must, conversely, be unreasonable.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

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

Contracts Law > Contract Modifications > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

HN10[**Contract Conditions & Provisions, Integration Clauses**

Where a plaintiff points to nothing more than vague statements in support of a material contractual alteration, no issue of fact exists upon which a reasonable juror could find that the parties in fact modified the agreement.

Contracts Law > Contract Modifications > General Overview

Contracts Law > Contract Interpretation > General Overview

HN11[**Contracts Law, Contract Modifications**

Although course of dealing may be appropriate under certain circumstances to demonstrate modification of contractual terms, course of conduct is only relevant to the extent that it does not directly conflict with written terms of the contract.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN12[**Consideration, Promissory Estoppel**

The elements of promissory estoppel are as follows: 1) A clear and definite agreement, 2) proof that the party seeking to enforce the agreement reasonably relied upon it to his detriment, and 3) a finding that the equities support enforcement of the agreement. Thus, in order to recover under a theory of promissory estoppel the plaintiff must prove that the defendants made clear and definite representations upon which the plaintiff reasonably relied to its detriment.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN13[**Nondisclosure, Elements**

Under Iowa law, fraud consists of: 1) a representation about the past or present, 2) falsity, 3) materiality, 4) scienter, 5) intent to deceive, 6) reasonable reliance on the promise, and 6) resulting in damage. Although the fraud may also

850 F. Supp. 637, *637L^A1994 U.S. Dist. LEXIS 5399, **5399

arise from a failure to disclose material facts, providing that the other elements are also present, the party failing to disclose the information must have a legal duty to do so.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN14 **Business Torts, Fraud & Misrepresentation**

A manufacturer does not have a duty to insulate distributors from all economic hardship at its own expense, even after a distributor has made substantial investments in the franchise.

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN15 **Sales (Article 2), Form, Formation & Readjustment**

Pre-contract representations are not admissible to prove promissory fraud, unless they are offered to prove fraud with respect to a provision contained in the written contract.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN16 **Contract Conditions & Provisions, Integration Clauses**

The integration clause is to prevent either party from relying on representations made prior to execution of the agreement that were not included in the agreement. To allow evidence of promissory fraud in the face of a written integrated contract would completely defeat the purpose of the integration clause.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN17 **Business Torts, Fraud & Misrepresentation**

Where a plaintiff does not point to any evidence in the record on which a reasonable juror could conclude that the defendant intentionally misled the plaintiff into reasonably relying on the misrepresentations, plaintiff may not prevail on its fraud claims.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fiduciary Duties

Governments > Fiduciaries

850 F. Supp. 637, *637L^A 1994 U.S. Dist. LEXIS 5399, **5399

Business & Corporate Law > Agency Relationships > Fiduciaries > General Overview

HN18 [blue icon] Causes of Action, Fiduciary Duties

A manufacturer-distributor relationship, absent more, does not give rise to a fiduciary relationship.

Torts > ... > Commercial Interference > Contracts > General Overview

HN19 [blue icon] Commercial Interference, Contracts

In order to commit tortious interference, a plaintiff must prove that the defendant, without privilege to do so, intentionally and improperly induced, or otherwise purposefully caused a third party not to enter into, or continue, a business relationship with the plaintiff, or perform a contract with another.

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

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

HN20 [blue icon] Entitlement as Matter of Law, Genuine Disputes

Where a plaintiff fails to point to any evidence in the record raising a genuine issue of fact, summary judgement is appropriate notwithstanding the fact that the case happens to be complex, or that it involves antitrust claims or state of mind such as motive and intent.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN21 [blue icon] Defenses, Cost Justification Defense

15 U.S.C.S. § 13(a) does not prevent price differentials based on the sale of differing quantities of goods to different buyers, i.e. volume discounts. Thus, § 13(a) does not ban price discrimination per se, but only non-cost justified discrimination.

Counsel: **[**1]** For OKI DISTRIBUTING INC, plaintiff: Leo Joseph Breslin, Lindhorst & Dreidame - 1, Cincinnati, OH.

For AMANA REFRIGERATION INC, a Delaware Corporation, defendant: Mark Christian Bissinger, Lawrence Robert Elleman, Dinsmore & Shohl - 1, Cincinnati, OH. For RAYTHEON COMPANY, Parent company of Amana Refrigeration, Inc, defendant: Lawrence Robert Elleman, Dinsmore & Shohl - 1, Cincinnati, OH.

Judges: Spiegel

Opinion by: S. ARTHUR SPIEGEL

Opinion

[*639] ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the Defendant Amana's Motion for Summary Judgement (doc. 21), the Defendant Raytheon's Motion for Summary Judgement (doc. 22), the Plaintiff's Memorandum in Opposition (doc. 43), the Plaintiff's Memorandum in Opposition to the Defendant Raytheon's Motion (doc. 42), and the Defendants' Reply (doc. 44).

BACKGROUND

This action arises out of a now terminated distribution agreement between the Plaintiff, O.K.I. Distributing, Inc. ("OKI"), a wholesale appliance distributor, and the Defendant Amana Refrigeration, Inc., a manufacturer of kitchen and laundry appliances. Prior to the fall of 1991, Amana used both the "one-step" and the "two-step" process of distribution. Under the "one-step" **[**2]** process, the manufacturer sells its products directly to retail dealers often through regional, manufacturer-owned, facilities called "factory branches." Under the "two-step" process, a manufacturer sells its product to independent wholesale distributors who resell the product to retail dealers. The Plaintiff in this case was an independent wholesale distributor under the **[*640]** "two-step" process. In the fall of 1991, Amana canceled all but three of its retail distributors in an effort to eliminate its use of the two-step" process and use only the "one-step" process.

The parties do not dispute that they had a written contract ("contract" "agreement" or "Distributor Agreement") that provided, among other things, that either party could terminate the agreement at any time and without cause. The parties also agree that the Defendant Amana in fact terminated the agreement with the Plaintiff. There is also no dispute that Iowa law governs that outcome of this case.

What is contested is the Plaintiff's claim that the written contract was modified both orally and through a course of dealing and course of conduct. The Plaintiff alleges that the modification permitted termination of the agreement **[**3]** only for cause, and that the Plaintiff's termination without cause, although consistent with the written contract, violated the agreement as modified. The Plaintiff also makes several other claims including promissory estoppel, fraud, breach of crossover agreement, breach of fiduciary relationship, tortious interference and violation of federal antitrust law.

The Defendants have moved for summary judgement. First, Amana and the Defendant Raytheon, Amana's parent corporation, have moved for summary judgement claiming, among other things, that the contract's "at-will" clause is clear and was never, nor could it ever have been, modified by oral agreement or course of conduct. The Defendants also claims that even if the contract was modifiable by oral agreement or course of dealing, the Plaintiff has failed to point to sufficient evidence of this oral or course of dealing modification upon which a reasonable juror could find in favor of the Plaintiff.

Furthermore, Raytheon has separately moved for Summary judgment claiming that it is not responsible for the acts of Amana, and that this is not a case where the Court should "pierce the Corporate veil" in the event that Amana is found to **[**4]** be liable for any damages. Thus, Raytheon argues, the Court should grant summary judgement in its favor for that reason as well.

STANDARD OF REVIEW

HN1[↑] The narrow question that we must decide on a motion for summary judgment is whether there exists a "genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court elaborated upon the appropriate standard in deciding a motion for summary judgment as follows:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

850 F. Supp. 637, *640L^A 1994 U.S. Dist. LEXIS 5399, **4

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

HN2[] The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. Id. at 321; Guarino v. Brookfield Township Trustees, 980 F.2d 399, 405 (6th Cir. 1992); [***5] Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). If the moving party meets this burden, then the non-moving party "must set forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Guarino, 980 F.2d at 405.

As the Supreme Court stated in *Celotex*, **HN3**[] the non-moving party must "designate" specific facts showing there is a genuine issue for trial. Celotex, 477 U.S. at 324; Guarino, 980 F.2d at 405. Although the burden might not require the non-moving party to "designate" facts by citing page numbers, "the designated portions must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party relies." Guarino, 980 F.2d at 405 (quoting Interroyal Corp. v. Sponseller, 889 F.2d 108, 111 [*641] (6th Cir. 1989), cert. denied, 494 U.S. 1091 (1990)).

HN4[] Summary judgment is not appropriate if the evidence is such that a reasonable jury could return [**6] a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Conclusory allegations, however, are not sufficient to defeat a motion for summary judgment. McDonald v. Union Camp Corp., 898 F.2d 1155, 1162 (6th Cir. 1990).

DISCUSSION

I

The Written Agreement

A

In this case the Court must consider whether under Iowa law, the parties were free to modify the at-will provision of the agreement whether orally or through their course of dealing. The Court must further consider, whether, if such oral modifications were permitted, the parties did in fact modify the contract in the manner alleged by the Plaintiff.

The parties do not dispute that the contract contained the following language:

This agreement may be terminated by either party at any time for any reason upon giving written notice of same by certified mail to the other party, which termination shall be effective ten (10) days from the date of mailing said notice.

The contract also stated that the agreement could not be,

substituted, varied or modified [**7] in any manner except by written instrument duly signed by the parties hereto.

Additionally, the agreement unambiguously stated that,

written terms herein cannot be explained, supplemented or contradicted by evidence of any prior Distributor Agreement, course of dealing, course of performance or usage of trade.

Finally, the agreement contained the following integration clause:

This agreement contains the final and complete Major Appliances Distributor Agreement governing the business relationship existing between the parties hereto This Distributor Agreement supersedes and cancels all prior Major Appliances Distributor Agreements, written or oral, between Amana and Distributor

HN5[] Under Iowa law, at-will termination clauses are enforceable, and terminations under such clauses breach neither the express terms of the agreement nor the implied covenant of good faith and fair dealing. See Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 138-39 (5th Cir.), cert. denied, 444 U.S. 938, 62 L. Ed. 2d 198, 100 S. Ct. 288 (1979). Furthermore, under Iowa law, where [**8] a signed contract contains a clause excluding

modification or revision except by a signed writing, the contract cannot be otherwise modified or rescinded. [Iowa Code § 554.2209\(2\)](#). Thus, where, as here, a contractual clause prohibits any modification which is not embodied in a signed writing, the parties are barred under Iowa law from modifying the contract either orally, or through course of dealing or course of conduct.

It is thus apparent that under the plain and unambiguous language of the contract, either party could terminate the agreement at any time for any reason. The contract, with equal clarity, forbids modification of the agreement by oral promise or course of dealing; contractual provisions enforced under Iowa law. Therefor, under the express language of the contract and applicable law, the Plaintiff's claim that the agreement was altered by oral representation and course of dealing must, as a matter of law, fail. Accordingly, we conclude that the Defendants are entitled to summary judgement on the breach of contract claim.

B

(i)

We also note that even if evidence of modification by way of oral representation or course of dealing were appropriate in this case, [\[**9\]](#) the Plaintiff has failed to point to sufficient [\[*642\]](#) evidence to raise a genuine issue of fact regarding such modification. The Plaintiff proffers evidence which it claims demonstrates that statements were made by Amana which constitute an oral contractual modification and which signifies the nature of the parties' relationship and course of dealing. However, many of the alleged promises took place before the contract was signed.

[HN6](#) Pre-formation evidence is barred by the Iowa parole evidence rule which states that, terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of any contemporaneous oral agreement¹

[Iowa Code § 554.2202](#). In this case, as noted above, there was an express integration clause contained in the written contract. [HN7](#) To allow pre-agreement discussions to modify the final written agreement would nullify the integration clause, render meaningless the express and unambiguous terms of the contract and eviscerate [section 554.2202](#) [\[**10\]](#) [of the Iowa Code](#). Accordingly, such statements are not appropriately considered by this Court. See [Lewelling v. Farmers Ins. of Columbus, Inc., 879 F.2d 212, 217 \(6th Cir. 1989\)](#) (integration clause completely barred introduction of extrinsic evidence to contradict the terms of an integrated contract); [Coal Resources, Inc. v. Gulf Western Industries, 756 F.2d 443, 447 \(6th Cir. 1985\)](#) ("the purpose of an integration clause stating that there are no agreements or understandings between the parties other than those reflected in the written contract is, of course, to prevent either party from relying upon statements or representations made during negotiations that were not included in the final agreement"). Therefore, [HN8](#) where a contract is a final integration of the parties' agreement, and the contract expressly allows termination at-will, parol evidence may not be offered to vary the written terms of the contract. See [Young v. Cedar County Work Center, Inc., 418 N.W.2d 844 \(Iowa Sup. Ct. 1987\)](#).

[\[**11\]](#) On the other hand, [HN9](#) consideration of post-contract oral agreements do not violate the parole evidence rule.² In order for extra-contractual statements or conduct to operate as a valid modification, the expressions, interpreted in light of the surrounding facts, must make the Plaintiff's understanding that a modification occurred a reasonable one. *Id.* The Defendants' understanding that no modification occurred must, conversely, be unreasonable. *Id.*

¹ This section does allow supplementation of the terms of the agreement by evidence of course of dealing. However, as discussed below, course of dealing is only admissible as evidence of modification to the extent that it is consistent with the written terms of the contract, and not to contradict contractual terms. See Part (ii) below.

² Although, as noted above, in this case such agreements do violate the express "written modification-only" clause of this contract as well as Iowa law.

The Plaintiff has failed to point to evidence in the record sufficient to support a finding by a reasonable juror that an oral modification had occurred, or that, in light of the circumstances of this case, the Plaintiff's belief that the parties modified the contract from an at-will contract to a for-cause contract was reasonable. For example, the Plaintiff notes that "Chad Calabria, an Amana representative [**12] and privy to its policies, representations and state of mind, stated that Amana would emphasize again and again the 'two step distribution concept' and that it was a 'vital force' in Amana's sales and marketing efforts." Similarly, the Plaintiff claims that Amana's president stated that "Amana was dedicated to the two-step distribution process." Besides these general references given to Amana distributors during the course of periodic "pep-talks," the Plaintiff makes nothing more than conclusory allegations.

In light of the clear language of the Contract's integration clause, its at-will clause, as well as its unambiguous prohibitions on oral [*643] or course of dealing modification, it is dubious at best whether even an express assurance by Amana's representatives could have constituted a valid modification. See Part A above. However, in this case, [HN10](#)[¹⁴] where the Plaintiff points to nothing more than vague statements in support of this material contractual alteration, we conclude that no issue of fact exists upon which a reasonable juror could find that the parties in fact modified the agreement. See [Corenswet, 594 F.2d at 136](#) (where Amana's president's statement [**13] that Amana does "not cancel a distributor without a reason, without a good reason" and "we do not cancel our distributors without a reason" were insufficient to modify the same termination clause at issue in this case under Iowa law). It is simply not reasonable to conclude that, in the face of the clear contractual language, that a reasonable person would consider such statements to be a promise to eliminate an at-will clause--in flagrant violation of a clause prohibiting any modification unless embodied in a signed writing--and replace it with a termination-for-cause proviso. The Defendants are therefore entitled to summary judgement on this point.

(ii)

Additionally, with respect to the Plaintiff's allegations of course of conduct and course of dealing (to the extent it would even be relevant in light of the express terms of the agreement and Iowa law) we note that [HN11](#)[¹⁵] although course of dealing may be appropriate under certain circumstances to demonstrate modification of contractual terms, course of conduct is only relevant to the extent that it does not directly conflict with written terms of the contract. [Corenswet, 594 F.2d at 136](#).

In this case, [**14] the Plaintiff wishes to demonstrate through course of conduct that the parties had a termination for cause only proviso; a proviso diametrically contrary to the terms of the written contract's at-will clause. Therefore, the course of dealing evidence upon which the Plaintiff relies is expressly offered for the purpose of contradicting the terms of the written agreement. Consequently, it would be inappropriate to allow such a course of dealing to modify the express at-will clause of the contract. See *id*. Thus, the Defendants are entitled to summary judgement on this point as well.

II

Promissory Estoppel

The Plaintiff also claims that in light of the representations of Amana's "commitment" to the "two-step distribution process" upon which the Plaintiff claims it relied, the Plaintiff is entitled to recover under a theory of promissory estoppel. We disagree.

The Iowa Supreme Court has defined [HN12](#)[¹⁶] the elements of Promissory Estoppel as follows:

- 1) A clear and definite agreement; 2) Proof that the party seeking to enforce the agreement reasonably relied upon it to his detriment; and 3) A finding that the equities support enforcement of the agreement.

[Amana Society v. Colony Inn, Inc., 315 N.W.2d 101, 117 \(Iowa Sup. Ct. 1982\)](#); [**15] [UHL v. City of Sioux City, 490 N.W.2d 69, 73 \(Iowa Ct. App. 1992\)](#) (citing *Amana*). Thus, in order to recover under a theory of promissory

estoppel the Plaintiff must prove that the Defendants made clear and definite representations upon which the Plaintiff reasonably relied to its detriment. *Amana, 315 N.W.2d at 117; UHL, 490 N.W.2d at 73; Restatement (Second) Contracts* § 90; John D. Calamari & Joseph M. Perillo, **Contracts** § 6-1, at 272 (3d Ed. 1987).

First, the Plaintiff, as discussed above, relies on unspecific words by Amana representatives to the effect that the "two step distribution concept" was a "vital force" in Amana's sales and marketing efforts, and that "Amana was dedicated to the two-step distribution process." These words contain no "clear and definite agreement" to alter the at-will clause of the contract, nor any other agreement that the contract could not be terminated at any time for any reason. See, e.g., Part IB(i) at 8-9.

Furthermore, the Plaintiff dedicates much of his Memorandum in Opposition to establishing that OKI *relied* on Amana's alleged representations, [**16] including the investment [*644] of time, energy and money into its operations. Such investments pursuant to an at-will distributorship agreement are not unusual. See e.g., *Corenswet, 594 F.2d at 132*. Additionally, the Plaintiff has failed to establish that it changed its position, either by engaging in a course of conduct it would not have, or by forbearing on some course of conduct it would have embarked on, had it not been for the Defendants' alleged "promises;" OKI simply did what it would have done as a distributor for Amana.

Far more importantly, however, the written contract contained express and unambiguous terms stating that the parties enjoyed an at-will relationship. The contract further provided that no course of conduct or oral representations could modify the contract. In light of the express contractual terms and the vague and imprecise nature of the representations upon which the Plaintiff relies, we conclude that any reliance the Plaintiff may have placed upon the alleged course of dealing or oral "promises" could not have been reasonable. See *Marketing West, Inc. v. Sanyo, 6 Cal. App. 4th 603 (Cal. App. Second Dist. 1992)* [**17] (holding that plaintiffs--independent sales representatives--could not have reasonably relied on express promises by defendant's senior vice president that at-will clause of contract did not apply to them in light of clear and unambiguous at-will language of contract).

Thus, we conclude that no reasonable juror could find that a clear and definite agreement occurred, nor that the Plaintiff was reasonable in any reliance it even arguably could have placed on the Defendants' statements. Accordingly, as promissory estoppel requires a clear and definite agreement, and not only reliance, but reasonable reliance on that agreement, and as the record is void of any evidence supporting such a claim, we conclude that the Defendants are entitled to summary judgement as a matter of law.

III

Crossover Payment Agreement

The Plaintiff also claims that the Defendants breached a "crossover agreement" when the Appliance Store of Pittsburgh purchased Amana products through a wholly owned and operated Amana branch and "set up shop" within OKI territory in the greater Dayton area. The Defendants claims that the crossover agreement was a permissive, not mandatory provision, and thus, Amana's failure [**18] to credit the Plaintiff's account does not give rise to any liability on Amana's part.

The transhipping/cross-over provision of the Distributor's agreement provided,

Amana *may* debit distributor's account in the amount of \$ 1,000.00 for each instance in which product originally sold to Distributor is transshipped by any other person or entity out of the Distributor's Authorized territory for resale in another distributor's authorized territory and Amana *may* credit the other distributor's account in the amount of \$ 1,000.00. This provision *does not* pertain to Product shipped out of Distributor's authorized territory in accordance with the Amana's Cross-over program.

(emphasis added). Pursuant to the crossover program, Amana could grant permission to a distributor to cross-over (or tranship) without risking the \$ 1,000.00 debit/credit provision.

The Plaintiff also cites in further support of its position, a memorandum issued along with the above agreement. That memorandum provided in pertinent part,

As outlined in Amana's Distributor's agreement, dealers may be sold only through a distributor's/branch's authorized territory. However, Amana recognizes there [**19] may be Amana dealers with multiple locations which cross over into more than one distributor's/branch's territory. Therefore, to continue doing business with such dealers (or crossover accounts) *in a manner that is consistent with Amana's marketing and sales strategies*, a new Crossover policy is being implemented

* * *

Should a dealer cross over into another territory in 1990, *without your first obtaining Amana's approval*, the selling distributor/branch will be considered a transhipper. This is in direct violation of Amana's [*645] Distributor agreement. Amana will enforce the Distributor Agreement, which provides that a selling distributor/branch *may* be subject to a \$ 1,000.00 debit for each instance of transhipment.

(emphasis added). The Plaintiff claims that under the crossover agreement, for every "crossover" sale of an Amana appliance, Amana should have credited the Plaintiff's account in the amount of \$ 1,000.00. The Plaintiff claims that because Amana, directly through its own branch, distributed Amana appliances within OKI territory, and that because at least 300 appliance were sold in the Plaintiff's territory, Amana is liable to the Plaintiff in the [**20] amount of at least \$ 300,000.00. We disagree.

First, under the plain language of the agreement, this particular clause is permissive, not mandatory. It is clear from the language of the contract that Amana had the *option* of debiting the account of the transhipper and crediting the account of the transhippee. Consequently, if Amana elected not to do so, Amana did not violate the agreement. Thus, as the contractual language unambiguously permits, but does not require, Amana to debit and credit distributors' accounts under the agreement, we conclude that there exists no genuine issue of fact upon which a reasonable juror could conclude that Amana breached the agreement. See [Potti v. Duramed Pharmaceuticals, Inc., 938 F.2d 641, 647 \(6th Cir 1991\)](#).³

[**21] Additionally, the memorandum purportedly issued by Amana's Vice President of sales for Major Appliances, upon which the Plaintiff heavily relies, only supports the Defendants' position. To the extent that the memorandum is indicative of any Amana policy statement underlying the crossover agreement, the policy, apparently, is aimed at discouraging transshipping *only* where to do so would be "in a manner that is inconsistent with Amana's marketing and sales strategies." Thus, it is not at all surprising that under the agreement Amana may approve a cross-over into another distributor's territory if Amana deems it advantageous; Amana may grant approval where it deems it consistent with Amana's marketing and sales strategies. This underscores the permissive nature of the cross-over agreement.

Finally, as the Plaintiff readily points out, in this instance it was Amana itself that sold the appliances to the retailer. Thus, since Amana itself was the party that "crossed-over," Amana undoubtedly deemed it "consistent with Amana's marketing and sales strategies" to do so, and thus worthy of its own approval. Amana thus did not violate the agreement. Accordingly, for the forgoing reasons, [**22] we hereby conclude that the Defendants are entitled to summary judgement on the Plaintiff's cross-over claim.

IV

FRAUD, TORTIOUS INTERFERENCE

³ As the *Potti* court stated, "interpretation of written contract terms is a matter of law for initial determination by the court. . . . it is only when the relevant language is ambiguous that the job of interpretation is turned over to the fact finder . . . and the determination whether a contract is ambiguous is made as a matter of law by the court." [938 F.2d at 647](#) (citations omitted).

BREACH OF FIDUCIARY DUTY & ANTITRUST VIOLATIONS

A

Fraud

(i)

The Plaintiff has also made a number of other claims allegedly stemming from its business relationship with the Defendants. First, the Plaintiff claims that the Defendants committed fraud by failing to communicate to its distributors that it was planning on eliminating the "two-step" process. We disagree.

[HN13](#) Under Iowa law, fraud consists of 1) a representation about the past or present; 2) falsity; 3) materiality 4) scienter 5) intent to deceive; 6) reasonable reliance on the promise; and 6) resulting in damage. [Robinson v. Perpetual Services Corp., 412 N.W.2d 562, 565 \(Iowa Sup. Ct. 1987\)](#); [Irons v. Community State Bank, 461 N.W.2d 849, 853 \(Iowa Ct. App. 1990\)](#). Although the fraud may also arise from a failure to disclose material facts (providing that the other elements are also present) the party failing to disclose the [*646] information must have a legal duty to do so. [Irons, 461 N.W.2d at 854](#). [**23](#)

First, the Plaintiff has failed to persuade the Court that there was any duty on the part of the Defendants to disclose to their distributors that they were planning to make a structural change in the way the company operates. [HN14](#) A manufacturer does not have a duty to insulate distributors from all economic hardship at its own expense, even after a distributor has made substantial investments in the franchise. See [Gen. Aviation v. Cessna, 13 F.3d 178, 183 \(6th Cir. 1994\)](#).

Furthermore, much of the Plaintiff's evidence focuses on alleged "promises" made prior to the formation of the Distributor Agreement contained in speeches and "pep-talks" of Amana representatives. Such [HN15](#) pre-contract representations are not admissible to prove promissory fraud, unless they are offered to prove fraud with respect to a provision contained in the written contract. [Lewelling v. Farmers Ins. of Columbus, Inc., 879 F.2d 212, 217 \(6th Cir. 1989\)](#); [Coal Resources, Inc. v. Gulf Western Industries, 756 F.2d 443, 447 \(6th Cir. 1985\)](#). As the court in *Coal Resources* stated,

although it is clear that making a contractual [**24](#) promise with no present intention of performing it constitutes promissory fraud . . . and that extrinsic evidence is always admissible to show promissory fraud, . . . [the defendant] argues that a promissory fraud theory may not be used to impose additional obligations upon a party to a written contract containing an integration clause. According to the defendant, [the plaintiff] . . . was entitled to show through extrinsic evidence that [the defendant] . . . had no intention, at the time the contract was entered into, of performing the promises it had made *in the written . . . agreement*. The defendant earnestly contends, however, that [the plaintiff] . was not entitled to show that [the defendant] had no intention of performing promises which were *not* reflected in the written agreement.

We agree with the defendant.

[756 F.2d at 446](#) (citations omitted) (emphasis in original). Similarly, in *Lewelling* the court stated that the purpose of [HN16](#) the integration clause "is to prevent either party from relying on representations made prior to execution of the agreement that were not included in the agreement. To allow evidence of promissory fraud [**25](#) in the face of a written integrated contract 'would completely defeat the purpose of the integration clause.'" [879 F.2d at 217](#) (quoting [Coal Resources, 756 F.2d at 446](#)).

In this case, as discussed above, the contract contained an integration clause. The Plaintiff relies on the pre-contract extrinsic evidence for the purpose of proving fraud with respect to promises *not* contained in the written contract. Consequently, the pre-contract statements are inappropriate, and thus insufficient to defeat the Defendants' motion for summary judgment.

Additionally, the post-contract evidence stemming from the "pep-talks" wherein the Defendants stated their devotion to the "two-step" process do not constitute "promises" upon which the Plaintiff could reasonably rely. Beyond those unspecific statements, as evidence of fraud, the Plaintiff makes conclusory allegations to the effect that the Defendants intentionally induced the Plaintiff to spend time and money looking into new markets only to ultimately deny the Plaintiff the distributorship in that area. [HN17](#)[¹⁸] The Plaintiff, however, does not point to any evidence in the record upon which a [**26] reasonable juror could conclude that the Defendants *intentionally misled* the plaintiff into reasonably relying on the misrepresentations. Absent evidence of the existence of these elements upon which a reasonable juror could rely, the Plaintiff may not prevail on its fraud claims. See [Robinson, 412 N.W.2d at 565](#). Thus, there is no genuine issue of material fact regarding whether any promise was ever made (or a material fact omitted), much less that such was made with the *intent* of misleading the Plaintiff into relying to its detriment. Thus, the Plaintiff's conclusory allegations must fail as a matter of law. [McDonald v. Union Camp Corp., 898 F.2d 1155, 1162 \(6th Cir. 1990\)](#).

[*647] (ii)

The Plaintiff's also claims that the Defendants committed fraud in connection with the "Trailing Credits" program. The trailing credits program involves the Nationwide Buying Group, an association of appliance dealers that attempts to obtain better pricing and terms for its members than might be normally available. "Trailing Credits" are volume discounts for certain large volume dealers to be paid by distributors in the form of rebates. [**27] Swallen's, OKI's largest dealer, qualified for "trailing credits."

Prior to finalization of the 1991 pricing and terms agreement between Amana and Nationwide under the trailing credits program, OKI contacted Swallen's, OKI's largest dealer, regarding the sale and purchase of appliances. However, the 1991 Amana-Nationwide agreement had not been finalized, and thus the only document purporting to reflect the prices under the as yet unfinalized agreement was not accurate. The fact that the agreement had not been finalized and that the prices may not have been accurate was a fact about which Amana informed the Plaintiff.

Upon careful consideration, we conclude that the Plaintiff has pointed to nothing in the record generating a material issue of fact on the issue of fraud in the "trailing credit program." OKI admitted that it took a "gamble" on the prices on the unofficial, unfinalized agreement, and that OKI "felt it was similar to price sheets we had in the past." We find no other evidence in the record to the effect that Amana made material misrepresentation or omission with the intent of misleading and inducing OKI into engaging in some course of conduct to OKI's detriment. Consequently, [**28] the Defendants are entitled to summary judgement on this point.

B

Breach of Fiduciary Duty

Tortious interference and Antitrust claims

The Plaintiff also claims that the Defendants breached a fiduciary duty owed to the Plaintiff, that Defendants committed tortious interference with its business dealings, and finally, that the Defendants violated the federal antitrust laws. We disagree.

First, it is well established that [HN18](#)[¹⁹] a manufacturer-distributor relationship, absent more, does not give rise to a fiduciary relationship. See [Aerospace America v. Abatement Technology, 738 F. Supp. 1061, 1070 \(E.D. Mich. 1990\)](#); [Power Motive Corp. v. Mannesmann Demag Corp., 617 F. Supp. 1048, 1051 \(D. Colo. 1985\)](#); see [WKT Distributing Co. v. Sharp Electronics, 746 F.2d 1333, 1336-37 \(8th Cir. 1984\)](#). In this case, the Plaintiff has failed to point to any evidence in the record to establish that a deeper relationship than a normal manufacturer/distributor relationship existed.

Furthermore, the Plaintiff claims that the Defendants tortiously interfered with OKI's business opportunities. We find that the [**29] Plaintiff has failed to point to evidence sufficient to defeat the Defendant's motion for summary judgement.

HN19[[↑]] In order to commit tortious interference, the Plaintiff must prove that the Defendants, without privilege to do so, intentionally and improperly induced, or otherwise purposefully caused a third party not to enter into, or continue, a business relationship with the Plaintiff, or perform a contract with another. *Preferred Marketing v. Hawkeye Nat. Life*, 452 N.W.2d 389, 395-396 (Iowa Sup. Ct. 1990); *Nesler v. Fisher & Co.*, 452 N.W.2d 191 (Iowa Sup. Ct. 1990); *Restatement (Second) Torts* § 766. The Plaintiff supports its claim with nothing more than conclusory allegations. Although OKI may have realized less profits or even lost money as a result of the termination, OKI has failed to point to evidence in the record to establish that the Defendants purposefully caused a third party not to enter into, or to discontinue a business relationship, or to breach a contract. There thus exists no genuine issue of fact in dispute.

Finally, the Plaintiff claims that the Defendants have violated the antitrust laws by use of the [**30] trailing credit program because it resulted in lower prices for some dealers than paid by others; i.e. price discrimination. See [15 U.S.C. § 13\(a\)](#). The Plaintiff puts [*648] great reliance on its assertion that summary judgement is inappropriate in a "complex" antitrust case because "motive and intent play leading roles." However, again, the Plaintiff points to no evidence in the record establishing that the defendant's were motivated or acted with the intent to hinder competition or engage in price discrimination.

Furthermore, it is well established that **HN20**[[↑]] where, as in this case, the Plaintiff fails to point to any evidence in the record raising a genuine issue of fact, summary judgement is appropriate notwithstanding the fact that the case happens to be complex, or that it involves antitrust claims or state of mind such as motive and intent. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Finally, **HN21**[[↑]] [section 13\(a\)](#) does not prevent price differentials based on the sale of differing quantities of goods to different buyers, i.e. volume discounts. [15 U.S.C. § 13\(a\)](#). Thus, [section 13\(a\)](#) does not ban price discrimination *per se*, but only non-cost justified discrimination. *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1417-8 (11th Cir. 1993); [15 U.S.C. § 13\(a\)](#).

In this case, the Plaintiff does not dispute that Swallen's was a high volume Amana customer, and in fact, OKI's largest. Besides making conclusory allegations, the Plaintiff does not refute that the pricing differential with Swallen's was based on the volume of Swallen's business. Consequently, we conclude that as the Plaintiff has failed to point to evidence in the record sufficient to raise a genuine issue of material fact in connection with its antitrust claim, the Defendants must prevail on their motion for summary judgement.

CONCLUSION

Accordingly, for the forgoing reasons, we hereby GRANT the Defendants' Motions for Summary Judgement (docs 21 & 22), and this action is hereby DISMISSED.

So ORDERED.

Dated: April 11, 1994

S. Arthur Spiegel

United States District Judge



American Agric. Movement v. Board of Trade

United States District Court for the Northern District of Illinois, Eastern Division

April 12, 1994, Decided ; April 14, 1994, Docketed

89 C 8467

Reporter

848 F. Supp. 814 *; 1994 U.S. Dist. LEXIS 4784 **; 1994-2 Trade Cas. (CCH) P70,727

THE AMERICAN AGRICULTURE MOVEMENT, INC., et al., Plaintiffs, v. THE BOARD OF TRADE OF THE CITY OF CHICAGO, et al., Defendants.

Core Terms

soybean, futures market, Plaintiffs', cash market, markets, prices, Defendants', antitrust, damages, speculative, trading, Contractors, lack standing, indirect, traced, allegations, injuries, factors, customers, decisions, variables, entity, motion to dismiss, antitrust claim, causal chain, Commodities, conspiracy, contracts, positions, traders

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1 [] **Motions to Dismiss, Failure to State Claim**

When faced with a motion that attacks the factual basis for jurisdiction under [Fed. R. Civ. P. 12\(b\)\(1\)](#), once defendants question jurisdiction, plaintiffs cannot rest on their pleadings. The district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists. However, if a defendant's [Rule 12\(b\)\(1\)](#) motion is an indirect attack on the merits of the plaintiff's claim, the court may treat the motion as if it were a [Rule 12\(b\)\(6\)](#) motion to dismiss for failure to state a claim upon which relief can be granted.

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

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

HN2 [] **Justiciability, Standing**

U.S. Const. art. III standing requires that a party seeking to proceed in federal court meet three requirements: (1) the party must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision.

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

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN3 [] **Private Actions, Prioritizing Resources & Organization for Intellectual Property Act**

Section 4 of the Clayton Act, codified at [15 U.S.C.S. § 15\(a\)](#), provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and shall recover threefold the damages by him sustained. Despite the breadth of this language, the Supreme Court has emphasized 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. 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 the further determination whether the plaintiff is a proper party to bring a private antitrust action.

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

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN4 [] **Private Actions, Standing**

To determine whether plaintiffs are proper parties to bring antitrust actions the court must consider the following factors: (1) the causal connection between the alleged antitrust violation and the harm to the plaintiff; (2) improper motive; (3) whether the injury was of the type that Congress sought to redress with the antitrust laws; (4) the directness between the injury and the market restraint; (5) the speculative nature of the damages; and (6) the risk of duplicate recoveries or complex damage apportionment.

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

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

HN5 [down arrow] Private Actions, Standing

To determine whether plaintiffs are proper parties to bring antitrust actions the court must consider three factors. The first of the factors is the causal connection between the damages claimed by the antitrust plaintiff and the harm to the plaintiff. The second factor is the nature of the injury suffered by the plaintiff and the relationship between that injury and the type of conduct sought to be redressed by the provision of a private remedy for antitrust violations. The third factor is the directness of the asserted injury and, closely related, the risk of duplicative recoveries or, conversely, the difficulty of apportioning damages among various classes of plaintiffs.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Private Attorneys General

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6 [down arrow] Private Actions, Standing

To determine whether plaintiffs are proper parties to bring antitrust actions the court must consider, *inter alia*, the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement. The existence of such a class of persons diminishes the justification for allowing a more remote party to perform the office of private attorney general.

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

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

HN7 [down arrow] Private Actions, Standing

Ultimately, standing involves a case-by-case analysis of the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Clayton Act > General Overview

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

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

HN8 [down arrow] Remedies, Damages

An allegation of improper motive, although it may support a plaintiff's damage claim under § 4 of the Clayton Act, codified at [15 U.S.C.S. § 15\(a\)](#), is not a panacea that will enable any complaint to withstand a motion to dismiss. A party may have suffered antitrust injury but still not be a proper plaintiff under [§ 15\(a\)](#) for other reasons.

Judges: [\[**1\]](#) MAROVICH

Opinion by: GEORGE M. MAROVICH

Opinion

[*816] MEMORANDUM OPINION AND ORDER

Plaintiff American Agriculture Movement, Inc. ("AAM"), a national organization representing and advocating the interests of farmers, along with several of its soybean-farmer members, brought this suit against the Chicago Board of Trade and 26 of its officers and employees (collectively "CBOT") under the Commodity Exchange Act ("CEA"), the Sherman Antitrust Act, and state common law. The Seventh Circuit affirmed this Court's dismissal of the CEA count and the state common law claims, but reversed this Court's entry of summary judgment on the antitrust claim. American Agriculture Movement, Inc. v. Board of Trade, 977 F.2d 1147 (7th Cir. 1992). Now before the Court is Defendants' motion to dismiss the single remaining antitrust count pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Defendants contend that Plaintiffs lack both Article III standing and standing to raise an antitrust claim. In addition, Defendants argue that AAM lacks associational standing to raise the claims of its members. For the reasons set forth below, the Court will grant Defendants' motion to dismiss.

BACKGROUND

[**2] This Court has written two prior opinions in this case and the Seventh Circuit also has reviewed the factual allegations presented by the Plaintiffs. Under these circumstances, we will endeavor to contain this statement of facts to those necessary to provide context to the resolution of the pending motions. According to the Complaint, Plaintiffs claim to have suffered injuries due to a price decline in the cash market for soybeans allegedly linked to action taken by the CBOT on July 11, 1989, regarding the futures market in soybeans. The Emergency Resolution ("Resolution") adopted by the CBOT specified that:

Effective as of the opening of the market on July 12, 1989, any person or entity, either alone or in conjunction with any other person or entity, who owns or controls a gross long or gross short position ¹ for any purpose whatsoever in excess of three million bushels in the July 1989 soybean futures contract traded on the Exchange must reduce said position and subsequent positions by at least 20% per trading day subject to the following absolute limits.

No person or entity, either alone or in conjunction with any other person or entity, shall own or control a gross long [**3] or gross short position for any purpose whatsoever in the July 1989 soybean futures contract traded on the Exchange in excess of three million bushels as of the close of trading on Tuesday, July 18, 1989.

No person or entity, either alone or in conjunction with any other person or entity, shall own or control a gross long or gross short position for any purpose whatsoever in the July 1989 soybean futures contract traded on the Exchange in excess of one million bushels as of the close of trading on Thursday, July 20, 1989.

This resolution is applicable to all positions, whether hedge or speculative.

¹ For the benefit of readers unfamiliar with futures contracts, we note that according to CBOT regulations, each soybean futures contract applies to a fixed quantity of 5,000 bushels of soybeans. In overly simplified terms, a long position in soybean futures is a position to buy soybeans for delivery at a designated future time at the agreed upon price. On the other hand, a short position in soybean futures is a position to sell soybeans at the agreed upon price for delivery at a designated future time. For example, a long position in 4,000 contracts reflects a position to buy 20 million bushels of soybeans. Because of the ability to offset positions, actual delivery is a rare event. For a more comprehensive discussion of the various components of commodities markets and futures contracts, see Philip M. Johnson & Thomas L. Hazen, I *Commodities Regulation* §§ 1.00-1.19, at 1-84 (2d ed. 1989); see also Chicago Mercantile Exch. v. SEC, 883 F.2d 537, 542-43 (7th Cir. 1989) (discussing futures contract trading), cert. denied, 496 U.S. 936, 110 S. Ct. 3214, 110 L. Ed. 2d 662 (1990); Leist v. Simplot, 638 F.2d 283, 286-88 (2d Cir. 1980) (same), aff'd sub nom., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 72 L. Ed. 2d 182, 102 S. Ct. 1825 (1982); William F. Sharpe & Gordon J. Alexander, *Investments*, ch. 5, at 594-628 (4th ed. 1990) (same).

[**4] AAM alleges that the publication of the Resolution led to a price decline in the soybean futures market. The AAM further asserts that the Resolution caused a proportionate [*817] decline in soybean cash market prices. AAM accuses the CBOT, individual defendants, affiliated firms and their clients, of a conspiracy to adopt the Resolution to manipulate the prices in the soybean market to the benefit of the speculative gross short positions in the soybean market held by these individuals and firms. AAM contends that soybean cash market prices were relatively high prior to the Resolution and would have remained so or even risen but for the issuance of the Resolution. AAM alleges that the CBOT, Directors, and the Business Conduct Committee members conspired with each other and with associated trading firms and their clients to restrain trade in the soybean futures and cash markets. As a result, AAM claims that its soybean farmer members who sell or refrained from selling in the soybean cash market suffered great financial loss.

DISCUSSION

As a preliminary matter, the Court must define the permissible scope of our inquiry in deciding a motion under [Fed. R. Civ. P. 12\(b\)\(1\)](#), as opposed [**5] to [Fed. R. Civ. P. 12\(b\)\(6\)](#). Plaintiffs argue that the Court is limited to the factual allegations of the complaint and cannot go beyond them. Plaintiffs, however, appear to ignore the fact that Defendants' motion is brought under both [Rule 12\(b\)\(1\)](#) for lack of Article III standing and [Rule 12\(b\)\(6\)](#) for failure to state an antitrust claim.² Defendants, not surprisingly, have a different view of what the Court may consider and argue that we are not limited to the allegations of the complaint on a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(1\)](#).

[**6] It is true that one may find language indicating that on a motion to dismiss the Court must accept the well-pleaded factual allegations of the complaint as true and interpret all reasonable inferences in favor of the plaintiff. See, e.g., [Capitol Leasing Co. v. F.D.I.C.](#), 999 F.2d 188, 191 (7th Cir. 1993). Such statements, however, do not offer a complete understanding of Plaintiffs' burden [HN1](#) when faced with a motion, such as the one here, that attacks the factual basis for jurisdiction under [Fed. R. Civ. P. 12\(b\)\(1\)](#). Under these circumstances, it is well-settled that once Defendants question jurisdiction, the Plaintiffs cannot rest on their pleadings.³ As the Seventh Circuit noted in *Capitol Leasing*, "the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Id.* (quoting [Grafon Corp. v. Hausermann](#), 602 F.2d 781, 783 (7th Cir. 1979)); see also [McNutt v. General Motors Acceptance Corp.](#), 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936); [**7] [Rennie v. Garrett](#), 896 F.2d 1057, 1057-58 (7th Cir. 1990). We also note, however, that "if a defendant's [Rule 12\(b\)\(1\)](#) motion is an indirect attack on the merits of the plaintiff's claim, the court may treat the motion as if it were a [Rule 12\(b\)\(6\)](#) motion to dismiss for failure to state a claim upon which relief can be granted." [Peckmann v. Thompson](#), 966 F.2d 295, 297 (7th Cir. 1992); see also [Malak v. Associated Physicians, Inc.](#), 784 F.2d 277, 279 (7th Cir. 1986). With these standards in mind, we will address the Defendant's multi-faceted attach on Plaintiffs' claim.

[8] [*818] Article III Standing**

² Plaintiffs are correct to the extent that had Defendants brought only a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" [Lujan v. Defenders of Wildlife](#), 119 L. Ed. 2d 351, 112 S. Ct. 2130, 2137 (1992) (quoting [Lujan v. National Wildlife Federation](#), 497 U.S. 871, 889, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)).

³ Defendants correctly note the ample authorities in support of this proposition. See, e.g., [NAACP v. American Family Mut. Ins. Co.](#), 978 F.2d 287, 293 (7th Cir. 1992), cert. denied, 124 L. Ed. 2d 247, 113 S. Ct. 2335 (1993); [Schaefer v. Transportation Media, Inc.](#), 859 F.2d 1251, 1253-54 (7th Cir. 1987) ("when the party moving for dismissal under [Rule 12\(b\)\(1\)](#) challenges the factual basis for jurisdiction, the nonmoving party (i.e., the plaintiff) must submit affidavits and other relevant evidence to resolve the factual dispute regarding the court's jurisdiction"); [Sprague v. King](#), 825 F. Supp. 1324, 1329 (N.D. Ill. 1993) ("Once questioned, it is plaintiff's burden to establish that all jurisdictional requirements have been satisfied.").

Plaintiffs claim two forms of injury allegedly caused by Defendants' conduct in issuing the Resolution of July 11, 1989. First, Plaintiffs claim to represent persons who sold cash market soybeans after July 12, 1989, at a price that was artificially depressed. Second, Plaintiffs claim to represent persons who refrained from selling cash market soybeans after July 12, 1989, because they believed the price was too low. Plaintiffs never traded July 1989 soybean futures contracts. Defendants challenge the ability of both groups of Plaintiffs to meet the standing requirements of Article III.

HN2[] Article III standing requires that a party seeking to proceed in federal court meet three requirements. The Seventh Circuit has summarized these requirements as follows:

- (1) the party must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision.

Simmons v. ICC, 900 F.2d 1023, 1026 (7th Cir. 1990) (quoting *City of Evanston v. Regional Transportation Authority*, 825 F.2d 1121, 1123 (7th Cir. 1987), [**9] cert. denied, 484 U.S. 1005, 98 L. Ed. 2d 649, 108 S. Ct. 697 (1988)). Defendants' argument requires us to focus primarily on the second element.

Defendants suggest that an order issued by the Commodities Futures Trading Commission ("CFTC") on the morning of July 11, 1989, prior to the CBOT action, would have caused any alleged decline in prices whether or not the CBOT action was taken later that day. As a result, Defendants contend this independent, supervening action prevents Plaintiffs from establishing the necessary link between Defendants' conduct and their resulting injury.

Defendants assert that on July 11, 1989, the CFTC determined that "a threat to an orderly liquidation of the July . . . 1989 soybean futures" contract existed. *Oversight Hearing With Regard to the Reauthorization of the Commodity Futures Trading Commission: Hearing Before the Senate Committee on Agriculture, Nutrition and Forestry*, 101st Cong., 1st Sess. 216-17 (1989) (testimony of Kalo A. Hineman, Commissioner, CFTC) (hereinafter "Hearing"). That determination was made in a letter faxed on July 11 to Central Soya, a member of the Ferruzzi [**10] Finanziara, S.p.A ("Ferruzzi") group. *Id.* The CFTC, along with the CBOT, had monitored Ferruzzi's activities in the May and July 1989 soybean futures market. In the letter the Commission also revoked the hedge exemption of Central Soya for anticipatory processing requirements during the last three trading days ⁴ in July and August futures. *Id.* According to Defendants, the CFTC's action required Ferruzzi group to reduce its holdings from approximately 4,095 contracts, a position encompassing almost 60 percent of the outstanding long or buy futures contracts, to 600 contracts by July 18, 1989. See *AAM*, 977 F.2d at 1151. After being advised of the CFTC action,⁵ the CBOT issued its Resolution which set more specific requirements for liquidation of gross long and short positions held by any trader.

[**11] As a result of the CFTC action that purportedly preceded the issuance of the CBOT Resolution, Defendants maintain that Plaintiffs cannot show that their injury "fairly can be traced to the challenged action of the defendant, [rather than] injury that results from the independent action of some third party [i.e. the CFTC] not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, [*819] 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976). Defendants contend that the CFTC letter to Central Soya revoking its regulatory exemption would have caused any decline in prices whether the CBOT issued its Resolution or not.

Plaintiffs point out that the CFTC order was a private order directed only at Central Soya, a Ferruzzi affiliate. Ferruzzi apparently was the largest single holder of long contracts. Defendants do not explain the link between

⁴ The last day of trading for July 1989 futures was July 20, 1989.

⁵ Defendants do not cite to any material that details when or how this communication between the CFTC and the CBOT occurred. Our review of the *Hearing* indicates that the CFTC and CBOT were in frequent contact throughout this period. We also note that a "Chronology of Events" prepared by CFTC staff indicates that the Business Conduct Committee had already recommended taking emergency action prior to the CFTC's decision to revoke the Ferruzzi hedge exemption. Finally, the Court finds that the present record as a whole provides only a cursory view into the circumstances and timing of the CFTC action.

Central Soya and Ferruzzi or how a letter directed at Central Soya bound all members of the Ferruzzi group. In contrast to the CFTC letter, the CBOT Resolution, a publicly announced order, applied to all holders of both gross long and short contracts.

Our review of the cases cited [**12] by Defendants⁶ results in the conclusion that on the current record, the Court is unable to find that the CFTC order is the type of independent superseding event that breaks the causal chain for purposes of Article III standing. For example, in *Simmons v. ICC*, 900 F.2d 1023, 1026 (7th Cir. 1990), the Seventh Circuit found that petitioners who sought to overturn a decision by the ICC to allow a railroad to abandon a rail line lacked standing because any competitive injury could not be traced to the ICC's actions. A train derailment had rendered the rail line inoperable for at least a year and one-half prior to institution of proceedings before the ICC. The Court reasoned that even if the ICC denied the request to abandon the line, no evidence nor any allegation indicated that the railroad would repair the line to make it operable. *Id.* Under these circumstances, the alleged injury to petitioners due to their inability to ship on the line could not be traced to the ICC's actions in permitting the railroad to abandon the line. *Id.* After ruling out other asserted bases for standing, the court dismissed the action for lack of standing.

[**13] In a somewhat different context, the Supreme Court in *Allen v. Wright*, 468 U.S. 737, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984), found that black parents who challenged an IRS tax-exemption granted to private schools, including those that purportedly discriminated against children on the basis of race, lacked standing to pursue their claim. In finding that the parents lacked standing, the Court identified numerous speculations and intervening decisions that interrupted the causal link between the IRS action and plaintiffs' alleged injury. *Id. at 758*. First, the Court noted that it was entirely speculative whether there were enough racially discriminatory schools in the community for withdrawal of exemptions to have an appreciable effect. Second, the Court found plaintiffs' claims involved further speculation as to whether removal of tax exemptions would lead any school to change its policies and as to whether any parent would transfer their child to public school if the private school lost its tax exemption. Finally, the Court deemed it purely conjectural that enough [**14] parents and school officials would reach decisions that would have a significant impact on the racial composition of the public schools. *Id.* As a result, the plaintiffs lacked standing because their injury could not be fairly traced to the IRS action.

Under the reasoning of these cases, it becomes clear that where plaintiffs' injuries would have occurred whether defendants acted or not, Article III standing is lacking because their injuries cannot then be fairly traceable to the defendants' conduct. On the basis of the current record, we cannot say that the CFTC action was independent of the CBOT action given the obvious level of interaction and communication between both entities and the lack of a complete record to review the circumstances surrounding the CFTC action. Moreover, we could only speculate that the CFTC action directed at Central Soya and not released to the public would have caused the same alleged market effect that the similar, but not identical, CBOT Resolution allegedly caused in the futures [*820] and cash markets after its public announcement.

Alternately, Defendants claim that the CBOT Resolution cannot be traced to prices in the futures market, let alone the cash [**15] market, because the Resolution did not set prices. Instead, it allowed the market participants, both longs and shorts, to freely negotiate prices. Defendants argue that, like the voters challenging the patronage system in *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 957 (7th Cir. 1989), countless individual decisions of futures market participants set the price for July 1989 futures and these individual decisions render the line of causation

⁶ We do not find *Michigan Consol. Gas v. Energy Regulatory Admin.*, 281 U.S. App. D.C. 277, 889 F.2d 1110, 1111-12 (D.C. Cir. 1989), on point. Though the courts finds that a plaintiff challenging an administrative agency's action lacks standing to obtain judicial review and refers to the lack of an injury fairly traceable to the agency's action, it does so in the context of standing under § 19(b) of the National Gas Act, *15 U.S.C. § 717r(b)*. *Id.*

from the CBOT Resolution to Plaintiffs' injuries too tenuous. Defendants further maintain that even more imponderables intervene between a decline in price in the futures market and prices on the cash market.⁷

[**16] When confronted with these arguments, AAM essentially relies on its allegations and points to the CBOT Resolution as the device through which it alleges Defendants restrained trade which caused a price decline in the futures market and a corresponding decline in the cash market to the detriment of Plaintiff farmers. Plaintiffs could have done more to aid the Court. Be that as it may, the Court finds that Defendants' argument sweeps too broadly in comparing this case to *Rutan*.

In *Rutan*, voters challenged the patronage hiring system on the ground that it gave incumbents an inordinate advantage over their opponents and thus deprived the voters of equal access and effectiveness of elections. [868 F.2d at 957](#). The Seventh Circuit affirmed the district court's decision finding that the voters lacked standing. First, the Seventh Circuit explained the incumbents' advantage, if any, comes not from the hiring policy, but from the independent evaluation of potential workers that the incumbent will indeed win. *Id. at 958* (quoting [Shakman v. Dunne, 829 F.2d 1387, 1397 \(7th Cir. 1987\)](#), cert. denied, [**17] 484 U.S. 1065, 108 S. Ct. 1026, 98 L. Ed. 2d 991 (1988)). The evaluation of voting decisions of these potential workers would require a review of countless individual assessments of political activity such that the plaintiff voters injury could not be fairly traced to the defendant. *Id.* Based on *Rutan*, we find that for purposes of Article III, standing may be lacking where the causal connection between defendants' conduct and plaintiffs' claims depends on a speculative review of unknown or unknowable decisions of third parties not before the court.

As the Seventh Circuit noted in this case, the "Resolution no doubt restrained trade in the July 1989 soybean futures market," [977 F.2d at 1157](#), because it affirmatively mandated certain traders to liquidate their positions by certain increments during the specified time frames. In this sense, the soybean futures market was not a free and competitive one; instead, it operated under the influence of the Resolution. Unlike the case in *Rutan* where the challenged policy provided no advantage unless others formed particular beliefs that the incumbent [**18] would win, the CBOT Resolution set in motion a liquidation of contracts. While the Resolution set no prices on its face, it certainly altered the futures trading landscape and the Defendants cannot shield the Resolution behind the numerous decisions of individual traders who acted within the affected market.

In addition, Plaintiffs' allegations indicate that Defendants' price neutral action, actually was calculated to cause a decline in both futures and cash prices. Defendants have pointed to matters outside the Complaint in their favor, but we also note that some of those matters weigh against them. For example, as Commissioner Hineman's testimony at the *Hearing* demonstrates, the clear concern of the CFTC and CBOT was Ferruzzi group's attempted execution of a "squeeze" by accumulating a dominant long position in both the soybean futures and cash markets. *Hearing*, at 185-86. Though price neutral on its face, this Court cannot say that Defendants [*821] could not anticipate a potential soybean futures price decline as a result of Ferruzzi's substantial liquidation of its long position in the July 1989 soybean futures. Moreover, Commissioner Hineman's testimony includes the tentative [**19] acknowledgment that "a portion of the price declines in the July soybean future and in cash prices on July 12 may be an unfortunate side-effect of the emergency action." [99 F.2d 188 at 194](#). To be fair, we also note that Commissioner Hineman added that "the more significant price slide in soybeans that began earlier in July before the emergency action and extended into early August, cannot be attributed to that event." *Id.* We only mention these statements to show that the nature and impact of the CBOT Resolution is not as divorced from the CFTC's action or, more importantly, the soybean futures and cash markets as Defendants would have one believe.

With that said in regard to the Resolution's potential effect on the soybean futures market, we find the Defendants' argument regarding the various imponderables involved in assessing the impact of a futures market price decline on the cash market more appealing yet still unsuccessful. On one hand, commentators acknowledge that "when the futures market experiences a significant price change, the prices of that commodity in the cash market will usually

⁷ Defendants list of imponderable include the whether, availability of competing soybeans from other regions and other nations, transport costs to ship grains, purchasing needs of any particular buyer, the quality and grade of the soybeans, storage costs incurred by farmers holding soybeans for later sale, and prices set by processors.

experience a similar movement." Johnson & Hazen, I *Commodities Regulation, supra*, [**20] § 1.04, at 13. Johnson and Hazen, however, also recognize the tremendous number of variables and difficulties involved in determining the cash price for a commodity. Johnson & Hazen, III *Commodities Regulation, supra*, §§ 5.13-5.18, 5.33, at 32-39, 66-67. To resolve this conflict, we turn to one of the acknowledged functions of the futures market.

One of the main economic functions of futures markets is "the provision of reliable pricing information." *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1172-73 (8th Cir. 1971), cert. denied sub nom., *Cargill, Inc. v. Butz*, 406 U.S. 932, 32 L. Ed. 2d 135, 92 S. Ct. 1770 (1972). Consistent with this function, the CEA requires the CBOT to enact and enforce rules to prevent price manipulation, cornering and other market disturbances that might lead to distortion in prices. *7 U.S.C. § 7(d)*; 17 C.F.R. § 1.51(a). In light of this prominent function and the traditional parallels between futures and cash prices, we conclude that there is a link, albeit difficult to measure, between the futures and cash markets. As a result of this [**21] link, we find that the various imponderables argued by Defendants do not break the causal chain for purposes of Article III standing for those Plaintiffs who actually sold soybeans during the alleged period of price decline in the cash market.

On the other hand, we cannot conclude that Article III is elastic enough to reach those Plaintiffs who refrained from selling soybeans allegedly because they felt the prices for soybeans were too low. The complexities, ambiguities and potential for pure speculation that exist in tracing a price decline from the futures market to the cash market are enlarged beyond the scope of Article III when one adds the further conjecture that any particular Plaintiff decided not to sell soybeans because he believed the price was too low. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975) (individuals who refrained from purchasing or selling stock lacked standing to bring securities fraud action based on claim that a misleading prospectus caused them not to sell or purchase). Farmers may decide not to sell soybeans at any given time for a host of articulable [**22] and inarticulable reasons such as a belief that prices will climb, excessive transportation costs, low storage costs, the poor quality or quantity of available supply, or a continuing relationship with a particular buyer who promises to buy in the future. Given that cash markets are essentially local, these considerations would vary from region to region and farmer to farmer. The causal chain from Defendants' action to the futures market to the cash market to those who refrained from selling soybeans during the asserted period of low prices is simply too weak to support standing for those Plaintiffs who refrained from selling soybeans.

[*822] Standing Under the Clayton Act

8

[**23] HN3↑

Section 4 of the Clayton Act, *15 U.S.C. § 15(a)*, provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . ." Despite the breadth of this language, the Supreme Court has emphasized 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." *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)); see also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 761, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977); *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555, 1562 (7th Cir 1991); *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Assoc.*, 830 F.2d 1374, 1377 (7th Cir. 1987). [**24] As the Supreme Court has observed, the "focus of the doctrine of 'antitrust standing' is somewhat different from that of

⁸ In contrast to the issue of Article III standing which was not mentioned, the Seventh Circuit noted that on remand this Court might "find it profitable to examine whether the AAM, whose members participated in the cash market, has standing under § 4 of the Clayton Act, *15 U.S.C. § 15*, to bring an antitrust suit challenging anticompetitive practices in the futures market." *977 F.2d at 1167*. That issue is now squarely joined before this Court. Unlike our discussion of Article III standing, our resolution of this issue will depend on the allegations of the Complaint and we will not consider matters outside of those allegations.

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 the further determination whether the plaintiff is a proper party to bring a private antitrust action." [Associated General Contractors, 459 U.S. at 535 n.31](#). This Court now proceeds [HN4](#)¹ to determine whether Plaintiffs are proper parties to bring this antitrust action.

After expressing dissatisfaction with various tests, the Supreme Court set forth several factors to guide our present inquiry in [Associated General Contractors, 459 U.S. at 537-45](#). Courts have developed various formulations of the factors outlined by the Supreme Court. We find the approach set forth by the Sixth and Eighth Circuits particularly useful. In [Lovett v. General Motors Corp., 975 F.2d 518 \(8th Cir. 1992\)](#), the Eighth Circuit listed the factors as follows:

- (1) the **[**25]** causal connection between the alleged antitrust violation and the harm to the plaintiff;
- (2) improper motive;
- (3) whether the injury was of the type that Congress sought to redress with the antitrust laws;
- (4) the directness between the injury and the market restraint;
- (5) the speculative nature of the damages; and
- (6) the risk of duplicate recoveries or complex damage apportionment.

Id. at 520; see also [Peck v. General Motors Corp., 894 F.2d 844, 846 \(6th Cir. 1990\)](#).

Though no black-letter rules or tests exist, [HN5](#)¹ the Seventh Circuit has distilled the factors into three primary concerns. [Nelson, 925 F.2d at 1562-63](#). The first of the factors is the causal connection between the damages claimed by the antitrust plaintiff and the harm to the plaintiff. *Id. at 1562*. The second factor is the "nature of the injury suffered by the plaintiff and the relationship between that injury and the type of conduct sought to be redressed by the provision of a private remedy for antitrust violations." *Id. at 1563*. Finally, the third factor is "the **[**26]** directness of the asserted injury and, closely related, the risk of duplicative recoveries or (conversely) the difficulty of apportioning damages among various classes of plaintiffs." [Nelson, 925 F.2d at 1563](#). Of particular relevance to this case, we add the [HN6](#)¹ related consideration of the "existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement." [Associated General Contractors, 459 U.S. at 542](#). As the Court explained, the existence of such a class of persons "diminishes the justification for allowing a more remote party . . . to perform the office of private attorney general." *Id.*

[*823] The differences between the expressions of the *Associated General Contractors* factors are ones of form rather than substance, and thus we are not concerned with any particular list. As the Seventh Circuit observed, [HN7](#)¹ "ultimately, standing involves a case-by-case analysis of 'the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.'" [Greater Rockford Energy & Technology Corp. v. Shell Oil Co., 998 F.2d 391, 396 \(7th Cir. 1993\)](#) **[**27]** (quoting [Associated General Contractors, 459 U.S. at 535](#)). Though various paths exist to reach a conclusion as to whether Plaintiffs are proper parties to bring this antitrust action, we will focus our attention on those trails marked by the parties' arguments.

Defendants initially concentrate their attack on Plaintiffs' claim on the directness or, more precisely, the indirectness of the relationship between the Resolution and the alleged decline in soybean cash market prices. Defendants argue that Plaintiffs, who participated only in the cash market, have suffered only indirect injuries from the Resolution which was expressly directed at the futures market in July 1989. Plaintiffs respond that the relevant market is the market for soybeans and the decline in cash market prices was both foreseeable and inextricably intertwined with the objectives of the alleged conspiracy.

As a threshold matter, we dispense with the notion proffered by Plaintiffs that the relevant market is the "market for soybeans." The Plaintiffs' Complaint clearly notes the distinction between the futures and cash markets for soybeans. As we noted above, **[**28]** the futures market operates in a distinctive manner with one essential variable term - price. As a fair reading of the Complaint indicates, several cash markets operate throughout the country. Those markets operate without the structure imposed by necessity in the futures market. Despite Plaintiffs' assertion to the contrary, Defendants wisely do not contend that the markets are entirely unrelated. In this Court's view, the futures and cash markets for soybeans are distinct though obviously related markets. Cf. [Utesch v. Dittmer, 947 F.2d 321, 323 \(8th Cir. 1991\)](#) (recognizing that "there are two distinct markets in which cattle

transactions take place: The 'cash' market and the 'futures' market."), cert. denied, 118 L. Ed. 2d 425, 112 S. Ct. 1764 (1992).

Moreover, the Seventh Circuit implicitly recognized this difference when it framed the issue for potential consideration on remand regarding Plaintiffs' standing to raise an antitrust claim when they did not participate in the soybean futures market. AAM, 977 F.2d at 1167; see *supra* n.8. We conclude that Plaintiffs' definition [**29] of the relevant market as the market for soybeans masks the important differences in function and methods between the futures and cash markets, not the least of which is the fact that futures traders rarely are concerned with taking or making actual delivery of the commodity as a result of their ability to offset their futures contract obligations. As a result, we decline to consider the Plaintiffs' standing in relation to the alleged injuries they suffered as participants in a generic "market for soybeans."

Now we turn to the question of the directness of the injury allegedly sustained by Plaintiffs. Defendants rely on *Associated General Contractors*, S.W. Suburban Realtors, and a more recent Supreme Court case applying antitrust standing analysis to RICO claims, [Holmes v. Securities Investor Protection Corp., 117 L. Ed. 2d 532, 112 S. Ct. 1311 \(1992\)](#), to show that Plaintiffs claims are so indirect as to warrant denying them standing under § 4. We begin our discussion with these three cases.

In *Associated General Contractors*, the Supreme Court considered the standing of labor unions who sought recovery under antitrust law for damages [**30] to their business activities. The unions alleged that the defendants, a multiemployer association of construction contractors and its members, restrained the market for subcontracting services by coercing landowners and other parties to divert business from union to non-union contractors and subcontractors. The Court reasoned that the immediate victims of coercion, the contractors and subcontractors had experienced direct injury due to the alleged violation. [459 U.S. at 540-41](#).

[*824] Conversely, the plaintiff unions had only experienced harm as an indirect result of whatever damages the construction contractors and subcontractors had suffered. [Id. at 541](#) & n.46. The Court explained that the causal chain between the alleged restraint in the market for construction subcontracts, a market in which the plaintiff unions did not participate, and the harm allegedly suffered by the union contained several "vaguely defined links." [Id. at 540](#). The speculative nature of the causal chain and the fact that the plaintiffs did [**31] not participate as consumers or competitors in the relevant market weighed against standing.

Additionally, the obvious existence of parties more directly harmed by the alleged violation diminished the need to allow more remotely injured parties to proceed with a damage action under § 4. [Id. at 542](#). Further, the Court found the plaintiffs' claim replete with speculation, complex questions of apportionment of damages, and the potential for duplicate recoveries. Taken together, these factors weighed heavily against enforcement of the plaintiffs' antitrust claim.

In *S.W. Suburban*, the Seventh Circuit applied the relevant factors to the claims of a corporate president who sought to pursue an independent antitrust claim for damages he suffered due to an alleged conspiracy to exclude his corporation from the market for the provision real estate brokerage services. The Seventh Circuit found that his claims were merely derivative of the damages suffered by his corporation. [830 F.2d at 1378](#). The court noted the substantial body of case law finding that derivative damages "sustained by employees, officers, [**32] stockholders, and creditors of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing." *Id.* We fully agree with the general rule stated in *S.W. Suburban* but find it of only marginal value given the different factual setting presented by Plaintiffs' claim.

In *Holmes*, the Supreme Court applied the proximate cause analysis adopted in *Associated General Contractors* for Clayton Act claims to RICO claims brought under [18 U.S.C. § 1964\(c\), 112 S. Ct. at 1315-18](#). Defendants acknowledge the different statutory context of *Holmes* but offer it as another example of an indirect claim not warranting standing. The Securities Investors Protection Corporation ("SIPC"), a private non-profit corporation, is charged with various statutory duties including a duty to advance funds to pay the claims of customers of defunct brokers. In *Holmes*, the SIPC sought recovery against multiple defendants under RICO for an alleged stock

manipulation scheme that prevented two broker-dealers from meeting obligations to their customers. The SIPC's statutory duty to reimburse [**33] those claims was thus triggered.

In considering the SIPC's claim, the Supreme Court found the link too remote between the conspirators' stock manipulation and the harm to customers, "being purely contingent on the harm suffered by the broker dealers." [112 S. Ct. at 1319](#). Only the "intervening insolvency [of the broker-dealers] connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors." *Id.* The Court further explained that allowing the nonpurchasing customers to sue, or allowing the SIPC to stand in their shoes, would require an analysis of whether the insolvency was caused by the alleged stock manipulation scheme or other factors such as poor business practices. [Id. at 1320](#). Assuming that this factual assessment could be successfully undertaken, the district court would also have to apportion damages between the defunct broker-dealers and the non-purchasing customers. *Id.* These considerations resulted in the Court's conclusion that neither the SIPC nor the non-purchasing customers were proper plaintiffs.

Plaintiffs rely most heavily on a comparison of this case to *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982). [**34] In that case, a health plan subscriber brought an antitrust claim against her health plan insurer for damages due to an alleged conspiracy to prevent clinical psychologists from receiving compensation under the Blue Shield plan to the benefit of physicians and psychiatrists providing psychotherapy [**825] services. Defendant Blue Shield denied reimbursement to McCready for the bills she paid to her psychologist. Blue Shield allegedly desired to motivate subscribers not to seek treatment from psychologists by denying them reimbursement for such services. The Supreme Court found that McCready's claimed damage, easily quantified, was an integral and necessary aspect of the alleged illegal conspiracy. [Id. at 479](#). The Court reasoned that the "injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." [Id. at 484](#).

Plaintiffs argue that the Complaint alleges that Defendants intended to cause a price decline in both the futures and cash markets. Plaintiffs further allege that the exposure of [**35] Defendants or affiliated trading firms and their clients on the futures market as holders of gross short positions exposed them to financial loss that they averted by causing a price decline in the futures market. Furthermore, the Plaintiffs assert that some of the affiliated trading firms and their clients had obligations to customers to supply them with large amounts of soybeans. Because these entities had not legitimately hedged their needs on the futures market, they were subject to losses from the high and allegedly increasing cash market prices. Plaintiffs argue that these allegations show that a cash market price decline was not only intended but necessary for the accomplishment of the alleged conspirators' goal to reduce their exposure on both the futures and cash markets.

Plaintiffs' reliance on *McCready* is misplaced. In many ways, *McCready* was a straight forward case because the plaintiff was a consumer in the relevant market for psychotherapy services and was directly affected by the defendant's decision to deny her reimbursement for services performed by a psychologist as part of a scheme to deprive psychologists of business. We do not find the present suit comparable. [**36] In this case, Plaintiffs did not participate in the futures market and the Resolution was directed at that market. Nor could one say that Defendants' conduct is remotely as direct as denying an insured coverage for certain services. The unpaid bills in *McCready* are a long way from the intricacies of the soybeans futures and cash markets here.

We may condense the arguments in favor of standing to ones similar to those found in *Associated General Contractors*. In simple terms, Plaintiffs have alleged an injury causally related to Defendants' conduct and have alleged that Defendants intended to cause a decline in prices in the cash market as a necessary part of their conspiracy. As the Court noted in *Associated General*, however, [HN8](#) [**37] "an allegation of improper motive, although it may support a plaintiff's damage claim under § 4, is not a panacea that will enable any complaint to withstand a motion to dismiss." [459 U.S. at 537](#). Moreover, even if we assume that the decline in prices allegedly caused by Defendants' conduct is the type of injury protected by **antitrust law**, this is not sufficient to confer standing "because a [**37] party may have suffered antitrust injury but still not be a proper plaintiff under § 4 for other reasons." [S.W. Suburban](#), 830 F.2d at 1377. Those other reasons raise a substantial, and in our view, insurmountable hurdle in this case.

While a causal link between the soybean futures market and the soybean cash market exists, we find the causal chain between Defendants' conduct and Plaintiffs' claimed injuries too indirect and attenuated to support antitrust standing here. In similar circumstances, the Second Circuit found a plaintiff who operated in the copper scrap market did not have standing to challenge the conduct of defendants who operated in the refined copper market. *Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10 (2d Cir. 1980), cert. denied, 452 U.S. 916, 69 L. Ed. 2d 420, 101 S. Ct. 3051 (1981). Though *Reading* was decided prior to *Associated General Contractors*, its analysis of the difficulties in tracing the impact of anticompetitive conduct from one portion of the copper market to another is still viable and helpful here. The [**38] Second Circuit found that the task of reconstructing innumerable individual decisions and countless market variables to gauge the effect of an alleged conspiracy in the market for refined copper on the price of [*826] copper scrap would "mire the court" in a difficult, if not impossible, effort to recreate the "possible permutations in the causes and effects of a price change." *Id. at 13-14*; see also *de Atucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510 (S.D.N.Y. 1985) (applying *Reading* to claim of London silver futures market participant against defendants operating in United States silver futures market).

In this case, the task of deciphering the effect of the parade of imponderables asserted by Defendants in this case is similar to the task that proved too speculative for the Second Circuit in *Reading*. To trace the effect of the Resolution, this Court would have to look first to conditions in the soybean futures and cash markets well prior to the issuance of the Resolution. The Court would have to determine the cause of the allegedly rising price for futures and cash market soybeans.⁹ That determination, if it could [**39] be made, would then lead to analysis of the Resolution's effect on futures traders and, through their actions, its effect on futures prices. Along the way, the Court would necessarily have to consider the countless interactions of innumerable market variables over a period of time before and after issuance of the Resolution. All this would only provide, at best, a view of the futures market price decline and its potential causes.

[**40] To reach the Plaintiffs' injuries, the Court would have to further speculate on the complex interaction between the futures markets and the numerous cash markets. As we previously mentioned, the conduct of countless individual decision-makers and multiple market variables varying by locality exacerbate the impediments to successful completion of this analysis. In the end, we may assume that the causal chain exists but the Court nonetheless finds that the attenuated nature of that chain's links weighs against standing for Plaintiffs.

In addition to the indirectness of the injury to Plaintiffs, Defendants argue that Plaintiffs' damages are speculative and "defy apportionment." To a great degree, this argument follows from the indirectness of the Plaintiffs' injuries. Plaintiffs contend that lower prices are direct and not speculative damages and that no overwhelming questions of apportionment exist. As in *Holmes*, this case would require the Court to determine what damages in the form of a price decline are attributable to Defendants' conduct as opposed to other market variables too numerous to mention. That calculation is further hampered by the additional variable of multiple [**41] cash markets with potentially differing local variables affecting cash prices. In consideration of these extraordinary difficulties, we find again that the balance tips against granting Plaintiffs standing to pursue their claim.

Finally, we consider an important factor that neither party addresses directly. In *Associated General Contractors* and in numerous other cases, courts have recognized that where a more directly harmed class of potential plaintiffs exists, the need to allow a more remotely harmed class to proceed is substantially diminished. *Associated General Contractors*, 459 U.S. at 542; see also *Holmes*, 112 S. Ct. at 1320; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479

⁹ Though not mentioned by either party, this case is perhaps further complicated by the absence of a potential party, Ferruzzi, which plays a central role in this saga. As the *Hearing* testimony indicates, the CFTC and the CBOT were concerned that Ferruzzi was attempting a squeeze that could and conceivably did contribute to the higher futures prices that allegedly prevailed prior to the issuance of the Resolution. As one court observed about the antitrust claims of traders in the silver futures market, "the magnitude of plaintiff's losses, if not the very potential for those losses, was directly determined by the actions allegedly taken by the non-exchange defendants to boost the price of silver futures." *Grosser v. Commodity Exchange, Inc.*, 639 F. Supp. 1293, 1319 (S.D.N.Y. 1986), aff'd, 859 F.2d 148 (2d Cir. 1988). Thus, it appears quite clear that the market conditions both before and after the issuance of the Resolution are not only relevant but essential to analyzing the potential impact of the Resolution on the soybean futures market.

U.S. 104, 111 n.6, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986). In this case, an easily identifiable group of potential plaintiffs exists whose harm from the Resolution is far more direct than Plaintiffs. Those traders who participated in the futures market experienced the effects of the Resolution [*827] most directly, especially those traders who held [**42] long positions who stood to lose from a price decline. Their self-interest would normally be sufficient to protect the public interest in antitrust enforcement. Futures market participants have brought suits against exchanges and boards of trade seeking relief under antitrust law in the past. See, e.g., Grosser v. Commodity Exchange, Inc., 639 F. Supp. 1293 (S.D.N.Y. 1986); de Atucha v. Commodity Exchange, Inc., 608 F. Supp. 510 (S.D.N.Y. 1985). Accordingly, the Court concludes that this factor also weighs heavily against Plaintiffs' standing.

The preceding discussion demonstrates that Plaintiffs' claim is indirect and attenuated and creates enormous levels of complexity and speculation regarding both causation and damages. Moreover, another more directly harmed group exists and that group could protect the public interest in antitrust enforcement. Allowing Plaintiffs to proceed would involve this Court in the type of complex and massive damages litigation that undermines the effectiveness of treble-damage suits. Accordingly, the Court holds that Plaintiffs lack standing to pursue their claim under § 4 of the Clayton Act. [**43] ¹⁰

AAM - Representational Standing

Even if we assume for the moment that Plaintiffs' claims are sufficient to overcome Defendants' other standing arguments, the Court finds that AAM lacks standing to represent its members. AAM seeks to represent the interests of its soybean farmer members in pursuing this action but there are no allegations that AAM itself has suffered any damages. Defendants assert that AAM lacks standing to represent its members because this suit involves issues of damages that require the participation of individual members. See Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). [**44] AAM contends that damage actions are not necessarily "excluded from the category of cases in which associations have standing."

The Seventh Circuit has recognized the uniform rejection of associational standing under § 4 of the Clayton Act. S.W. Suburban, 830 F.2d at 1380 n.3 (collecting cases). The court noted that both the language of § 4 and the test enunciated in *Hunt* barred an association's standing in a suit to recover damages to its members under § 4. *Id.* This Court finds no reason to depart from this authority and holds that AAM lacks standing to represent its members in this suit.

CONCLUSION

For the foregoing reasons, the Court grants the Defendants' motion to dismiss.

ENTER:

GEORGE M. MAROVICH

UNITED STATES DISTRICT JUDGE

DATED: April 12, 1994

End of Document

¹⁰ Lest there be any doubt, even had we found that those Plaintiffs who refrained from selling had standing under Article III, our analysis and conclusion with respect to that class of Plaintiffs would not differ. In fact, the class of Plaintiffs who refrained from selling soybeans is one step further down the already attenuated causal chain and the damage assessment would have an added level of difficulty for these Plaintiffs.



Ehredt Underground v. Commonwealth Edison Co.

United States District Court for the Northern District of Illinois, Eastern Division

April 12, 1994, Decided ; April 13, 1994, Docketed

Case No. 91 C 2361

Reporter

848 F. Supp. 797 *; 1994 U.S. Dist. LEXIS 4658 **; 147 L.R.R.M. 2223; 1994-2 Trade Cas. (CCH) P70,833

EHREDT UNDERGROUND, INC., Plaintiff, v. COMMONWEALTH EDISON COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 196, Defendants.

Prior History: [\[**1\]](#) Adopting Magistrate's Document of January 27, 1994, Reported at: [1994 U.S. Dist. LEXIS 748](#).

Core Terms

employees, conspiracy, bid, antitrust, recommendation, contractors, conspired, collective bargaining agreement, summary judgment, affiliation, alleges, restraint of trade, good faith, renegotiate, summary judgment motion, apparent authority, fair dealing, union labor, ambiguous, breached, objects, asserts, defense motion, diverted, parties, cable, grant summary judgment, legitimate business, Sherman Act, Underground

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 proper where the record shows that no genuine issue of material fact exists and the moving party must prevail as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). In ruling, the court considers whether any rational trier of fact could find for the non-moving party. Although the general rule is that a court must draw all inferences in favor of the nonmoving party, [antitrust law](#) limits the extent to which permissible inferences from ambiguous evidence may be drawn.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judicial Officers > General Overview

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

HN2 [down] **Standards of Review, De Novo Review**

A district court must make a de novo determination of any portion of a report by a magistrate to which specific written objection has been made. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions. [Fed. R. Civ. P. 72\(b\); 28 U.S.C.S. § 636\(b\)\(1\)](#).

Antitrust & Trade Law > Sherman Act > General Overview

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

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

Section one of the Sherman Antitrust Act states that every contract, combination or conspiracy in restraint of trade or commerce is illegal. [15 U.S.C.S. § 1](#).

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

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

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

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

HN4 [down] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

On a motion for summary judgment an antitrust plaintiff alleging an agreement in restraint of trade must produce evidence sufficient to carry its burden of showing that the illegal arrangement existed. To meet this burden, a plaintiff must show by direct or circumstantial evidence a conscious commitment to a common scheme designed to achieve an unlawful objective. The court may not draw inferences that are "economically senseless."

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN5 [down] **Antitrust & Trade Law, Sherman Act**

The Seventh Circuit applies a two-part test to determine whether summary judgment is proper in an antitrust conspiracy case. First, the court must assess whether the plaintiff's evidence of conspiracy is ambiguous. Evidence of a conspiracy will be considered ambiguous where the evidence is as consistent with the defendants' permissible independent interests as with an illegal conspiracy. If evidence is deemed ambiguous, the court must ask whether there is any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests.

848 F. Supp. 797, *797L^{1994 U.S. Dist. LEXIS 4658, **1}

Antitrust & Trade Law > Sherman Act > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

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

HN6 [down] Antitrust & Trade Law, Sherman Act

Under the Market Force test, evidence of an antitrust agreement is considered ambiguous where the evidence is as consistent with the defendant's permissible independent interests as with an illegal conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

HN7 [down] Antitrust & Trade Law, Sherman Act

Conduct not supported by any economic rationale is persuasive evidence against the finding of an antitrust conspiracy.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8 [down] Regulated Industries, Higher Education & Professional Associations

A corporation can be held liable in an antitrust action for actions undertaken by its agent under cloak of apparent authority.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

HN9 [down] Authority to Act, Apparent Authority

Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

HN10 [down] Criminal Actions, Intent

Employees who affect decision-making authority on behalf of the corporation possess apparent authority or represent the corporation's intent.

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN11 [💡] Breach, Breach of Contract Actions

Illinois law does not recognize a duty to renegotiate upon a change in circumstances.

Judges: ALESIA

Opinion by: JAMES H. ALESIA

Opinion

[*800] MEMORANDUM OPINION AND ORDER

This matter is before the court on the parties' objections to Magistrate Judge W. Thomas Rosemond's Report and Recommendation ("Report") on the motion by defendant Commonwealth Edison Company ("Edison") for summary judgment on Counts I, II, and IV of Plaintiff's First Amended Verified Complaint (the "Complaint").¹ Magistrate Judge Rosemond recommended granting defendant's motion for summary judgment on Count I, denying defendant's motion as to Count II, and granting summary judgment in part and denying it in part as to Count IV. For the reasons discussed below, the Court accepts the conclusions of the Report with respect to Count I and Count II. The Court sustains plaintiff's objection regarding its first claim under Count IV, and overrules plaintiff's objections to the Report as to the second claim under Count IV.

[2] I. FACTS**

A. Edison and URD Work

Plaintiff Ehredt Underground, Inc. ("Ehredt") is an Illinois corporation engaged in the business of underground excavation. Kenneth Ehredt is the corporation's president, manager and sole shareholder.

Edison is a public utility which provides electricity to approximately the northern one-third of Illinois. Under a contract entitled the General Joint Agreement ("GJA"), Edison and Illinois Bell Co. ("Illinois Bell"), a public utility responsible for providing local telephone service within Illinois, divide responsibility for installation of electrical and telephone cable. Geographic areas are divided up under the GJA, with either Edison or Illinois Bell accepting sole responsibility for installing both companies' equipment in the assigned area. The GJA provides that contractors laying cable for Edison also act as agents for Illinois Bell and lay telephone cable at the same time.

As part of the GJA, Edison is responsible for completing underground residential distribution work ("URD"), which includes digging, trenching for ground cable, installing various equipment, and connecting cable. Although Edison's own employees traditionally ^{**3} had performed URD work, in 1988 Edison management decided to hire outside contractors to perform some URD construction work in several of Edison's northern Illinois districts. In response to a request by officers from unions representing Edison employees, Edison agreed that it would contract out URD work only to companies whose employees were represented by unions.

¹ This court previously granted defendant Local 196's motion to dismiss [*Count III. Ehredt Underground, Inc. v. Commonwealth Edison Co., 830 F. Supp. 1083 \(N.D. Ill. 1993\).*](#)

[*801] In late 1988, an Edison construction foreman invited Ehredt and several other contractors, including Trench-It, Inc. ("Trench-It") to perform URD work on a purchase-order basis. Ehredt and the other contractors began performing work for Edison in the North Shore and Crystal Lake Districts of Edison's northern division. At this time, Ehredt did not employ union labor. At some point in late 1988, however, Ken Ehredt was informed that its employees should be represented by a union in order to work for Edison.

Starting in November 1988, Ehredt asserts that certain Edison representatives informed Ehredt that it should provide kickbacks for the award of URD work. Ehredt refused these requests, although an Edison representative had related to Ehredt that Trench-It provided kickbacks to Edison supervisors.

In early 1989, Edison [**4] invited Ehredt, Trench-It, and several other contractors to submit bids for a contract to perform URD work. After the lowest bidder declined the contract, Edison awarded both Ehredt and Trench-It contracts to perform URD work. Both Ehredt and Trench-It performed contractor URD work in the Crystal Lake District during 1989 and 1990. Ehredt's 1989 Crystal Lake URD contract originally was set to expire October 31, 1989, but the contract was extended twice by the consent of all parties.

B. The Union Requirement

Although Ehredt's employees were not represented by a union at the time Edison originally solicited Ehredt for a bid, Edison's bid proposal form requires bidding parties to identify the union with which the bidding party has a labor contract. Shortly after Ehredt submitted his bid, therefore, he began discussions with several unions. Ehredt eventually negotiated a two-year collective bargaining agreement with International Brotherhood of Electrical Workers, ("IBEW"), AFL-CIO, Local 336 ("Local 336"). The International approved the agreement on March 14, 1989.

Soon after the agreement was executed, certain parties began questioning Local 336's jurisdiction over Ehredt's [**5] employees. First, Daniel Rosenmayer, president of Trench-It, complained to Harold Eastwood, business manager of Local 196, that Local 336 was representing employees in Local 196's jurisdiction. On May 9, 1989, James Conway, the International Vice President of the IBEW for the Sixth District, notified Thomas Beagley of Local 336 that Local 336 was not chartered for the type of work being performed by Ehredt employees. Conway stated that Local 196 was an IBEW-authorized union chartered for the work performed by Ehredt employees and, accordingly Local 336 must terminate its collective bargaining agreement with Ehredt.

In response, Local 336 appealed Conway's decision to the International President of the IBEW, who has the sole authority to determine all jurisdictional disputes. The International President reversed Conway's decision, stating that the agreement between Local 336 and Ehredt Underground was valid. In November 1989, Conway again disputed the jurisdiction of Local 336 over Ehredt's employees, and in late November, the International President again stated that the agreement was valid.

Far from accepting the International President's decision, the opposition to Ehredt's Local [**6] 336 affiliation subsequently intensified its pressure on the International President to force Ehredt to switch unions. In January 1990 Harold Eastwood of Local 196 joined the battle and complained to the International President that Local 196 had jurisdiction over Ehredt employees. In January and March 1990, Conway sent two more letters to the International President. Finally, on March 13, 1990, the International President reversed his prior position and informed Local 336 that Local 196 had jurisdiction over Ehredt employees and Local 336 should not enter into further collective bargaining agreements with Ehredt. On July 17, 1990, the president of Local 336 notified Ehredt that the setting of pad transformers, pedestals, and switching gear for Edison was beyond the scope of the collective bargaining agreement between Ehredt and Local 336, because the existing agreement covered only trenching and cable laying. As such, Local 336 stated to Ehredt that it would not renew [*802] its collective bargaining agreement with Ehredt following its expiration on October 31, 1990.

C. The Rest of the Story

Although the above facts relate a fairly orderly though vigorous campaign to force Ehredt [**7] employees to affiliate with Local 196, Ehredt asserts a more sinister side to the crusade. Ehredt maintains that in late 1988, his workers noticed that they were being followed from job site to job site. In April 1989 two Ehredt employees were attacked at a remote location while working on an Edison project. The two attackers first approached Ehredt manager Terry Counley while the other employee was away. The attackers asked to see Counley's union card, which he produced for them. After examining the card, the two men picked up some of Counley's equipment and dropped it in the trench. When Counley bent over to retrieve the equipment, the two men beat Counley. The attackers told Counley that "that's what he could expect if he ever worked in Cary, Illinois again." After releasing the brake on Ehredt's earth-moving equipment, the men departed.

Moments later, Local 196's business agent, Dave Lindsey arrived at the job site and questioned Counley about switching from Local 336 to Local 196. Counley told Lindsey that he could not give him an answer and asked for Lindsey's card. Lindsey handed him Harold Eastwood's business card. Harold Eastwood was a business manager for Local 196 and participated [**8] in the dispute involving Local 336's jurisdiction over Ehredt employees.

On one occasion, Ehredt claims that Eastwood himself related to Counley and Ehredt that Ehredt's workers were in the wrong union, and that Local 196 was determined to obtain all work that it believed was within its jurisdiction. Eastwood stated that an Edison Board member was assisting him in getting rid of non-union excavation and cable installation contractors or getting them into Local 196.

Ehredt also alleges that he faced opposition on the job from Edison supervisors, despite Edison's overall satisfaction with Ehredt's work. As noted above, Edison extended Ehredt's contract twice between October 1988 and March 1990. Nevertheless, Douglas Hill, the supervisor in the underground construction department of Edison's Crystal Lake District, repeatedly threatened to terminate Ehredt and replace it with Trench-It. Ehredt asserts that Hill and other Edison employees consistently gave work to Trench-It that had been contracted to Ehredt. In addition, Hill often falsely blamed Ehredt for falling behind in its work and threatened to give the work to Trench-It.

D. The 1990 Crystal Lake District Contract

In [**9] January 1990, Edison began to solicit bids for a second contract. Prior to his bid submission, Ken Ehredt spoke with Douglas Hill, the Edison supervisor, about his bid strategy, stating that he would likely increase his bid by twenty-five (25) percent from the preceding contract. In a later conversation, Hill told Ehredt that once Trench-It won the contract, most of Ehredt's employees would probably quit and go to work for Trench-it. Ehredt was alarmed at the implications of the statement. Not only was Hill aware of Ehredt's bid strategy, but also Hill's statement implied to Ehredt that Edison would give Trench-It special consideration in the bidding process for the as-yet unawarded contract. Ken Ehredt went to Forrest Stahmer, Edison's Contract Coordinator, to express concerns about possible favoritism. Stahmer assured Ehredt that the bidding procedure was kept as apolitical as possible.

Ehredt's fears were confirmed when Trench-It's bid for the contract came in just below the figure Ehredt had disclosed to Hill. Ehredt, however, had not followed his original strategy: upon the request of an Edison employee, he had lowered rather than raised his contract price. Ultimately, on March [**10] 23, 1990, Edison awarded Ehredt a two-year contract for the Crystal Lake District, with the understanding that Ehredt would perform the work as a union contractor. Edison awarded Trench-It the backup 1990 Crystal Lake District URD contract.

[*803] Approximately three days after the contract was awarded, Hill called Ehredt's manager, Terry Counley, into his office. Hill told Counley that he did not think Ehredt could handle the work they had contracted to do and that he would "keep a close eye" on them. Further, Hill threatened to pull Ehredt off the job and give the work to Trench-It if Ehredt made "any wrong move." Ehredt asserts that although it made no "wrong moves," Hill began giving Crystal Lake work to Trench-It. Counley testified that on several occasions he arrived at the worksite only to find that the work had been done and, on one occasion, Counley arrived as Trench-It workers were completing the work.

At a January 2, 1991 meeting between Kenneth Ehredt and Terry Counley of Ehredt Underground and Janet Rudolph and George Adamaitis of Edison's purchasing department, Ken Ehredt complained to Rudolph about the work diverted to Trench-It. Rudolph assured Ehredt that Edison would stand [**11] by its contract and pay Ehredt

for all excavation work performed in the Crystal Lake District if Douglas Hill gave the work away in violation of the contract. As yet, Edison apparently has not deemed any work done by Trench-It as violative of the Crystal Lake District contract because Edison has not paid Ehredt for any diverted work.

E. Finding a New Union

Anticipating the expiration of its affiliation with Local 336, Ehredt contacted the Congress of Independent Unions ("CIU") in late July or early August 1990 about possible union representation. The CIU is a labor organization which is not affiliated with the AFL-CIO and is not organized by craft lines or geographic areas. The wage scale that would have been implemented under CIU representation was roughly comparable to the wages Ehredt paid under the Local 336 agreement.

Ken Ehredt notified James Harper, purchasing agent for Edison, that the CIU was under consideration as a possible replacement for Local 336. Harper referred the question of CIU representation to Daniel Shamblin of Edison's legal department. Three weeks later, Shamblin notified Harper that contractors should not affiliate with any unions not affiliated **[**12]** with the AFL-CIO because Edison's own unions would not look favorably upon such an affiliation. Harper relayed this information to Ehredt.

Because of the new requirement of AFL-CIO affiliation, Ehredt began discussions with various AFL-CIO unions, including Local 150. Despite Local 150's AFL-CIO membership, Edison representatives Douglas Hill and James Harper related to Ehredt that Local 150 was not acceptable. Specifically, Hill told Ken Ehredt, "We don't want 150. Why don't you go with 196 and make everybody happy?"

Subsequently, in October 1990, Local 196 filed an intervenor petition with the National Labor Relations Board ("NLRB"), which scheduled an election for November 19, 1990. Local 196 now stepped up its efforts to pressure Ehredt and its employees to join Local 196. Agents from the International contacted Ehredt's employees at their homes in an effort to rally enough employee support. Agents of Local 196 assured Ken Ehredt that if Local 196 was given a collective bargaining agreement with Ehredt, the Local would assist in obtaining Edison's consent to price changes which would be necessitated under Local 196's higher price structure. Ehredt was also promised that Local 196 **[**13]** would permit him to continue running the company as he had under Local 336. On the basis of these oral agreements, Ehredt agreed not to oppose Local 196's appearance on the NLRB election, and he informed his employees of this fact.

Local 196 won the election unanimously, and on December 17, 1990, it executed a collective bargaining agreement with Ehredt. Ehredt claims that no negotiation over terms of the agreement was possible. The agreement provided for a wage scale that was nearly ninety (90) percent higher than the scale implemented under the agreement with Local 336.

Ehredt's 1990 Crystal Lake District contract was predicated on Local 336's wage structure, and Ehredt found that an adjustment in its contract was needed as a result of the new agreement with Local 196. Ehredt **[*804]** requested a renegotiation of the contract. In early January, Janet Rudolph refused to renegotiate the contract and told Ehredt that unless he could adhere to his original bid, he would lose the contract. On January 14, 1991, Ehredt informed Janet Rudolph that he would not continue performing work under the terms of the 1990 Crystal Lake District URD contract, and that he was pulling his employees off the job. **[**14]** Ehredt performed no work for Edison after that date. Edison subsequently awarded the contract to Trench-It, and Trench-It hired eighty (80) percent of Ehredt's employees.

F. Ehredt's Complaint and the Magistrate Judge's Report

In Counts I and II, Ehredt claims that Edison conspired to restrain trade in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. In Count I, Ehredt alleges that Edison conspired with Illinois Bell to compel Ehredt to execute a collective bargaining agreement with Local 196. Ehredt asserts that this conspiracy had the effect of eliminating competitive bidding in the Crystal Lake District and raising the cost to consumers of electrical and telephone services. In Count II, Ehredt claims that Edison, Local 196, Local 336, the International, and Trench-

It conspired to force Ehredt into executing a collective bargaining agreement containing ruinous economic terms, with the effect that Ehredt would be forced out of business and competition eliminated in the relevant market.

In Count IV, Ehredt alleges that Edison, through Douglas Hill, breached its contract with Ehredt under two theories. First, Ehredt [**15] claims damages through Hill's diversion to Trench-It of work which was originally assigned to Ehredt. Second, Ehredt asserts that Edison breached the covenant of good faith and fair dealing by rejecting the CIU as an acceptable union and by refusing to renegotiate its contract after implementing the collective bargaining agreement with Local 196.

The Magistrate Judge recommended that defendant's motion for summary judgment be granted as to Count I, denied as to Count II, and granted in part and denied in part as to Count IV. Plaintiff objects to the Magistrate Judge's recommendation to grant summary judgment on Count I and to grant summary judgment in part on Count IV. Defendant objects to the Magistrate Judge's recommendation to deny summary judgment as to Count II and as to part of Count IV.

II. DISCUSSION

A. Standard of Review

1. Summary Judgment

HN1 [↑] Summary judgment is proper where the record shows that no genuine issue of material fact exists and the moving party must prevail as a matter of law. *FED. R. CIV. P. 56(c)*; *Wigod v. Chicago Mercantile Exchange, 981 F.2d 1510, 1514 (7th Cir. 1992)*. In ruling, the court considers whether [**16] any rational trier of fact could find for the non-moving party. *Wigod, 981 F.2d at 1514*. Although the general rule is that a court must draw all inferences in favor of the nonmoving party, *Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072, 2077, 119 L. Ed. 2d 265 (1992)*, "antitrust law limits the extent to which permissible inferences from ambiguous evidence may be drawn." *Wigod, 981 F.2d at 1514* (citing *Valley Liquors Inc. v. Renfield Importers, Ltd., 822 F.2d 656 (7th Cir. 1987)*).

2. Magistrate Judge's Report and Recommendation

HN2 [↑] A district court must make a *de novo* determination of any portion of the Report to which specific written objection has been made. The district judge "may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions." *FED. R. CIV. P. 72(b): 28 U.S.C. § 636(b)(1)*. Therefore, this court will address both parties' objections and, applying the appropriate standard for summary judgment, [**17] make a *de novo* determination as to each objection.

B. The Antitrust Claims

In Count I, Ehredt alleges that Edison and Illinois Bell conspired in restraint of trade to [*805] require their contractors to use union labor. The Magistrate Judge recommended granting summary judgment. Ehredt makes two objections to the Magistrate Judge's recommendation. First, Ehredt objects to the Magistrate Judge's conclusion that Illinois Bell did not conspire with Edison. Ehredt maintains that by signing the GJA, Illinois Bell relinquished the right to make labor decisions in areas assigned to Edison under the GJA. Ehredt states that "a requirement by Edison that subcontractors be union becomes the agreement of its principal, Illinois Bell. This creates the necessary plurality of actors and agreement necessary under Section One of the Sherman Act." Plaintiff's Memorandum in Support of Objections, at p. 4. Second, Ehredt objects that the agreement between Edison and Ehredt violates Section One. This court disagrees with Ehredt's contentions for the reasons that follow.

1. Liability Under Section One

HN3 [↑] Section One of the Sherman Antitrust Act states that "every contract, combination . . . [**18] or conspiracy in restraint of trade or commerce . . . is . . . illegal." *15 U.S.C. § 1*. The Supreme Court has held that

HN4[¹⁸] on a motion for summary judgment an antitrust plaintiff alleging an agreement in restraint of trade must produce evidence sufficient to carry its burden of showing that the illegal arrangement existed. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984). To meet this burden, a plaintiff must show by direct or circumstantial evidence "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id. at 768*. In regard to the motion for summary judgment on this anti-trust court, the court may not draw inferences that are "economically senseless." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2083 (1992) (explaining *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)). [**19]

HN5[¹⁹] The Seventh Circuit applies a two-part test to determine whether summary judgment is proper in an antitrust conspiracy case. First, the court must assess whether the plaintiff's evidence of conspiracy is ambiguous. *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1171 (7th Cir. 1990). Evidence of a conspiracy will be considered ambiguous where the evidence "is . . . as consistent with the defendants' permissible independent interests as with an illegal conspiracy." *Id.* If evidence is deemed ambiguous, the court must ask whether there is any evidence that "tends to exclude the possibility that the defendants were pursuing these independent interests." *Id.*

In light of these principles, we agree with the Magistrate Judge's finding that the record does not support the existence of a conspiracy between Edison and Illinois Bell. As an initial matter, we reject the notion that a contractual division of authority automatically makes one party to the contract a co-conspirator in illegal activities undertaken by the other party. As the Magistrate Judge pointed out. "under plaintiff's argument, every delegation of contracting authority from principal [**20] to agent would give rise to antitrust liability as the agency agreement necessarily gives the agent the power to impose terms and conditions on third parties." Report, at p. 12. Ehredt has cited no authority that supports this extreme position, and this proposition contradicts the express mandate *Monsanto* that a "conscious commitment" must be made to the unlawful scheme. *Monsanto*, 465 U.S. at 764, 104 S. Ct. at 1471.

Without Ehredt's theory of conspiracy through contract, we are left to examine the record for evidence that Illinois Bell and Edison conspired to require contractors to use union labor. As the Magistrate Judge noted, the only so-called evidence of agreement to use union labor is that both Edison and Illinois Bell use union labor. Applying the standard for summary judgment enunciated by the Seventh Circuit, it is clear that Ehredt cannot even reach the threshold of "ambiguous" evidence of a conspiracy, as there is simply no evidence in the record suggesting Edison and Illinois Bell conspired, other than the similar union requirement. Where the defendant has come forward [*806] with a sufficient legitimate business [**21] justification, evidence of parallel business behavior, absent more, cannot defeat a motion for summary judgment. *American Floral Services, Inc. v. Florists' Transworld Delivery Ass'n*, 633 F. Supp. 201, 211 (N.D. Ill 1986). Here, Edison has explained that it requires its contractors to use unionized labor to improve internal relations. In the context of this case, this is sufficient to shift the burden back to Ehredt to produce "some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement." *Weit v. Continental Illinois Nat'l Bank & Trust Co.*, 641 F.2d 457, 462 (7th Cir. 1981) (citing *First National Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289-90, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1962); *Modern Home Inst. Inc. v. Hartford Accident and Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975)). We agree with the Magistrate Judge that Ehredt has not and cannot meet its burden.

Moreover, we note that a conspiracy between Edison and Illinois Bell to require contractors to use union labor [**22] makes no economic sense. From a financial standpoint, Edison and Illinois Bell would have all economic incentive *not* to use union labor because forcing contractors to use union labor would result in higher costs for the utilities. On the other hand, Edison's assertion that it uses union labor to improve internal labor relations is a feasible explanation. The compelling inference is that both Edison and Illinois Bell independently and legitimately arrived at their decisions to require union labor.

2. "Unilateral Conspiracy"

Ehredt next objects to the Magistrate Judge's conclusion that the URD contract between Edison and Ehredt may not form the requisite Section One "agreement." Essentially, Ehredt contends that the contract amounts to all illegal

agreement by two employers "fixing the wage at which one or both pay their employees." Plaintiff's Memorandum in Support of Objections, at p. 2. Ehredt argues that the URD contract provided that Ehredt must sign a collective bargaining agreement with a union, and in turn, the collective bargaining that he signed contained uniform wage provisions. Therefore, Ehredt contends, the existence of the collective bargaining condition in **[**23]** the URD contract defeats Edison's motion for summary judgment.

This novel position is not supported by any authority and is contrary to reason. As the Magistrate Judge correctly found, Edison's inclusion of the collective bargaining provision in its URD contracts was "for the legitimate and rational business purpose of maintaining a productive and agreeable relationship with its work force, which consisted primarily of union members." Report, at p. 17. By no rational interpretation can the collective bargaining provision be considered an illegal price-fixing condition. There is no reference whatsoever in the URD contract to an amount of wages Ehredt must pay his employees. Finally, as the Magistrate Judge observed, allowing a party to sue under the Sherman Act to recover damages "suffered as a result of another party's insistence on 'restrictive' terms in a contract . . . would make every contract illegal, as all contracts place restraints and restrictions on the parties who enter them." Report, at p. 15.

In sum, Ehredt has presented no evidence from which this court could find that a conspiracy or unlawful agreement existed between Edison and Illinois Bell or Edison and Ehredt. **[**24]** Thus, Ehredt's objections to the Magistrate Judge's recommendation on Count I are denied, and defendant's motion for summary judgment on Count I is granted.

3. Count II

Count II of Ehredt's Complaint alleges that Edison, Local 196, Local 336, the International, Trench-It and certain employees of Edison conspired to force Ehredt to contract with Local 196 for the purpose of forcing Ehredt out of the URD industry. Ehredt's theory of the case may be stated as follows. Certain Edison employees wanted Trench-It, and not Ehredt, to perform URD work for Edison because Trench-It provided kickbacks to the Edison employees and because seven Edison employees had family members employed by Trench-It. Edison, Edison employees, **[*807]** Trench-It and Local 196 conspired to force Ehredt to breach its contract. Edison employees, Local 196, and Trench-It pressured the International President until he expelled Ehredt from Local 336. After the expulsion from Local 336, Edison railroaded Ehredt into signing a collective bargaining agreement with Local 196 that contained ruinous economic terms. The object of the conspiracy was achieved when Ehredt was forced to discontinue working for Edison, and Trench-It **[**25]** was awarded the URD contract.

The Magistrate Judge recommended that defendant's motion for summary judgment on Count II be denied. The Report concluded that the record supported the rational inference that a conspiracy existed between certain Edison employees, Trench-It and Local 196. The Magistrate Judge further found that this inference was economically rational and more persuasive than the inference that each of the parties was acting independently and in furtherance of legitimate business goals.

Edison objects to the Magistrate Judge's recommendation on several grounds. First, Edison contends that central to Ehredt's claim is the contention that Edison conspired with its own employees, and that an antitrust conspiracy may not be based on such a conspiracy. Second, defendants argue that the Magistrate Judge improperly relied on no more than allegations of the Complaint to support its inferences that Edison acted improperly. Edison argues that Ehredt must bring forth additional evidence of the conspiracy to survive a summary judgment motion. Finally, Edison asserts that the Magistrate Judge's Report is filled with factual errors that destroy the inferences upon which the Report **[**26]** relies to find a basis for an anticompetitive conspiracy.

Essentially, Edison's objections boil down to the core contention that Ehredt has not brought forth any evidence implicating Edison in the conspiracy, other than that regarding Edison employees whose conduct is not chargeable

to Edison. Therefore, in order to thoroughly address Edison's objections, it is necessary to examine the specific evidence Ehredt avers and what rational inferences may be drawn from that evidence.²

(a) Local 196

Ehredt alleges that Local 196 conspired with Edison and Trench-It to force Ehredt to enter into a collective bargaining agreement with Local 196 for the purpose of driving Ehredt out of business. The record demonstrates that Local 196 complained to the International in January 1990 that Local 336 was **[**27]** representing employees that were in Local 196's jurisdiction. The record also states that two Ehredt employees suffered a beating at a remote worksite and that the assailants likely were associated with Local 196, especially in light of the solicitation on behalf of Local 196 moments after the attack. Ehredt also alleges that the business agent for Local 196 indicated to Ken Ehredt and Terry Counley that Ehredt was in the wrong union and that an Edison Board member was assisting Local 196 in getting rid of non-union contractors or getting them into Local 196.

Upon examination of this evidence, we find that the inference is unmistakable that Local 196 wanted Ehredt to affiliate with Local 196, and may have used coercive and abusive means to go about urging membership. The evidence, however, does not go beyond this inference. The only evidence connecting Local 196 to a concerted action with Edison and Trench-It is Eastwood's boasting about his Edison connection³ and the fact that Trench-It's president first complained to Eastwood about the jurisdictional question.

[28] [*808]** Applying the standard enunciated in *Market Force*, the conspiracy is ambiguous at best. Substantial evidentiary support exists in the record to infer that Local 196 was acting in its own, legitimate interest in obtaining Ehredt's membership into the union. On the other hand, there may be some evidence to indicate that Local 196 had some contact with either Trench-It or Edison in connection with the union jurisdiction dispute. Thus, drawing all reasonable inferences in favor of the plaintiff, it is possible, although remote, to say that ambiguous evidence of an antitrust conspiracy exists.

Defendants however, have rebutted the inference of Local 196's involvement in the conspiracy. It is economically senseless for Local 196 to go through all of the trouble questioning jurisdiction and harassing Ehredt into signing a collective bargaining agreement, only to watch the terms of the agreement force Ehredt out of business. Ehredt has identified no reason that would explain why Local 196 would undertake a campaign to recruit union members for the purpose of putting them out of work. In addition, Local 196 appears to have had a legitimate reason to contest Local 336's jurisdiction over **[**29]** Ehredt employees. See *Market Force, Inc.*, 906 F.2d at 1171 (evidence tending to exclude the possibility of legitimate, independent interests is needed to support ambiguous conspiracy evidence). Local 196 contended that Local 336 was not chartered for the type of work being performed by Ehredt employees, specifically the setting of pad transformer, pedestal and switching gear. Thus, the only rational inference supported by the record is that representatives from Local 196 pressured Ehredt into signing a collective bargaining agreement because Local 196 wanted Ehredt's membership and jurisdiction over all URD workers in the area.⁴ As

² We will address the evidence with respect to alleged co-conspirators Local 196, Edison, Edison employees and Trench-It. The record is devoid of any evidence implicating the International and Local 336 in the conspiracy.

³ We note, however, that although this evidence may evince a connection between Edison and Local 196, it does not show that Local 196 had any interest in forcing Ehredt out of business. In fact, Eastwood's statements could be more easily read to support the opposite proposition, because Eastwood stated that the Edison official was helping to get contractors into the union. Logically, a union does not recruit members only to effectuate their unemployment by its "ruinous" collective bargaining agreement.

⁴ The record reveals that Local 196's campaign to recruit Ehredt was undertaken at the urging of Daniel Rosenmayer, president of Trench-It. This fact does not help Ehredt's case. As stated above, Trench-It's and Local 196's goals in pressuring Ehredt to switch unions were distinct. Trench-It wanted Ehredt to pay higher wages so it could compete with Ehredt for the URD contract, while Local 196 wanted Ehredt's membership. In order to find an antitrust conspiracy with a labor union based on a collective bargaining agreement, the goal between co-conspirators must be a common one. *Mid-America Regional Bargaining Assn. v. Will County Carpenters Dist. Council*, 675 F.2d 881, 889 (7th Cir. 1982).

such, plaintiff has offered no rational evidence to infer that Local 196 entered into an unlawful agreement in restraint of trade.

[30] (b) Trench-It**

Unlike the evidence surrounding Local 196, it is not difficult to infer from the evidence that Trench-It would like to have seen Ehredt put out of business. With respect to Trench-It, the record shows that Daniel Rosenmayer, the president of Trench-It, instigated the union jurisdiction dispute surrounding Ehredt's Local 336 affiliation. Moreover, Eastwood, Local 196's business manager, testified that Rosenmayer related to him that Trench-It lost the 1990 URD contract to Ehredt because of Local 336's lower wages. We agree with the Magistrate Judge's finding that "it is difficult to imagine what legitimate business goals Rosenmayer could have had in initiating a union jurisdiction dispute over another company's employees - as president of a company, Rosenmayer's labor concerns should have extended no further than determining which union, if any, would represent *his* employees." Report, at p. 20.

This evidence, however, does not demonstrate an anti-trust violation. While Rosenmayer's tactics relating to the union jurisdiction dispute may not have been pristine, they cannot amount to a conspiracy in restraint of trade. The most that can be inferred from Rosenmayer's **[**31]** actions is that, with the intent to force Ehredt to repudiate its Edison contract, he contacted the unions to ensure that Local 336 was within its proper union-defined, jurisdictional boundaries. At this point, Rosenmayer had done nothing to violate the Sherman Act because no agreement was made between two entities to restrain trade. Subsequently, James Conway, International Vice President of the IBEW for its Sixth District, began a concerted effort to see that its jurisdictional restrictions were followed. At this point, still not actionable **[*809]** conspiracy is shown to exist because no agreement for an unlawful purpose has been shown. Subsequently, after the jurisdictional plea was initially rejected, both Conway and Rosenmayer complained vigorously to the International President to reverse himself and find that Local 336 had no jurisdiction over Ehredt's employees. On March 13, 1990, he, indeed, reversed his prior decision. He ultimately determined that Local 196 had jurisdiction over Ehredt's employees and that Local 336 did not and should refrain from entering into further collective bargaining agreements with Ehredt. Plaintiff does not allege that the ultimate decision regarding jurisdiction **[**32]** was made other than in good faith. As such, no agreement to achieve an unlawful purpose can be shown between Rosenmayer and/or Trench-It and the International. From all the evidence, the most that can be inferred is that Trench-It maliciously initiated a union jurisdiction dispute and that the union then, independently and lawfully, decided a union dispute through its intra-union procedures. We cannot conclude that a plaintiff demonstrates an antitrust violation by alleging that an entity participated in a union jurisdictional dispute regarding a competitor. As such, Ehredt's allegations do not amount to an anti-trust conspiracy between Trench-It and the International.

(c) Edison

Next, the Report concludes that Edison conspired to frustrate Ehredt's ability to compete with Trench-It through Edison's application of its union affiliation requirement. The Magistrate Judge noted that, at the outset of Edison's relationship with Ehredt, Edison required union affiliation, but not with any specific union. Later, Edison, through Daniel Shamblin, determined that the union must be AFL-CIO affiliated. Regarding this requirement, the Magistrate Judge found the following:

This application **[**33]** of the [union-affiliation] policy, which was inconsistent with both the original union requirement and Edison's policy toward other contractors, is unsupported by any legitimate business justification. Therefore, the inference that the policy was applied to Ehredt for the purpose of finishing Ehredt off in the URD market must be seen as the exclusive inference.

...

The fact that the Local 196 requirement apparently ran counter to Edison's economic self-interest in the URD contract market strengthens the circumstantial evidence . . . which suggests strongly that the policy was imposed as the *coup de grace* in a campaign organized by Edison, Trench-It and Local 196 to drive Ehredt out of the URD market.

Report, at pp. 27, 29. Edison objects to this characterization of its union requirement as an indicator of Edison's anticompetitive objective. Edison asserts that any inference of conspiracy is refuted by other evidence in the record.

We agree with Edison and sustain its objection. Any negative inference drawn from Edison's union requirement is refuted by stipulated evidence in the record and the lack of economic rationale for Edison to conspire. [HN6](#)⁵ Under the *Market Force* [**34] test, evidence of an antitrust agreement is considered ambiguous where the evidence "is . . . as consistent with the defendant's permissible independent interests as with an illegal conspiracy." [Market Force, Inc., 906 F.2d at 1171](#). It is far more likely that Edison refused the CIU for legitimate business reasons rather than as a calculated move designed to ultimately force Ehredt into breaching its contract.

First, as provided in the Statement of Uncontested Facts, Daniel Shamblin unilaterally made the decision to reject the CIU. His decision was based, as Ehredt has stipulated, on Shamblin's concern about work stoppages and difficulties with Edison's other unions. Final Pretrial Order -- Uncontested Facts, P 100. Shamblin made his decision without contacting or consulting anyone outside of Edison. *Id.* As such, Edison was acting independently when it made the decision to reject the CIU. We disagree with the Magistrate Judge's conclusion that the decision to reject a union not affiliated with the AFL-CIO was unsupported by any legitimate business [*810] justification. Preserving internal relations is an acceptable business justification.⁵

[**35] Even assuming that Ehredt's evidence of Edison's involvement rose to the level of ambiguity, this court could not rationally find that Edison participated in the conspiracy because such participation would have been economically senseless. Conspiring to force out the low-bid contractor to replace it with a higher cost contractor is contrary to Edison's economic self-interest. We disagree with the Magistrate Judge's finding that the inference of Edison's involvement is strengthened because such a requirement is against Edison's self-interest. To the contrary, [HN7](#)⁵ conduct not supported by any economic rationale is persuasive evidence against the finding of an antitrust conspiracy. See [Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 \(1986\)](#); [Eastman Kodak Co., 112 S. Ct. at 2083](#); [Market Force, Inc., 906 F.2d at 1171](#).

The record also supports, overwhelmingly, the overall fairness and unbiased attitude of Edison towards Ehredt. First, despite Hill's apparent ill will towards Ehredt [**36] from as early as November 1988, Edison not only extended Ehredt's first contract, but it also accepted Ehredt's choice of unions -- Local 336. Second, although Ehredt had ongoing concerns about neutrality of the bidding process, the procedure ultimately was conducted in a fair manner, and Ehredt won its second contract. Finally, when Ken Ehredt expressed his concerns to Janet Rudolph, she affirmed Edison's commitment to "stand by" the URD contract.

Therefore, with respect to Edison's involvement as a public utility in the antitrust conspiracy, we disagree with the Magistrate Judge that the record supports an inference suggesting Edison acted with anticompetitive intent. This determination, however, does not fully answer the question of Edison's liability in the antitrust context.

(d) Edison Employees

Although Edison argues that the conclusion that Edison was not involved in the alleged conspiracy should be the end of the argument, Ehredt maintains and the Magistrate Judge found that Edison employees participated in the conspiracy with Trench-It to oust Ehredt, and that Edison may be found liable under *antitrust law* for its employees' conduct. Before turning to the legal question [**37] of whether Edison can be found liable in an antitrust context for the actions of its employees, however, we turn to the record to determine if the inference that Edison employees conspired with Trench-It can be supported.

In particular, we agree with the Magistrate Judge's determination that the suspect behavior of Douglas Hill, the Edison supervisor, indicates that he wanted Trench-It and not Ehredt performing the URD contract. The evidence

⁵ In addition, we disagree that Local 196 was the only acceptable union to Edison. The remarks made by Douglas Hill concerning the desirability of Local 196 over Local 150 is not necessarily indicative of Edison's decision whether Local 150 would be an acceptable union. Shamblin, not Hill, made decisions regarding union affiliation. Furthermore, Local 336 had been accepted by Edison. The union itself, not Edison, determined that Ehredt must be represented by Local 196.

strongly suggests that Hill leaked Ehredt's bid strategy for the 1990 Crystal Lake District URD contract to Trench-It, as Trench-It's bid came in just below the figure Ken Ehredt had disclosed to Hill. Notably, when Ehredt won the contract after changing its bid strategy, Hill reacted by becoming furious and threatening Ehredt that lie would give the contract to Trench-It if Ehredt made "any wrong move."

Second, after Ehredt began working for Edison under the 1990 URD contract, Hill continued his attempts to sabotage Ehredt. Hill made repeated threats to pull Ehredt off the job, despite Ehredt's satisfactory performance. Ehredt's foreman, Terry Counley, testified that work assigned to Ehredt was diverted to Trench-It. When Ken Ehredt confronted **[**38]** Hill about the transfer of Ehredt's work to Trench-It, Hill retorted that "it's none of your damn business what I do with this work." Report, at p. 24.

Other evidence also implicates Hill in wrongdoing. Ken Ehredt testified that he **[*811]** approached Hill and Frank King, Edison's Crystal Lake District area foreman, about Edison's failure to pay Ehredt for completed work. King stated that Ehredt had "to pay the piper." Ehredt contends that this was a reference to paying kickbacks to Edison employees. In sum, we agree with the Magistrate Judge's conclusion:

Even if Hill's discussion with Ehredt concerning Ehredt's bid plans for the 1990 Crystal Lake Contract was held for the legitimate business reason of providing assistance to potential bidders, Hill's subsequent behavior - his prediction of Trench-It's winning the bid, repeated threats against Ehredt transfer of work to Trench-It, and the reference to kickbacks made by one of his subordinates in his presence - gives rise to the unmistakable inference that Hill discussed bids for the purpose of leaking bid information to Trench-It in order to deprive Ehredt of the opportunity to win a competitive bid. Such conduct is illegal per se under **[**39]** the Sherman Act. See [United States v. W.F. Brinkley & Son Constr. Co., 783 F.2d 1157, 1161 \(4th Cir. 1986\)](#).

Report, at pp. 25-26.

In addition, the actions of Hill and Trench-It, viewed together, raise a strong inference that Hill and Trench-It acted in concert for the common goal of forcing Ehredt to breach its contract. While Hill used intimidation and provided Trench-It with confidential information, Trench-It apparently agreed to receive and utilize bid information and to receive work wrongfully diverted from Ehredt. Ehredt has asserted adequate evidence in the record to support an inference that Edison employees had an incentive to see Trench-It, rather than Ehredt, perform the URD contract, whether because of a financial gain through kickbacks from Trench-It or a desire to further the interests of family members employed by Trench-It. This scenario is also consistent in a larger context: the actions of Hill and others are not consistent with Edison's economic interests, but are consistent with the interests of an employee whose own fortunes bear no immediate relation to the price paid by Edison for URD work. Thus, we find sufficient evidence **[**40]** from which to draw the inference that Hill and possibly other Edison employees⁶ conspired with Trench-It to put Ehredt out of business.

(e) Edison's Liability for its Employees' Actions

Edison, however, strenuously urges this court that such a conspiracy - between Edison employees and Trench-It - cannot form the basis of an antitrust conspiracy involving Edison. Edison avers that Hill was acting outside the scope of his authority, and to the extent that he acted unlawfully and in a manner injurious to Edison, Edison is not liable for his conduct. In contrast, the Magistrate Judge found that Hill was acting within the scope of his authority during the period in question, and was purporting to act on **[**41]** Edison's behalf. For these reasons, the Magistrate Judge found that Hill's actions could be charged to Edison. Report, at p. 26.

In [American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 \(1982\)](#), the Supreme Court held that [HN8](#) a corporation could be held liable in an antitrust action for actions undertaken by its agent under cloak of apparent authority. In ASME, a chairman of one of defendant's subcommittees issued an "unofficial response" condemning a competitor's product which ultimately led to the

⁶ The record also indicates that Frank King, Edison's area foreman for the Crystal Lake District, was likely a participant in the conspiracy. In the presence of Douglas Hill, King told Ken Ehredt that he had to "pay the piper." Ehredt alleges that this statement intimated to him that he had to pay a kickback.

competitor's failure. This action by the corporation's agent was asserted as a basis for imposing antitrust liability on the defendant non-profit corporation. The Court found that the corporation had cloaked the subcommittee official with apparent authority, and "permitted those agents to affect the destinies of businesses and thus gave them the power to frustrate competition in the marketplace." *Id. at 571*. The Court defined **HN9**¹⁵ apparent authority as "the power to affect the legal relations of another" [*812] person ****42** by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." *Id. at 566 n.5* (citing *Restatement (Second) of Agency § 8* (1957)). The Court rejected the defendant's argument that it should not be held liable unless its agents acted with intent to benefit the corporation, and stated that "whether [the agents] act in part to benefit [the principal] or solely to benefit themselves or their employers, [the] agents can have the same anticompetitive effects on the marketplace." *Id. at 574*. The Court also found that the defendant need not have ratified the agent's actions because imposing such a rule would allow a defendant corporation to avoid antitrust liability by ignoring its agents' conduct and would encourage corporations to do as little as possible to oversee its agents. *Id. at 573*.

Analogous cases have similarly concluded that **HN10**¹⁶ employees who affect decision-making authority on behalf of the corporation possess ****43** apparent authority or represent the corporation's intent. See *United States v. Basic Constr. Co*, 711 F.2d 570 (4th Cir. 1983) (holding that a corporation will be held criminally responsible for antitrust violations committed by employees who acted with apparent authority and for the benefit of the corporation; corporate intent is shown by actions and statements of employees in positions of authority or have apparent authority to make policy decisions). In addition, the Seventh Circuit has found that, under ASME, "principals are liable when their agents act with apparent authority and commit torts even if the principal derives no benefit from the agent's actions and even if the agent acts entirely for his own purposes." *United States v. One Parcel of Land*, 965 F.2d 311, 319 (7th Cir. 1992). According to that court, the relevant inquiry into apparent authority asks "whether to a third party the agent appears to be acting in the ordinary course of the business provided to him." *One Parcel of Land*, 965 F.2d at 319; but see *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129 (5th Cir. 1987) ****44** (refusing to hold defendant corporation responsible in antitrust for criminal acts of its employee which were outside of his authority).

We hold, therefore, that the allegations and evidence suffice to raise a genuine issue of material fact as to whether Hill acted with sufficient apparent authority in conspiring with Trench-It in order to hold Edison responsible for any anti-trust violations. Hill possessed authority to apportion work between Ehredt and Trench-It. As such, Hill possessed authority to "affect the destinies of businesses and . . . frustrate competition in the marketplace." See ASME, 456 U.S. at 571. The record demonstrates that an agreement may have existed between Hill and Trench-It to restrain trade. Furthermore, we hold that Ehredt may be able to show that Hill and other Edison employees were acting sufficiently within their apparent authority when diverting work to Trench-It and by-passing the competitive process to hold Edison, as principal, responsible under Section One of the Sherman Act. Edison's Motion for Summary Judgment on Count II is therefore denied insofar as the plaintiff alleges a conspiracy ****45** in restraint of trade between Edison and Trench-It. Plaintiff has alleged no other actionable conspiracy and, as such, all other allegations in Count II of agreements in restraint of trade are stricken.

4. Count IV

In Count IV, Ehredt alleges that Edison breached the 1990 Crystal Lake District URD contract. Ehredt sets forth two specific theories for the breach for which he seeks recovery. Ehredt first claims that Edison breached the URD contract when Hill diverted work to Trench-It. Second, Ehredt alleges that Edison breached the covenant of good faith and fair dealing by (1) refusing the CIU as an acceptable union replacement for Local 336 and (2) refusing to renegotiate the URD contract to reflect Ehredt's higher labor costs as a result of his agreement with Local 196.

(a) Ehredt's First Claim: Improper Diversion of Work

The Magistrate Judge recommended granting Edison's motion for summary judgment on the first theory of recovery. The [*813] Magistrate Judge found that Janet Rudolph's response to Ehredt that Edison would pay Ehredt for all URD work in the Crystal Lake District diverted to Trench-It in violation of the contract was dispositive evidence that Ehredt suffered ****46** no damages as a result of the alleged transfers of work to Trench-It. Report, at

pp. 31-32. Ehredt objects to this conclusion, arguing that Rudolph's response demonstrates rather than relieves Edison's liability. Ehredt has produced Trench-It's paid invoices for work done during the contract period in the Crystal Lake District, and asserts that Edison has not paid him for this work.

We agree with Ehredt and sustain its objection. Ehredt has stated a valid claim under this theory and Rudolph's promise to pay for diverted work only strengthens Ehredt's case. In its brief, Edison stated that "Edison fulfilled its obligations under its contract with plaintiff by *agreeing* to pay for all work plaintiff was contractually entitled to perform." Edison's Motion for Summary Judgment On Count IV of the Complaint, P 4 (emphasis added). We disagree. Edison will fulfill its obligations to Ehredt under the contract when it *pays* Ehredt for the work it was entitled to perform. Edison's contention that Rudolph's promise to fulfill Edison's contractual obligations entitles it to summary judgment is erroneous. Rudolph's promise to pay does nothing to alleviate the damages Ehredt has suffered as [**47] a result of the alleged breach of contract. Ehredt's objection to the Magistrate Judge's recommendation on the first claim of Count IV is sustained.

(b) Ehredt's Second Claim: Breach of Duty of Good Faith and Fair Dealing ⁷

The Magistrate Judge recommended granting summary judgment in favor of Edison on Ehredt's claim that Edison's failure to recognize the CIU breached the express terms of the URD contract. He recommended denying summary judgment on Ehredt's claim that the denial resulted in a breach of the covenant of good faith and fair dealing. Ehredt does not object to the Magistrate Judge's recommendation to grant summary judgment under the first theory of this claim. Therefore, this court accepts the [**48] recommendation as to the first theory of liability on Ehredt's second claim that Edison breached the URD contract by refusing to accept the CIU as an acceptable union.

With respect to the second part of this claim, the Magistrate Judge found that Edison had unilaterally changed its union requirement to include only those unions affiliated with AFL-CIO "to the discrete disadvantage of Ehredt." Report, at p.34. Because Edison was vested with discretion to approve of Ehredt's suggested union, the Magistrate Judge found that a question existed as to whether Edison exercised its discretion reasonably and with proper motive. Report, at p. 34.

Edison objects to the Magistrate Judge's recommendation, arguing that Edison's refusal of the CIU cannot possibly be considered in bad faith because Ehredt has stipulated in the Statement of Uncontested Facts that it was not. Paragraph 100 of this Statement states that Shamblin, Edison's manager responsible for rejecting the CIU, rejected the CIU "because Edison faced considerable risk of work stoppages and difficulties with its own unions and from building trades unions if its contractors employed members of the CIU." Ehredt has also stipulated that [**49] Shamblin's decision was made without contacting anyone outside of Edison. Therefore, Edison claims, the decision to reject the CIU cannot have been made in bad faith.

Because the record contains no evidence whatsoever contradicting the above stipulations, we agree with Edison and sustain its objection as to this claim. Ehredt does not implicate Shamblin in any other way as involved in wrongdoing, and there is simply no evidence supporting the contention that he was motivated by something other than legitimate business concerns. Thus, viewing the evidence in the light most favorable to Ehredt, [*814] we are unable to conclude that Edison's decision not to accept the CIU could have breached the covenant of good faith and fair dealing. This theory supporting the breach of contract claim is dismissed as having no basis in fact.

The Magistrate Judge next recommended denying Edison's motion for summary judgment on Ehredt's claim that Edison breached the duty of good faith and fair dealing by refusing to renegotiate the 1990 Crystal Lake Contract following Ehredt's signing with Local 196. The Magistrate Judge found that although parties are not required to renegotiate contracts when circumstances [**50] change, the facts of the case warranted departure from this rule. The Magistrate Judge found that the change in circumstances - Ehredt's higher cost - was the result of a unilateral decision by Edison. The Magistrate Judge stated that "if the covenant of good faith and fair dealing means anything

⁷ Edison states that "it appears that the Magistrate Judge's Report is also intended to be a ruling on Edison's Motion *in Limine* . . . to exclude legal theories." This is not the case; Edison's Motion *in Limine* was not decided by the Magistrate Judge and is still pending before the court.

at all, it means that a party cannot use its unilateral discretion to change the conditions underlying the contract and then refuse to renegotiate the terms of the contract. That is precisely what appears to have occurred in this case" Report, at p. 36.

Edison objects to the Magistrate Judge's determination, stating that the law does not recognize any "good faith" duty to renegotiate because of a change in circumstances. We agree with Edison that [HN11](#) [**51] Illinois law does not recognize a duty to renegotiate upon a change in circumstances. *USX Corp. v. International Minerals & Chemicals Corp.*, No. 1987 U.S. Dist. LEXIS 10914, *20 (N.D. Ill. 1987); see [*M.A.T.H. Inc. v. Housing Auth. of East St. Louis, 34 Ill. App. 3d 884, 341 N.E.2d 51, 53 \(5th Dist. 1976\)*](#) (no duty to renegotiate housing contract pursuant to the Illinois [**51] Housing Authorities Act due to an alleged change of circumstances); cf. [*Bane v. Ferguson, 707 F. Supp. 988, 994*](#) (N.D. Ill.) (finding that under Illinois law, duty of good faith and fair dealing does not apply in "overarching fashion, . . . but rather . . . limits one party's discretion where a contract gives the party that discretion"), aff'd, [*890 F.2d 11 \(7th Cir. 1989\)*](#). Edison was not bound to renegotiate the contract. Edison's objection to the Magistrate Judge's recommendation on the third claim of Count IV is sustained. Defendant Edison's motion for summary judgment is granted with respect to plaintiff's claims in Count IV of breach of the duty of good faith and fair dealing.

CONCLUSION

For the reasons stated above, the findings of the Magistrate Judge's Report and Recommendation are accepted in part and rejected in part. The defendant's motion for summary judgment on Count I of Plaintiff's First Amended Verified Complaint is granted. Count I is dismissed with prejudice. Defendant's motion for summary judgment on Count II is denied as to the allegations of an agreement in restraint of trade between Edison and [**52] Trench-It and granted as to all other allegations of conspiracy in restraint of trade. The defendant's motion for summary judgment on Count IV is denied as to Plaintiff's breach of contract claim and granted as to Plaintiff's breach of the covenant of good faith and fair dealing claim.

Date: APR 12 1994

JAMES H. ALESIA

United States District Judge

End of Document



Panache Broad. v. Richardson Elecs.

United States District Court for the Northern District of Illinois, Eastern Division

April 14, 1994, Decided ; April 15, 1994, Docketed

No. 90 C 6400

Reporter

1994 U.S. Dist. LEXIS 4830 *

PANACHE BROADCASTING OF PENNSYLVANIA, INC., et al., Plaintiffs, v. RICHARDSON ELECTRONICS, LTD., and VARIAN ASSOCIATES, INC., in their own right and as successors in interest to Varian Supply Company, a joint venture, Defendants.

Subsequent History: [*1] Adopting Order of September 29, 1995, Reported at: [1995 U.S. Dist. LEXIS 14339](#).

Core Terms

tubes, electron, manufactured, conspiracy, acquisitions, prices, allegations, motion to dismiss, anticompetitive, customers, Sherman Act, joint venture, sales, amended complaint, eliminated, rebuilders, Memorandum, horizontal, dud, distributor, effects, Clayton Act, carcasses, products, argues, competitors, collection, antitrust, relevant market, power tube

LexisNexis® Headnotes

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

[HN1](#) [down arrow] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Horizontal agreements are those among parties at the same level of the distribution chain.

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

Business & Corporate Law > Joint Ventures > Formation

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

Business & Corporate Law > Joint Ventures > General Overview

[HN2](#) [down arrow] Cartels & Horizontal Restraints, Price Fixing

Although horizontal restraints do allow a finding of per se unreasonableness for a broader array of practices than vertical restraints, an allegation of a horizontal restraint does not, by itself, mandate a finding of a per se violation.

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

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

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

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

Attempted monopolization, as opposed to conspiracy to monopolize, involves individual action such as predatory pricing.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

HN4 [] **Types of Contracts, Joint Contracts**

A joint venture may constitute a violation of [§ 7](#) of the Clayton Act, [15 U.S.C.S. § 18](#).

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN5 [] **Motions to Dismiss, Failure to State Claim**

For purposes of deciding a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), the facts alleged in the complaint are presumed true.

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

HN6 [] **Regulated Practices, Market Definition**

A "market" is the set of suppliers to which a set of customers can turn for their requirements of a particular product at existing or slightly higher prices. A particular supplier's "market share" is that supplier's fraction of output. The higher the aggregate market share of a small number of suppliers, the easier it is for them to increase prices above the competitive level without losing so much business to other suppliers as to make the price increase unprofitable; this is the power called market power.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

[HN7](#)[] Motions to Dismiss, Failure to State Claim

A complaint may be dismissed for failure to state a claim only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. In considering a motion to dismiss, the court accepts all well-pleaded allegations as true and draws all reasonable inferences in the light most favorable to the plaintiff.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[HN8](#)[] Pleadings, Rule Application & Interpretation

Documents attached to the complaint as exhibits are part of the complaint for all purposes. [Fed. R. Civ. P. 10\(c\)](#).

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

[HN9](#)[] Antitrust & Trade Law, Sherman Act

The Supreme Court has cautioned that summary procedures should be used sparingly in antitrust cases because of the complexities involved. If a claim under the antitrust laws has been adequately set forth in the complaint, the highly factual and subjective questions of intent and purpose should be resolved after discovery and trial. The Supreme Court has observed that in antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted sparingly. In such instances, a complaint that does not contain a welter of factual detail, but does set out a possible theory as to how the plaintiff's anticompetitive conduct violated [§§ 1 or 2](#) of the Sherman Act, [15 U.S.C.S. §§ 1, 2](#), may survive a motion to dismiss. The prevailing standard of antitrust pleading is liberal, requiring only facts sufficient to at least inform the defendant of whether the claim is based on the per se or rule of reason theory.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

[**HN10**](#) [blue document icon] Sherman Act, Claims

To show a violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), plaintiff must establish a contract, conspiracy or combination intended to restrain competition and which actually has an anticompetitive effect. The statute was intended to prohibit only "unreasonable" restraints of trade, however. A court must examine the legality of any allegedly anticompetitive conduct by determining the consequences of the conduct in the affected market. The absence of a sufficient allegation of anticompetitive effects in a Sherman Act complaint is generally fatal to the existence of the cause of action. The only exception to the requirement of an allegation of anticompetitive effects occurs in a narrow category of cases that are deemed per se antitrust violations. In such cases, the kind of conduct complained of is so destructive to free competition that its deleterious effects are conclusively presumed. Examples of such per se offenses include price-fixing arrangements, group boycotts, market allocations, and certain types of tying arrangements.

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

[**HN11**](#) [blue document icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

An agreement to allocate customers or territories between competitors at the same level of the market structure is generally considered a per se violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), whether the parties split a market within which both do business, or whether the parties reserve one market for one party and another for the other.

Antitrust & Trade Law > Sherman Act > 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

[**HN12**](#) [blue document icon] Antitrust & Trade Law, Sherman Act

Interbrand competition is the competition among the manufacturers of the same generic product, and is the primary concern of [antitrust law](#). The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors wholesale or retail of the product of a particular manufacturer.

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

HN13 Regulated Industries, Higher Education & Professional Associations

Plaintiffs are required to plead anticompetitive effects for claims brought under the rule of reason, but not for claims alleging per se violations of the Sherman Act.

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

HN14 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Agreements to negotiate for other arrangements in the future are not themselves unlawful. Such provisions contemplating future conduct do not themselves make out a per se claim.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN15 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

An antitrust complaint must plead factual detail only sufficient enough to inform the defendant of whether the claim is based on a per se or rule of reason theory.

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

Civil Procedure > Trials > Bench Trials

HN16 Regulated Practices, Market Definition

The definition of a relevant market is a question of fact.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN17 Antitrust & Trade Law, Sherman Act

A co-conspirator who joins a conspiracy with knowledge of what has gone on before, and with an intent to pursue the same objectives, may be charged in the antitrust context with the preceding acts of its co-conspirators.

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

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

Assuming that defendant's conduct is not presumptively illegal, the sufficiency of plaintiff's allegations must be analyzed under the rule of reason test of anticompetitive effects. It is important, in a "rule of reason" analysis, to assess defendant's market power both before and after the allegedly anticompetitive restraint is imposed.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN19 [L] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

Market allocation is unlawful regardless of whether competitors have competed previously between themselves in the same market.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN20 [L] **Regulated Industries, Sports**

The antitrust laws proscribe competitor agreements to restrict output, just as they proscribe agreements to restrict price.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN21 [L] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

A showing of previous competition between parties to an agreement is not a required element of a claim that the agreement is unlawful.

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

Civil Procedure > Trials > Bench Trials

HN22 [L] **Regulated Practices, Market Definition**

The definition of a relevant market is a question of fact reserved for later proceedings on the merits.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

[**HN23**](#) [blue icon] Motions to Dismiss, Failure to State Claim

On a motion to dismiss for failure to state a claim, the court is bound to draw all inferences in the light most favorable to plaintiffs.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN24**](#) [blue icon] Regulated Industries, Sports

The inability of plaintiff to explain how the alleged conduct by defendant restrained trade in a discernible market is fatal to his claim under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

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

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

[**HN25**](#) [blue icon] Relevant Market, Geographic Market Definition

The relevant geographic market defines the area where goods are bought and sold, not where goods are made.

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

[**HN26**](#) [blue icon] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Horizontal price-fixing agreements need not include an explicit agreement on prices to be charged or that one party has the right to be consulted about the other's prices.

Antitrust & Trade Law > Clayton Act > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

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

[**HN27**](#) [blue icon] Antitrust & Trade Law, Clayton Act

Section 5(a) of the Clayton Act, [15 U.S.C.S. § 16\(a\)](#), affords private plaintiffs the right to use guilty pleas as all-purpose admissions in civil antitrust actions as prima facie evidence of an antitrust violation.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN28 [blue icon] Motions to Dismiss, Failure to State Claim

For the purposes of a motion to dismiss for failure to state a claim, and pending a ruling on class certification, plaintiff's class allegations must be presumed true.

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

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

Evidence > Inferences & Presumptions > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN29 [blue icon] Conspiracy to Monopolize, Sherman Act

To establish a conspiracy to monopolize under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), a plaintiff must show (1) a conspiracy; (2) overt acts in furtherance of the conspiracy; (3) an effect upon a substantial amount of interstate commerce; and (4) the existence of specific intent to monopolize in a relevant market. Proof of conspiracy to monopolize does not require plaintiff to show an exercise of monopolistic power or that defendants actually excluded existing or potential competitors.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN30 [blue icon] Sherman Act, Claims

The element of anticompetitive effect required for claimed violations of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), corresponds with that required for claimed violations of [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#). Furthermore, direct purchasers of defendants' products need only allege that they paid inflated prices as a result of defendants' alleged anticompetitive conduct to sufficiently allege antitrust injury.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

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

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN31 [💡] **Involuntary Dismissals, Failure to State Claims**

Plaintiffs' factual allegations must be presumed true and must be viewed in the light most favorable to plaintiffs in considering a motion to dismiss for failure to state a claim.

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

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

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 > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

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

International Trade Law > General Overview

HN32 [💡] **Conspiracy to Monopolize, Elements**

A restraint-of-trade claim under § 1 of the Sherman Act, 15 U.S.C.S. § 1, and a conspiracy-to-monopolize claim under § 2 of the Sherman Act, 15 U.S.C.S. § 2, require the same threshold showing: the existence of an agreement to restrain trade. Any conspiracy to monopolize is also a conspiracy to restrain trade in violation of § 1 of the Sherman Act, 15 U.S.C.S. § 1. After plaintiff makes a showing of such an agreement, then § 2 of the Sherman Act, 15 U.S.C.S. § 2, requires plaintiff to show that the conspiracy was formed with the specific intent to obtain or maintain a monopoly. It is this additional requirement that imposes a greater burden on a plaintiff claiming a § 2 conspiracy-to-monopolize violation than on one claiming a restraint-of-trade violation under § 1 of the Sherman Act, 15 U.S.C.S. § 1.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > General Overview

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN33 [💡] **Clayton Act, Claims**

Direct purchasers of a product, the price of which has been inflated by anticompetitive conduct, have standing to sue under the antitrust laws. Plaintiffs have standing to sue under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), if their alleged injury occurred within the market endangered by defendants' allegedly anticompetitive conduct.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > Formation

Mergers & Acquisitions Law > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

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

Mergers & Acquisitions Law > Merger Guidelines

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

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Mergers & Acquisitions Law > Antitrust > Market Definition

[HN34](#) [+] Types of Contracts, Joint Contracts

Section 7 of the Clayton Act, [15 U.S.C.S. § 18](#), forbids mergers and other acquisitions that are reasonably likely to substantially lessen competition in the relevant market. A plaintiff need not show a certainty or even a high probability of lessened competition, but only a tendency toward monopoly or reduced competition in the present and in the future. In assessing the probability of a substantial lessening of competition, the relevant criteria include (1) the market power of the joint venturers; (2) the relationship of their lines of commerce; (3) the reasons underlying the joint venture; and (4) the joint venture's line of commerce and its relationship to that of its parents. Assuming that the relevant market is properly defined, an acquisition which reduces the number of significant sellers in a market already highly concentrated is unlawful under [§ 7](#) of the Clayton Act, [15 U.S.C.S. § 18](#). Courts must resolve doubts against the acquisition.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

[HN35](#) [+] Antitrust & Trade Law, Sherman Act

Judicial interpretations of the standards for judging the lawfulness of transactions under [§ 7](#) of the Clayton Act, [15 U.S.C.S. § 15](#), and under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), have "converged."

[Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts](#)

[Business & Corporate Law > Joint Ventures > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > Joint Ventures](#)

[Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview](#)

HN36 [] [Types of Contracts, Joint Contracts](#)

The Supreme Court has described the basic implications of any joint venture on competition in these terms: The joint venture is the chosen competitive instrument of two or more corporations previously acting independently and usually competitively with one another. The result is a "triumvirate of associated corporations." If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce. Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture's market.

[Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts](#)

[Business & Corporate Law > Joint Ventures > Formation](#)

[Mergers & Acquisitions Law > Antitrust > Joint Ventures](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview](#)

[Business & Corporate Law > Joint Ventures > General Overview](#)

HN37 [] [Types of Contracts, Joint Contracts](#)

The complete list of the Supreme Court's recommended criteria in assessing the probability of a substantial lessening of competition includes: the number and power of the competitors in the relevant market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessity for its existence; the joint venture's line of commerce and the relationship thereof to that of its parents; the adaptability of its line of commerce to non-competitive practices; the potential power of the joint venture in the relevant market; an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through the joint venture; the effect, in the event of the occurrence, of the other joint venturer's potential competition; and such other factors as might indicate potential risk to competition in the relevant market.

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Evidence > Inferences & Presumptions > General Overview](#)

HN38[**Regulated Practices, Market Definition**

Immense market shares strengthen the inference of market power and create a presumption of illegality. For example, three firms with a combined market share of 90 percent can raise prices with relatively little fear that the fringe of competitors will be able to defeat the attempt by expanding their own output.

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN39[**Antitrust & Trade Law, Clayton Act**

There is no support in the Seventh Circuit for the argument that [§ 7](#) of the Clayton Act, [15 U.S.C.S. § 18](#), applies only to those ventures that constitute true acquisitions of stock or assets.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Merger Guidelines

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

Mergers & Acquisitions Law > Antitrust > General Overview

HN40[**Types of Contracts, Joint Contracts**

The test of [§ 7](#) of the Clayton Act, [15 U.S.C.S. § 18](#), is the effect of the acquisitions at issue, not the size of the joint venture's holdings. The effect on competition is determined in part by the nature of the relevant market and by the nearness of the absorbed company to it.

Judges: PALLMEYER; NORDBERG

Opinion by: REBECCA R. PALLMEYER

Opinion

REPORT AND RECOMMENDATION

Plaintiff Panache Broadcasting of Pennsylvania, Inc. ("Panache"), a purchaser of electron power tubes,¹ [*2] instituted this civil antitrust action for treble damages and injunctive relief on behalf of a proposed class of purchasers who bought electron power tubes from one or both Defendant corporations between February 26, 1986 and the present. Plaintiffs allege that in entering into certain agreements, Defendants "engaged in a far-reaching scheme to eliminate competition, allocate markets and production, increase prices, and control the market for electron power tubes in the United States" in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and section 7 of the Clayton Act, 15 U.S.C. § 18. (Complaint II PP 3-4.) Defendant Varian Associates, Inc. ("Varian") now moves to dismiss Plaintiffs' Second Amended Complaint as against itself in its entirety.²

The Parties

Plaintiff Panache is a Delaware corporation with its principal place of business in Bala Cynwyd, Pennsylvania. (Complaint II P 10.) Panache, which owns and operates a Philadelphia radio station known as WWDB, has purchased electron power tubes as an end-user for use in WWDB's broadcasting equipment. (*Id.*) Plaintiff V-R Electronics, Inc. ("V-R") is a Pennsylvania corporation with its principal place of business in Upper Darby, Pennsylvania. (*Id.* P 12.) Until recently, V-R designed, manufactured, repaired ultrasonic welding equipment containing electron power tubes; V-R has purchased electron power tubes from Defendant REL for use in its welding products. (*Id.*) Plaintiff Wood Radio Limited Partnership ("Wood") is a Delaware limited partnership with its principal place of business in Grand Rapids, Michigan. (*Id.* P 13.) Wood owns and operates two radio stations -- WOOD-AM and WOOD-FM [*3] -- and has purchased electron power tubes from Defendant REL as an end user for use in its broadcasting equipment. (*Id.*)³

Defendant Varian is a Delaware corporation with its principal place of business in Palo Alto, California. (Complaint II P 16.) Varian is the world's largest manufacturer of electron power tubes. (*Id.* P 17.) Varian also distributes these tubes. (*Id.* P 36.) Defendant Richardson Electronics, Ltd. ("REL"), originally incorporated under the laws of Illinois, subsequently reorganized and reincorporated under the laws of Delaware. (*Id.* P 14.) REL has its principal place of business in LaFox, Illinois. (*Id.*) REL is the dominant distributor in the United States for most worldwide manufacturers of electron power tubes, including those manufactured by Varian. [*4] (*Id.* P 15.) REL is also a manufacturer of electron power tubes. (*Id.* P 36.)

On February 26, 1986, Varian and REL formed Varian Supply Company ("VASCO"), a fifty-fifty joint venture. (*Id.* P 18.) Plaintiffs' original complaint named VASCO as a defendant in this action. (*Id.* P 18.) In April 1992, however, VASCO was dissolved pursuant to court order. See *United States v. Varian Assocs., Inc.*, No. 91 C 6211 (N.D. Ill. April 14, 1992) (Lindberg, J.) (granting plaintiff's motion for final judgment). Varian and REL are successors of VASCO's assets and liabilities. (Complaint II P 18.)

PROCEDURAL BACKGROUND

The procedural background of this case is fully described in this court's earlier Report and Recommendation ("R & R") issued on August 28, 1992, and will not be repeated here. In that R & R, this court considered Varian's and VASCO's motion to dismiss Plaintiffs' First Amended Complaint. In Count I of that three-count complaint, Plaintiffs charged that Defendants, in forming VASCO and entering into a joint venture agreement ("JV Agreement"),⁴

¹ Electron power tubes are vacuum or gas-filled electron tubes capable of handling at least 25 watts of power; they are used to amplify and control electrical signals in a variety of industrial, communication and scientific applications such as heating, dielectric sealing, and radio and television broadcasting where current or voltage amplification is required. (Second Amended Complaint (hereafter "Complaint II") P 2.)

² Defendant Richardson Electronics, Ltd. has also moved to dismiss Plaintiffs' Second Amended Complaint. That motion was not referred to this court and is not addressed in this Report.

³ Plaintiffs' Second Amended Complaint also lists as a named plaintiff CCA Electronics, Inc. ("CCA"), a Georgia manufacturer of radio transmitters containing electron power tubes. CCA has subsequently withdrawn from the suit.

engaged in a contract, combination and conspiracy which unreasonably restrained trade and commerce in electron power [*5] tubes in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs alleged that Defendants maintained prices for electron power tubes at artificially high levels and substantially reduced actual and potential competition in the manufacture, distribution and sale of electron power tubes. In Count II, Plaintiffs asserted that Defendants combined and conspired to monopolize, and attempted to monopolize, the market for electron power tubes, in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. In Count III, Plaintiffs alleged that Defendant REL's acquisition of stock and assets of other corporations substantially reduced competition in the market for electron power tubes, in violation of § 7 of the Clayton Act, 15 U.S.C. § 18.

[*6] In its earlier R & R, this court concluded that Plaintiffs had failed to allege a violation of the antitrust laws, and recommended dismissal of all three counts of Plaintiffs' First Amended Complaint as against Varian and VASCO. As to Count I, the Report concluded that Plaintiffs failed to allege that the VASCO joint venture constituted a horizontal⁵ combination between Varian and REL, or that it resulted in the impermissible allocation of markets or fixing of prices. Likewise, the Report determined that Plaintiffs failed to plead a claim of attempted monopolization or of conspiracy to monopolize in Count II. Finally, the Report concluded that the allegations in Count III focused on REL's -- not Varian's -- acquisition activity, and that Plaintiffs had not adequately alleged that the VASCO joint venture substantially lessened competition, so as to withstand Varian and VASCO's motion to dismiss Plaintiffs' § 7 Clayton Act claims.

[*7] On February 16, 1993, Judge Nordberg issued a memorandum opinion, affirming this court's R & R in part and reversing in part. Panache Broadcasting of Pennsylvania, Inc. v. Richardson Electronics, Ltd., 1993-1 Trade Cas. (CCH) P 70,169, at 69,815 (N.D. Ill. Feb. 17, 1993). As a preliminary matter, Judge Nordberg found that because Plaintiffs alleged that the VASCO joint venture established an agreement between Varian and REL as distributors,⁶ Plaintiffs had successfully pleaded a horizontal combination. *Id.* at 69,817. Judge Nordberg noted, however, that HN2[↑] although horizontal restraints do allow a finding of *per se* unreasonableness for a broader array of practices than vertical restraints, an allegation of a horizontal restraint does not, by itself, mandate a finding of a *per se* violation. *Id.* He concluded that Plaintiffs had not adequately pleaded a *per se* claim of price fixing, and dismissed that claim with prejudice. *Id.* Although the pricing formula contained in Article VIII(4) of the JV Agreement set internal joint venture prices at profitable levels, he reasoned that the formula did not set public sale prices and so could [*8] not be characterized as resale price maintenance. *Id.*

In contrast, Judge Nordberg found that Article VIII(11) of the JV agreement could be construed as an impermissible allocation of customers. Judge Nordberg noted, however, that the agreement did not allocate customers of tubes manufactured by Richardson, leaving a "big hole" in Plaintiffs' claim of illegal customer allocation. Still, drawing all inferences in favor of Plaintiffs, he concluded that their claim of illegal customer allocation should be dismissed without prejudice and that Plaintiffs should be allowed leave to amend their allegations on this claim. *Id.* at 69,818.

As for pressing both claims of price-fixing and customer allocation [*9] under a rule of reason analysis, Judge Nordberg held that Plaintiffs' allegations -- that REL and Varian dominated the market; that they maintained artificially high prices for electron power tubes; and that REL removed most of the competition in the power tube market -- were sufficient. *Id.* He suggested that additional allegations of market share and barriers to entry would have been helpful in showing Defendants' market power. *Id.*

⁴ Plaintiffs attached to Complaint II copies of the VASCO Joint Venture Agreement (Exhibit A) and a related Distributor-Requirements Agreement executed between Varian and REL (Exhibit B). Pursuant to FED. R. CIV. P. 10(c), both agreements are made a part of the complaint.

⁵ As explained in the August 28, 1992 Report and Recommendation, (R & R, at 9), HN1[↑] horizontal agreements are those among parties at the same level of the distribution chain.

⁶ Although the complaint only alleged that Varian is a manufacturer of electron power tubes, Judge Nordberg found that the language of the joint venture agreement clearly implied that Varian is a distributor as well. Panache, 1993-1 Trade Cas. (CCH), at 69,816 n.1.

Judge Nordberg also dismissed Count II as to the claim of conspiracy to monopolize without prejudice, and as to a claim of attempted monopolization by VASCO and Varian with prejudice. *Id.* Agreeing with this court that [HN3](#)[↑] attempted monopolization, as opposed to conspiracy to monopolize, involves individual action such as predatory pricing, Judge Nordberg found it unlikely that Plaintiffs could show any facts to demonstrate that Varian or VASCO had engaged in such conduct. *Id.* With respect to Plaintiffs' claim of *conspiracy* to monopolize, however, he allowed Plaintiffs the benefit of repleading to cure their failure to allege (1) that Defendants' conspiracy had a substantial effect on interstate commerce and (2) with particularity the [\[*10\]](#) existence of the conspiracy and overt acts in furtherance of it. *Id.*

Finally, Judge Nordberg dismissed Count III without prejudice on the grounds that, although [HN4](#)[↑] a joint venture may constitute a violation of [§ 7](#) of the Clayton Act, Plaintiffs had not sufficiently alleged the anticompetitive effects in the relevant market of the joint venture in the present case. *Id.* The district court granted Plaintiffs a final opportunity to file an amended complaint and to include in it additional claims raised in Plaintiffs' brief in response to Defendants' motion to dismiss. *Id.*

On March 17, 1993, Panache, joined by three additional proposed class representatives, filed a Second Amended Complaint ("Complaint II"). That complaint named Varian and REL as defendants and contained eight counts. Five of these counts (Counts I, II, V, VI and VIII) pertain to Defendant Varian. On May 7, 1993, Varian moved to dismiss Complaint II in its entirety as against itself. For reasons discussed below, Varian's motion to dismiss Plaintiffs' Second Amended Complaint should be granted in part and denied in part.

FACTUAL BACKGROUND

[HN5](#)[↑] For purposes of Defendants' motion to dismiss under [FED. R. CIV. \[\[*11\]\(#\)\] P. 12\(b\)\(6\)](#), the facts alleged in Plaintiffs' Second Amended Complaint, summarized below, are presumed true.

Relevant Market and Defendants' Market Shares⁷

[\[*12\]](#) As the world's largest manufacturer of electron power tubes, (Complaint II P 17), Defendant Varian enjoys annual U.S. sales of such tubes in excess of \$ 50 million. (*Id.* P 35.) Varian is either the only producer, or one of two producers, of many types and sizes of electron power tubes. (*Id.*) In addition, as Judge Nordberg observed, the language of the JV Agreement clearly implies that Varian also distributes these tubes. *Panache*, 1993-1 Trade Cas. (CCH), at 69,816 n.1. Defendant REL is either the dominant or only United States distributor for virtually all domestic and foreign manufacturers of electron power tubes, and a major manufacturer of such tubes itself. (Complaint P 36.) REL's annual sales of electron power tubes in the United States, including those it distributes for Varian, exceed \$ 65 million. (*Id.*) Defendants Varian and REL sell electron power tubes to original equipment manufacturers ("OEMs"), such as Plaintiff V-R, as well as to end-users who need replacement tubes, such as Plaintiffs Panache and Wood. (Complaint II P 34.) Approximately 85% of all sales of electron power tubes in the United States and, correspondingly, of [\[*13\]](#) all sales of such tubes by Varian and REL, are for replacement use rather than for installation in new equipment. (*Id.*)

According to Plaintiffs, the relevant *product* market for this action is electron power tubes, (*Id.* P 31), and the relevant *geographic* market in this case is the United States, its territories, and the District of Columbia. (*Id.* P 30.) Varian and REL "have accounted for at least 70% of electron power tube sales in the United States" between

⁷ [HN6](#)[↑] A "market" is the set of suppliers to which a set of customers can turn for their requirements of a particular product at existing or slightly higher prices. *F.T.C. v. Elders Grain*, 868 F.2d at 907 (citing [Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 5 L. Ed. 2d 580, 81 S. Ct. 623 \(1961\)](#)). A particular supplier's "market share" is that supplier's fraction of output. [United States v. Rockford Memorial Corp., 898 F.2d 1278, 1283](#) (7th Cir.), cert. denied, **498 U.S. 920, 112 L. Ed. 2d 249, 111 S. Ct. 295 (1990)**. "The higher the aggregate market share of a small number of suppliers, the easier it is for them to increase prices above the competitive level without losing so much business to other suppliers as to make the price increase unprofitable; this is the power we call market power." *Id.*

February 26, 1986 and the present. (*Id.* P 31.) In addition, Varian and REL accounted for over 85% of the United States sales of those electron power tubes which are socket-interchangeable with the tubes sold by Varian and REL during the same period of time. (*Id.* P 32.)

The VASCO Agreements

On February 26, 1986, Varian and REL entered into the JV Agreement that granted VASCO exclusive worldwide rights to distribute electron power tubes manufactured by Varian. These rights were subject to certain exclusions, however. (Complaint II P 40.) Article VIII(11) of the JV Agreement, for example, provided that Varian would continue to make direct sales to all OEMs and worldwide governments and their agencies, [*14] to the extent that orders from such customers exceeded \$ 5,000; REL, through VASCO, would become the exclusive distributor for all products to all customers for orders of \$ 5,000 or less. (JV Agreement, Ex. A to Complaint II, art. VIII P 11.)

Pursuant to the JV Agreement, REL, Varian, and VASCO entered into a Distributor-Requirements Agreement ("DR Agreement") that made VASCO the exclusive distributor of certain electron power tubes and accessories manufactured by Varian's Eimac division. (*Id.* P 41; see DR Agreement, Ex. B to Complaint II.) The DR Agreement also made VASCO the exclusive supplier of REL for such products and provided that REL would purchase all of its requirements for such products from VASCO. (Complaint P 41.)

Article VIII(4) of the JV Agreement sets forth a method for calculating prices to be paid and cash payments to be made by VASCO to Varian for products sold pursuant to the DR Agreement, as well as by REL for products purchased from VASCO pursuant to the DR Agreement. (JV Agreement, Ex. A to Complaint II, Art. VIII(4).) The pricing formula in the DR Agreement appears to allow REL to pay VASCO, and VASCO to pay Varian, Varian's "Factory Cost" plus a cash [*15] amount, equivalent to "newly negotiated" and "confidential" distributor prices, so as to maintain Varian's profit margins at then-current levels. (See *Id.*) In the event that Varian's share of gross profits -- defined in article VIII(4)(a)(ii) of the DR Agreement as net sales, minus factory cost, minus VASCO's expenses -- exceeded such levels, Article VIII(4)(d) allowed for an adjustment of prices to equalize Varian's and REL's share of gross profits. (*Id.* P VIII(4)(d).)

Pursuant to the JV Agreement, Varian and REL established a Joint Venture Management Committee ("JV Management Committee"), composed of senior executives of Varian and REL, to manage VASCO. (Complaint II P 43.) VASCO did not own any facilities for manufacturing, production, warehousing or distribution; it operated out of REL's offices and its sole customer was REL. (*Id.* P 42.) Nor did VASCO have any marketing or sales force or employees of its own; employees of Varian and REL, paid directly by Varian and REL, conducted all of VASCO's activities. (*Id.*)

The Program to Purchase Surplus Tubes and Tube Carcasses

Pursuant to Article VIII(8) of the JV Agreement, REL agreed to "conduct an aggressive [*16] program" to purchase all surplus Varian Eimac tubes at prices and on terms set by the JV Management Committee, and, upon request by Varian, to purchase tube carcasses.⁸ (Complaint II PP 46, 47; JV Agreement, Ex. A to Complaint II PP VIII(8) and (9).)

Beginning in or around early 1988, Varian and REL began to collect surplus tubes and tube carcasses, and "raised the prices of electron power tube lines involved in the collection program." (Complaint II P 52.) The JV Management Committee regularly conferred about the collection program, which ultimately became the focus of an investigation by the U.S. Department of Justice during or after 1989. (*Id.* P 53.) On November 25, 1991, [*17] Varian pleaded guilty to a felony violation of § 1 of the Sherman Act, 15 U.S.C. § 1, pursuant to a criminal Information charging Varian with unlawfully agreeing with REL to "adopt a program to collect rebuildable tube carcasses to keep them from being rebuilt by tube rebuilders for the purpose of raising prices of rebuilt power grid tubes and new tubes of

⁸ Surplus tubes and tube carcasses are "broken, damaged, defective, spent, used, or obsolete electron power tubes" of the types that can be rebuilt or reconditioned and then sold in competition with new electron power tubes. (Complaint II P 50.) Such surplus tubes and carcasses are sometimes referred to as "dud tubes" or simply "duds."

the same types." *United States v. Varian Assocs., Inc.*, No. 91 C 6211 (N.D. Ill. April 14, 1992) (Lindberg, J.) (granting plaintiff's motion for final judgment).⁹

The Acquisitions

During and after 1981, REL acquired the businesses, [*18] or their assets or exclusive marketing agreements, of thirteen enterprises. (Complaint II P 56.) Relevant to the present motion, these included the acquisition of the inventory and equipment of Westinghouse Electric Corporation ("Westinghouse") in March 1988, of Amperex Electronic Corporation ("Amperex") in July 1988, and of the transmitting tube product lines of N.V. Philips ("Philips") in August 1988. (*Id.* PP 56(j),(l) and (m).) All three involved Defendant Varian. (*Id.* P 57.) The following year, Varian acquired Machlett Laboratories ("Machlett"), a division of Raytheon, Inc., one of the only significant remaining U.S. manufacturers of new electron power tubes. (*Id.* P 59.)

On or about August 13, 1986, VASCO entered into exclusive marketing agreements with primary Chinese manufacturers and exporters of electron power tubes,¹⁰ according to Plaintiffs, "to head off the potential manufacture in China and sale within the U.S. of low-priced electron power tubes socket-compatible with tubes manufactured by Varian." (*Id.* P 58.) In addition, during 1989, Varian acquired Machlett Laboratories, allegedly "one of the only significant remaining U.S. manufacturers of electron [*19] power tubes." (*Id.* P 59.)

DISCUSSION

Standard of Review

HN7 A complaint may be dismissed for failure to state a claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957) (footnote omitted). In considering a motion to dismiss, the court accepts all well-pleaded allegations as true and draws all reasonable inferences in the light most favorable to the plaintiff. *National Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 616 (7th Cir. 1992), rev'd on other grounds, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994). [*20] **HN8** Documents attached to the complaint as exhibits are part of the complaint for all purposes. *FED. R. CIV. P. 10(c)*.

As our own Court of Appeals has observed, **HN9** "The Supreme Court has cautioned that summary procedures should be used sparingly in antitrust cases because of the complexities involved." *Scheidler*, 968 F.2d at 617 (citing *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)). *Poller* and its progeny, the *Scheidler* court noted, "simply stand for the proposition that, if a claim under the antitrust laws has been adequately set forth in the complaint, the highly factual and subjective questions of intent and purpose should be resolved after discovery and trial." *Id.* (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) and *Havco of America, Inc. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1980), cert. denied, 470 U.S. 1054 (1985)). The Supreme Court has observed that in antitrust cases, "where 'the proof is [*21] largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted sparingly." *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976) (quoting *Poller*, 368 U.S. at 473). In such instances, a complaint that does "not contain a welter of factual detail," but does set out a possible theory as to how the plaintiff's anticompetitive conduct violated §§ 1 or 2 of the Sherman Act, may survive a motion to dismiss. *Nelson v. Monroe Regional Medical Ctr.*, 925 F.2d 1555, 1567 n.7 (7th Cir.), cert. denied, 116 L. Ed. 2d 236, 112 S. Ct. 285 (1991); see also *Appraisers Coalition v. Appraisal Inst.*, No. 93-C-913, 1993 WL 326671, at *2-3 (N.D. Ill. Aug. 23, 1993) (citing *Seglin v. Esau*, 769 F.2d 1274, 1279

⁹ On October 7, 1991, REL had pleaded guilty to a felony violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, pursuant to a criminal Information charging REL with the same conduct as that charged Varian. *United States v. Varian Assocs., Inc.*, No. 91 C 6211, (N.D. Ill. April 14, 1992) (Lindberg, J.) (granting plaintiffs motion for final judgment).

¹⁰ Specifically, VASCO entered into agreements with Jing Guang Electrical Manufactory, China National Electronics Export and Import Corporation, and China National Electronics Devices Corporation. (Complaint P 58).

(*7th Cir. 1985*) and other cases) (prevailing standard of antitrust pleading is liberal, requiring only facts sufficient to at least [*22] inform defendant of whether claim is based on *per se* or rule of reason theory).

I. Sherman Act § 1 Claims

HN10[↑] To show a violation of § 1 of the Sherman Act, plaintiff must establish "a contract, conspiracy or combination intended to restrain competition and which actually has an anticompetitive effect." *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 396 (7th Cir. 1993) (citations omitted), cert. denied, 127 L. Ed. 2d 375, 114 S. Ct. 1054 (1994). The statute was intended to prohibit only "unreasonable" restraints of trade, however. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988). A court must examine the legality of any allegedly anticompetitive conduct by determining the consequences of the conduct in the affected market. *Havoco*, 626 F.2d at 554. The absence of a sufficient allegation of anticompetitive effects in a Sherman Act complaint is generally fatal to the existence of the cause of action. *Id.* The only [*23] exception to the requirement of an allegation of anticompetitive effects occurs in a narrow category of cases that are deemed *per se* antitrust violations. In such cases, the kind of conduct complained of is so destructive to free competition that its deleterious effects are conclusively presumed. *Id. at 555*. Examples of such *per se* offenses include price-fixing arrangements, group boycotts, market allocations, and certain types of tying arrangements. *Id.* (citations omitted).

A. Count I: Overall Conspiracy

In Count I of their complaint, Plaintiffs allege that the JV Agreement between Varian and REL constituted a contract, combination, and conspiracy in unreasonable restraint of trade and commerce in electron power tubes in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. (Complaint II P 63.) Plaintiffs make a number of specific allegations in this count. First, Plaintiffs assert that Varian and REL conspired to allocate markets and for electron power tubes, (*id. P 64(a)*), resulting in the reduction or elimination of "actual and potential horizontal competition between Varian and REL" as distributors [*24] of, and manufacturers of, electron power tubes. (*Id. PP 64(b)*, 64(c).) Second, Plaintiffs allege that Varian and REL reduced or eliminated actual and potential competition from other manufacturers and distributors of electron power tubes through a concerted effort to acquire competitors and competitors' inventory and equipment and to discontinue REL's manufacture of acquired tube lines that would have competed with Varian tubes. (*Id. P 64(d)*.) Third, Plaintiffs allege that Varian and REL reduced or eliminated competition from electron power tube rebuilders through an aggressive campaign to acquire surplus tubes and tube carcasses, thereby depriving tube rebuilders of raw material needed to manufacture and sell rebuilt tubes in competition with Defendants. (*Id. P 64(e)*.) Fourth, Plaintiffs allege that Varian and REL reduced or eliminated competition from electron power tubes manufactured in the People's Republic of China. (*Id. P 64(f)*.) Finally, Plaintiffs allege that Defendants fixed, maintained and stabilized prices at artificially high levels, (*id. P 64(g)*), affecting a substantial amount of interstate commerce, (*id. P 65*), and injuring Plaintiffs and other [*25] members of the proposed class by charging them substantially higher prices for electron power tubes than they would have had to pay absent the § 1 violations. (*Id. P 66*.)

1. Effects of Customer Allocation on Horizontal Competition

In the First Amended Complaint, Plaintiffs' challenge to the lawfulness of alleged horizontal restraints on distribution was separate from their allegations of unlawful customer allocation. As Defendants note, Plaintiffs' Second Amended Complaint now addresses customer allocation and horizontal distribution claims in a single allegation. Specifically, Plaintiffs now allege that Varian's and REL's conspiracy to allocate markets and customers reduced actual and potential horizontal competition between them as distributors and manufacturers of electron power tubes. (Complaint II PP 64(a)-(c).)

HN11[↑] An agreement to allocate customers or territories between competitors at the same level of the market structure is generally considered a *per se* violation of § 1 of the Sherman Act, whether the parties split a market within which both do business, or whether the parties reserve one market for one party and another for the other. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50, 112 L. Ed. 2d 349, 111 S. Ct. 401 (1990) [*26] (citing United

States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972)). Noting that Plaintiffs had alleged that REL manufactures most of the tubes sold in the United States, Judge Nordberg earlier concluded that Article VIII(11)¹¹ [*27] and Exhibit A¹² of the JV Agreement, invoked by Plaintiffs in their First Amended Complaint to support a claim of a *per se* violation of § 1, do not indicate the existence of an agreement to allocate REL-manufactured tubes. Panache, 1993-1 Trade Cas. (CCH) P 70,169, at 69,817-18. Nevertheless, Judge Nordberg suggested that this pleading deficiency could be cured.

Varian now contends that Plaintiffs' Second Amended Complaint fails to cure this deficiency. Varian assumes that to plead a restraint on interbrand competition at the distribution level, Plaintiffs must plead at a minimum that Varian customers were prevented from purchasing from Richardson brands manufactured by Richardson or other firms. Varian asserts that Plaintiffs have failed to do so and, consequently, have failed to allege facts sufficient to establish the elimination of interbrand¹³ competition at the distribution level. (Reply Memorandum of Defendant Varian Associates, Inc. in Response to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss the Second Amended Complaint Pursuant to Rule 12(b)(6) (hereinafter "Varian's Reply"), at 4.)

[*28] Notably, HN13 Plaintiffs are required to plead anticompetitive effects for claims brought under the rule of reason, but not for claims alleging *per se* violations of the Sherman Act. Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081, 1087-88 (7th Cir. 1992) (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107-08 (7th Cir. 1984)). Thus, Plaintiffs are not required to plead anticompetitive effects in order to cure the prior pleading deficiency in the *per se* claim of unlawful customer allocation. As Judge Nordberg earlier noted, *per se* claims require the pleading of an agreement affecting the allocation of REL-manufactured tubes; the anticompetitive effects of such an agreement are presumed.

Plaintiffs urge that their Second Amended Complaint has cured the deficiency in their earlier pleaded claim of a *per se* violation of § 1 of the Sherman Act. Although Plaintiffs do not expressly allege in the Second Amended Complaint that REL agreed not to sell to any set of customers tubes manufactured by firms other than Varian, Plaintiffs have alleged the existence of "(1) agreements by REL not to compete [*29] with Varian in the sale of electron power tubes to 'restricted' Varian accounts, and (2) agreements by Varian not to sell its products directly in competition with REL at other accounts." (Complaint II P 44(a).) Specifically, Plaintiffs urge that Articles VIII(6) and VIII(7) of the JV Agreement impose restraints on REL's distributor relationships with manufacturers other than Varian, and thus could prevent customers from purchasing from REL products manufactured by firms other than Varian. (Complaint II P 44; JV Agreement, Ex. A to Complaint II, Art. VIII(6), (7).) Notably, however, the restraints challenged by Plaintiff here are imposed not by the JV Agreement itself, but by conduct of REL and VASCO that the Agreement only anticipates.¹⁴ Article VIII(6), for example, provides in part for the joint venture to enter into a

¹¹ Article VIII(11) of the JV Agreement provides:

So long as JV is a distributor of products pursuant to the [DR] Agreement attached hereto, Varian shall continue to (a) make direct sales of Products to local, state and federal governmental entities as provided in Exhibit A attached hereto and subject to the \$ 5000 order limitation provided in Exhibit A, (b) continue and expand its OEM [original equipment manufacturer] arrangements as provided in Exhibit A attached hereto and subject to the \$ 5000 order limitation provided in Exhibit A, and (c) continue to make direct internal sales of Products to Varian divisions and subsidiaries.

¹² Exhibit A describes markets and products covered by the JV agreement.

¹³ The Supreme Court has explained the distinction between interbrand and intrabrand competition in these terms:

HN12 Interbrand competition is the competition among the manufacturers of the same generic product -- television sets in this case -- and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors -- wholesale or retail -- of the product of a particular manufacturer.

distributor relationship with manufacturers other than Varian "as soon as possible alter the execution" of the JV Agreement. (JV Agreement, Ex. A to Complaint II, Art. VIII(6).) Article VIII(7), similarly, states that the joint venture "anticipates entering into transactions and arrangements" with other tube manufacturers. (*Id.* Art. VIII(7).) Plaintiffs [*30] apparently contend that provisions such as these -- HN14¹⁴ agreements to negotiate for other arrangement in the future -- are themselves unlawful. Plaintiffs have not cited case law or other authority demonstrating that such provisions in fact result in unlawful customer allocations; this court is unwilling to conclude that provisions contemplating future conduct themselves make out a *per se* claim.

[*31] In his earlier opinion, however, Judge Nordberg did determine that, analyzed under the rule of reason, Plaintiffs have successfully pleaded a horizontal combination and sufficiently alleged Defendants' market power, that is, that Plaintiffs had adequately pleaded anticompetitive effects. *Panache Broadcasting, 1993-1 Trade Cas. (CCH) P 70,169, at 69,817*. Moreover, in their Second Amended Complaint, Plaintiffs have alleged such effects expressly, stating that Defendants' agreement to allocate customers for electron power tubes did result in the reduction or elimination of "actual and potential horizontal competition between Varian and REL" as distributors of such tubes (Complaint II PP 64(b), 64(c)), and did injure Plaintiffs and other members of the proposed class by resulting in substantially higher prices for electron power tubes than they would have had to pay absent the § 1 violations.¹⁵ (*Id.* P 66.) Plaintiffs' complaint does, therefore, sufficiently allege a scheme of illegal customer allocation under the rule of reason. Varian's motion to dismiss Plaintiffs' claim of illegal customer allocation should therefore be denied.

[*32] 2. Restraint of Competition in Manufacturing

Varian next asserts that Plaintiffs fail to plead the existence of an agreement between the parties to restrict manufacturing competition. Specifically, Varian contends that Plaintiffs alleged neither that Varian and REL manufactured competing products, nor that the JV Agreement, or any other agreement, eliminated manufacturing competition between Varian and REL. (Memorandum of Defendant Varian Associates, Inc. in Support of its Motion to Dismiss the Second Amended Complaint Pursuant to Rule 12(b)(6) (hereinafter "Varian's Memorandum"), at 5.) According to Varian, although Varian and REL both manufacture electron power tubes, Plaintiffs failed to allege that

¹⁴ Articles VIII(6) and VIII(7) provide:

6. As soon as possible after the execution of this Agreement, JV [VASCO Joint Venture] shall enter into distributor relationships with manufacturers other than Varian and pursuant to agreements approved by the JV Management Committee for the distribution in Territories of Other Products. Other Products sold to JV pursuant to such agreements shall be purchased at prices which are subject to approval by the JV Management Committee.

7. In addition to the activities described in this Article VIII, JV anticipates entering into transactions and arrangements with tube manufacturers other than Varian to purchase or to have manufactured piece parts and subassemblies for power grid tubes or finished goods with Varian supervision. In this regard and as a condition to the close of this Agreement, Richardson shall assign to the JV any and all rights and any and all obligations it has or may have in the future with manufacturers from the People's Republic of China ("PRC") as well as elsewhere to purchase such piece parts, subassemblies or finished goods . . . and the JV shall then sell to Varian such piece parts and subassemblies

(emphasis added). "Other Products" is defined in Exhibit B to the JV Agreement as "all products that are interchangeable with those products that Varian has granted exclusive distribution rights to."

¹⁵ Plaintiffs insist, more precisely in their opposition brief than in their Second Amended Complaint, that:

REL and Varian agreed not only that REL would not sell Varian tubes to "restricted" accounts, but that REL would not sell any other competing tubes to those restricted accounts. In turn, Varian bound itself to sell electron power tubes and any competing tubes made by other manufacturers only to VASCO, which in turn sold only to REL, thereby protecting REL from any possible competition from Varian in the sale of both Varian and non-Varian tubes. REL also assigned all of its current and future distribution and supply agreements with other manufacturers to VASCO, further assuring Varian control over any possible competition from REL's distribution of those competitors' lines.

(Plaintiffs' Memorandum in Opposition to Defendant Varian Associates' Motion to Dismiss the Second Amended Complaint (hereinafter "Plaintiffs' Opposition"), at 9-10) (footnote omitted) (citing Complaint II P 44; JV Agreement, Art. VIII PP 6-7.)

REL made a single tube type that competed with a tube type manufactured by Varian. (*Id.* at 5-6.) Citing [National Collegiate Athletic Association \(NCAA\) v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 111, 82 L. Ed. 2d 70, 104 S. Ct. 2948 \(1984\)](#), Varian contends that Plaintiffs must, at a minimum, plead that Varian and REL each manufactured some tubes that were reasonable substitutes for some tubes manufactured [*33] by the other. (Varian's Reply, at 6.)

Plaintiffs insist that they have satisfied pleading requirements with their allegation in P 37 of Complaint II that Varian and REL were "horizontal competitors in the manufacture" of electron power tubes. (Plaintiffs' Opposition, at 11.) Moreover, they contend that their general allegations in paragraphs 44(b) and 44(d) that the agreements between Varian and REL and the subsequent conduct of the VASCO joint venture reduced or eliminated manufacturing competition, and in paragraphs 56-61 that specified acquisitions reduced manufacturing competition, satisfy notice pleading requirements under [Rule 8\(a\)](#). (*Id.*)

Plaintiffs' allegations do minimally meet the liberal pleading standards for complex antitrust complaints. See [Nelson v. Monroe Regional Medical Ctr., 925 F.2d 1555, 1567 n.7](#) (7th Cir.), *cert. denied*, 116 L. Ed. 2d 236, 112 S. Ct. 285 (1991); [Appraisers Coalition v. Appraisal Inst., No. 93- C-913, 1993 WL 326671](#), at *2-3 (N.D. Ill. Aug. 23, 1993) (Nordberg, J.) ([HN15](#) antitrust complaint must plead factual detail only sufficient enough to inform defendant of whether [*34] claim is based on *per se* or rule of reason theory). If Varian can demonstrate that its tubes and REL-manufactured tubes are not reasonable substitutes for each other, then Varian very well may be entitled to summary judgment on this issue.¹⁶ At this stage, however, Varian's motion to dismiss Plaintiffs' [§ 1](#) allegations of restraint on manufacturing competition should be denied.

3. The Alleged Acquisition Activity

Plaintiffs allege that [*35] the agreement between REL and Varian reduced or eliminated competition through Defendants' program of "acquiring competitors, competitors' inventory, and competitors' equipment." Of the thirteen acquisitions described in Complaint II, Plaintiffs allege that all acquisitions made after February 1986, particularly Amperex (P 57), Philips (P 57), Westinghouse (P 57), and Machlett (P 59), were made in collusion with Varian to advance the conspiracy to "dominate, control, allocate, and monopolize" the tube market. Varian insists that in allegations concerning only three of these acquisitions -- Amperex, Philips and Machlett -- do Plaintiffs plead any type of involvement by Varian.¹⁷ (Varian's Memorandum, at 6.)

***36] a. Amperex Acquisition**

Plaintiffs allege that around July 1988, REL bought Amperex Electronic Corporation, a manufacturer of electron power tubes, and that shortly thereafter, by agreement with Varian, REL discontinued producing Amperex electron power tubes that were socket-interchangeable with tubes produced by Varian. (Complaint II P 56(1).) Plaintiffs further allege that this transaction (1) made Varian the dominant or only manufacturer of these tubes to OEMs in the U.S. and (2) made REL the dominant or only seller of these tubes in the U.S. for replacement uses. (*Id.*)

Varian argues that Plaintiffs have failed to state a [§ 1](#) Sherman Act claim against Varian because they have pleaded neither that Varian participated in making the acquisition, nor that, at the time of the alleged post-acquisition agreement, REL and Varian competed in the manufacture of Amperex tube types. Thus, Varian

¹⁶ Moreover, Varian's reliance on *NCAA* is misplaced. At issue in that case was the relevance of reasonably substitutable products to a definition of the relevant market and a determination of the defendant's market power. *NCAA*, 468 U.S. at 111. Because [HN16](#) the definition of a relevant market is a question of fact, *Clark Equip. Co. v. Lift Parts Mfg. Co.*, No. 82- C-4585, [1990 WL 8690](#), at *5 (N.D. Ill. Jan. 22, 1990), the Court's discussion of the correct test for its determination is of limited utility here.

¹⁷ Although Varian only considered the Amperex, Philips, and Machlett acquisitions in its motion in this regard, Plaintiffs also attributed the acquisition of Westinghouse Electric Corporation ("Westinghouse") directly to Varian's alleged collusive behavior. (Complaint II P 57; *but see id. P 56(j)* (where Plaintiffs omit reference to Varian).) The court will refrain from any discussion of Westinghouse as the parties' briefs make no reference to this particular acquisition.

concludes, Plaintiffs have failed to plead the facts to show that the alleged post-acquisition agreement caused some actual "anticompetitive effect," (Varian's Reply, at 10), a necessary component of a non-*per se* § 1 claim.

Plaintiffs urge that the fact that REL did the actual acquiring [*37] is irrelevant to a claim of conspiracy under § 1 of the Sherman Act as each conspirator is jointly and severally liable for the actions of each co-conspirator in furtherance of a conspiracy. (Plaintiffs' Opposition, at 12-13 (citing *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1257 (7th Cir. 1980)).) Although Plaintiffs' argument is not dispositive of Varian's § 1 liability, it is well recognized that [HN17](#) [↑] a co-conspirator who joins a conspiracy with knowledge of what has gone on before and with an intent to pursue the same objectives may be charged, in the antitrust context, with the preceding acts of its co-conspirators. *Havoco*, 626 F.2d at 554 (citations omitted). Thus, Plaintiffs' allegations are sufficient as to this element.

Varian also asserts, however, that because Plaintiffs failed to plead that REL had ever manufactured a single Amperex tube type prior to the alleged agreement, Plaintiffs' Second Amended Complaint fails to allege that Varian and REL were actual competitors in the manufacture of Amperex tube types. This failure, according to Varian, means that any agreement between Varian and REL concerning production [*38] of the Amperex line cannot constitute a horizontal restraint.

[HN18](#) [↑] Assuming that Varian's conduct is not presumptively illegal, the sufficiency of Plaintiffs' allegations must be analyzed under the rule of reason test of anticompetitive effects. *Havoco*, 626 F.2d at 556. In *Havoco*, a case cited by Varian, the Seventh Circuit noted the importance, in a "rule of reason" analysis, of assessing defendant's market power both before and after the allegedly anticompetitive restraint was imposed. *Havoco*, 626 F.2d at 554, 557 (citing *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1948)).

Plaintiffs here allege not only that Defendants enjoyed significant market power, but also that shortly after REL bought Amperex in July 1988, Varian and REL agreed that REL would discontinue producing Amperex tube types that were socket-interchangeable with tubes produced by Varian. (Complaint II P 56(1).) This transaction, Plaintiffs contend, rendered Varian the dominant or only manufacturer and seller of these tubes to OEMs within the United [*39] States. (*Id.*) Plaintiffs have adequately alleged Varian's gain in market power after Varian's allegedly anticompetitive behavior occurred.

Moreover, citing *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 112 L. Ed. 2d 349, 111 S. Ct. 401 (1990), Plaintiffs insist that an agreement to refrain from competitive production constitutes, "at a minimum, an unlawful restraint of potential competition." (Plaintiffs' Opposition, at 13.) The *Palmer* Court held that a market allocation agreement between competing providers of bar review courses on its face illegally restrained trade in violation of § 1. 498 U.S. at 403. Significantly, the *Palmer* Court concluded that [HN19](#) [↑] market allocation is unlawful regardless of whether competitors had competed previously between themselves in the same market, as they had in that case. *Id.* Furthermore, as Plaintiffs point out, [HN20](#) [↑] the antitrust laws proscribe competitor agreements to restrict output, just as they proscribe agreements to restrict price. (Plaintiffs' Opposition, at 13) (citing *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992)).) [*40]

Nonetheless, Varian asserts, without citing supporting law, that in order to plead facts showing that the alleged post-acquisition agreement caused some actual anticompetitive effect, Plaintiffs must allege that "the Amperex tubes were an economically viable product line (i.e., a line that could have been manufactured profitably) that Richardson would have elected to manufacture but for the alleged agreement with Varian." (Varian's Reply, at 10.) Because Plaintiffs make no such allegations, Varian concludes that they fail to plead that the competitive state of the market would have been different had REL and Varian not entered into the alleged agreement. (*Id.*)

The Supreme Court's reasoning in *Palmer*, as well as the Seventh Circuit's reasoning in *Havoco*, are at odds with Varian's argument. Under *Palmer*, [HN21](#) [↑] a showing of previous competition between parties to an agreement is not a required element of a claim that the agreement is unlawful. A showing that Amperex tubes were not an economically viable product line may be fatal to Plaintiffs' ability to prove their claim. These contentions are not, however, fatal to Plaintiffs' ability to state a cognizable [*41] claim for relief. Because Plaintiffs have sufficiently pleaded the potential anticompetitive effects of Varian's agreement with REL with respect to the Amperex

acquisition, (Complaint II PP 56(d), 57, 64(d)(e)), Varian's motion to dismiss this sub-count of Plaintiffs' § 1 claim should be denied.

b. Philips and Machlett Acquisitions

Plaintiffs assert that in August 1988, REL acquired certain manufacturing assets and exclusive worldwide marketing rights for Philips' transmitting tube power lines, including certain electron power tube lines, then subsequently sold certain of these assets and product lines to Varian. (Complaint II P 56(m).) REL's actions concerning Philips, allege Plaintiffs, were in collusion with Varian. (*Id. P 57.*) Plaintiffs also allege that Varian's 1989 acquisition of Machlett, one of the remaining U.S. manufacturers of new electron tubes, was made in furtherance of Defendants' joint plan to control the U.S. market for such tubes. (*Id. P 59.*)

Varian first argues that these allegations fail to state violations of § 1 of the Sherman Act because Plaintiffs did not plead that either Philips or Machlett made any of the types of electron power tubes that [*42] were socket-interchangeable with any of the tube types made by Varian. (Varian's Memorandum, at 8.) Accordingly, Varian argues, its purchase, through these acquisitions, of the capability of making products that did not compete with products it previously manufactured does not state a § 1 violation. (*Id.*)

Plaintiffs insist that because they alleged a broad conspiracy by Defendants to control the U.S. market for all electron power tubes, their general allegation that the Philips and Machlett acquisitions contributed to the overall illegal concentration of production and sales of such tubes satisfies the limited burdens of notice pleading under by FED. R. CIV. P. 8(a). (Plaintiffs' Opposition, at 14.) In addition, Plaintiffs characterize Varian's argument as a premature attack on their identification of "electron power tubes" as the relevant product market for this action. (*Id.* at 14 n.6.)

Indeed, as Varian acknowledges, (Varian's Reply, at 11), HN22[] the definition of a relevant market is a question of fact reserved for later proceedings on the merits. Clark Equip. Co., 1990 WL 8690, at *5. Nonetheless, Varian insists that by alleging that "electron power tubes have no substitutes [*43] in equipment designed to use such tubes," (Complaint II P 34), Plaintiffs themselves have acknowledged that "there are no substitutes for a tube designed to fit a particular socket" and thus demarcate a narrower relevant product market than one comprising all electron power tubes. (Varian's Reply, at 11.)

HN23[] Drawing all inferences in the light most favorable to Plaintiffs, as the court is bound to do on a motion to dismiss for failure to state a claim, this court cannot agree with Varian's narrow interpretation of Plaintiffs' allegation. The more reasonable construction of Plaintiffs allegation in P 34 of Complaint II is that electron power tubes are not practically interchangeable with other products, or, in other words, electron power tubes comprise a relevant product market because customers cannot substitute other products for such tubes.

Varian's second argument is that in light of Plaintiffs' allegation that 85% of the sales of electron power tubes by Varian and REL are for replacement rather than for installation in new equipment, (Complaint II P 34), it is these sales that give Defendants the market power that makes the Philips and Machlett acquisitions illegal. (Varian's [*44] Reply, at 11-12.) Thus, Varian argues, the acquisitions of Philips and Machlett "can reduce competition in the relevant market only if plaintiffs plead that those firms make tubes that fit in the same socket and hence are found by buyers to be satisfactory substitutes for one another." (*Id.*) Simply stated, Varian insists that Plaintiffs have failed to plead specifically that Phillips and Machlett made tubes for replacement use rather than for installation in new equipment.

Varian's argument is unconvincing. Although Plaintiffs have alleged that 85% of all sales of electron power tubes in the United States, and correspondingly of sales by Varian and REL, are for replacement rather than for installation in new equipment, (Complaint II P 34), this does not render Varian powerless in the market of tubes made for installation in new equipment. Plaintiffs have also alleged that Varian and REL together "have accounted for at least 70% of electron power tube sales in the United States" during the relevant period. (Complaint II P 31.) To this court's understanding, these two allegations, read together, simply mean that while Defendants' sales of tubes for installation in new equipment [*45] comprised only 15% of their total sales, they still enjoyed a 70% market share

in such sales in the U.S. during the relevant period. Hence, Plaintiffs have adequately alleged Defendants' market power in the market for tubes for installation in new equipment. Varian's motion to dismiss their claim should therefore be denied, regardless of whether Phillips and Machlett made tubes for replacement use or for installation in new equipment.

c. Chinese Tubes

Plaintiffs allege that Varian and REL reduced or eliminated competition from the People's Republic of China ("China") when VASCO entered into exclusive marketing agreements with primary PRC manufacturers and exporters of electron power tubes, "to head off the potential manufacture in China and sale within the U.S. of low-priced electron power tubes socket-compatible with tubes manufactured by Varian." (Complaint II PP 58, 64(f).) Plaintiffs further allege that pursuant to these agreements, REL and Varian diverted Chinese production away from such tubes and toward the manufacture of other tubes. (*Id. P 58.*)

According to Varian, this allegation fails to state a § 1 Sherman Act claim because Plaintiffs have not sufficiently alleged [*46] the nature of the anticompetitive effects that would have resulted from Defendants' actions. (Varian's Memorandum, at 9.) Varian relies on a Seventh Circuit case, Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081, 1089 (7th Cir. 1992), to illustrate Plaintiffs' need to plead how the exclusive marketing agreements diverted Chinese production away from low-priced tubes that were socket-compatible with Varian tube types. The Seventh Circuit in Banks held that HN24[¹] the inability of plaintiff, a college football player, to explain how the NCAA's no-draft rule restrained trade in a discernible market was fatal to his § 1 claim. Id. at 1093-94. At best, concluded the court, plaintiff "merely attempted to frame his complaint in antitrust language." Id. at 1093.

Plaintiffs do not respond to Varian's argument. Instead, they repeat their allegation -- that the conspiracy between REL and Varian "kept the major Chinese power tube factories from underselling Varian tubes in the United States" - - but fail, once again, to explain how this was accomplished. (Plaintiffs' Opposition, at 15.) As in [*47] Banks, Plaintiffs' failure to allege how Varian and/or REL obtained control over production decisions in China, as well as their failure to adequately allege the anticompetitive effects that would have resulted from Defendants's actions, is fatal to their § 1 claim as it concerns marketing agreements with Chinese agencies.¹⁸ Varian's motion to dismiss this claim should be granted.

[*48] 4. Price Fixing

In paragraph 64(g) of their Complaint, Plaintiffs predicate their § 1 claim against Varian and REL on the Defendants' "fixing, maintaining, and stabilizing of prices for electron power tubes at artificially high levels." Varian argues that this allegation is foreclosed by Judge Nordberg's dismissal of Plaintiffs' price-fixing claim in the First Amended Complaint. (Varian's Memorandum, at 10.) Plaintiffs suggest that while Judge Nordberg's decision bars them from stating a *per se* claim for resale price maintenance on the basis of the pricing formula in the VASCO JV Agreement, it does not bar them from stating a claim of horizontal collusion between REL and Varian to affect prices. (Plaintiffs' Opposition, at 16-17.)

It is true that although Judge Nordberg explicitly recognized that the VASCO joint venture established a horizontal agreement between Varian and REL as distributors, he nonetheless analyzed the pricing formula contained in Article VIII(4) of the agreement only as a vertical arrangement to set prices between Varian as manufacturer and REL as distributor. Panache Broadcasting, 1993-1 Trade Cas. (CCH) P 70,169, at 69,817. [*49] It was on the basis of this reading of the pricing formula that Judge Nordberg rejected Plaintiffs' *per se* claim of price fixing. He rejected

¹⁸ Although the court accepts Varian's first argument -- that Plaintiffs' allegation concerning the exclusive marketing arrangements with Chinese agencies is insufficient for the purpose of pleading -- Varian's second is less persuasive. Varian contends that under Plaintiffs' definition of the relevant geographic market as the United States, "there would have been no competition from foreign imports anyway." (Varian's Memorandum, at 10). As Plaintiffs point out, however, HN25[¹] the relevant geographic market defines the area where goods are bought and sold, *not* where goods are made. Thus, foreign-made electron power tubes exported to the United States are part of the U.S. geographic market.

the claim on the ground that the formula could not be characterized as resale price maintenance because it did not set prices for public sales. *Id.* Therefore, urges Varian, Judge Nordberg's decision forecloses the possibility that Plaintiffs can re-allege a *per se* price-fixing claim on the basis of the JV Agreement; since Plaintiffs have not pleaded any other price-fixing agreement between Varian and REL, argues Varian, Plaintiffs' claim of a *per se* price-fixing violation should be dismissed.

HN26 [↑] Horizontal price-fixing agreements need not include "explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices," however. *Denny's Marina v. Renfro Prods., Inc.*, 8 F.3d 1217, 1221 (7th Cir. 1993) (citing *Palmer*, 498 U.S. at 48). The Court in *Palmer*, 498 U.S. at 49, for example, concluded that the revenue-sharing formula contained [*50] in an agreement between defendants, coupled with the price increase that took place immediately after the agreement was formed, indicated that defendants formed the agreement "for the purpose and with the effect of raising" prices. Accordingly, the Court upheld the denial of Defendants' motion for summary judgment.

Likewise, in the present case, Judge Nordberg noted that Plaintiffs' allegations that REL and Varian dominated the market, that they maintained artificially high prices for electron power tubes, and that REL removed most of the competition in the power tube market, were sufficient to press a horizontal price-fixing claim, at least under a rule of reason analysis. *Panache Broadcasting*, 1993-1 Trade Cas. (CCH) P 70,169, at 69,818. Moreover, Plaintiffs have now cured the weaknesses that Judge Nordberg identified in their claim by alleging Defendants' market shares and the barriers to entry in the relevant market. (Complaint II PP 30-39.) Thus, Varian's motion to dismiss Plaintiffs' claim of horizontal price fixing should be denied, at least insofar as that claim may be proven under a rule of reason analysis.

B. Count II: Dud Tube Conspiracy

[*51] In Count II, Plaintiffs again allege that the JV Agreement between Varian and REL constituted a contract, combination, and conspiracy in restraint of trade, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. (Complaint II P 69.) In this count, however, Plaintiffs allege that by agreeing to collect surplus tubes and tube carcasses, Varian and REL conspired to reduce or eliminate competition from rebuilders of surplus tubes and tube carcasses. (*Id.* P 70.) Defendants accomplished this, argue Plaintiffs, by increasing their costs for, or by eliminating their supply of, such tubes. (*Id.*) According to Plaintiffs, Defendants conspired to increase prices for new electron power tubes that are socket-interchangeable with tubes that could be rebuilt from the dud tubes that Defendants agreed to collect, and that Varian produced and REL sold. (*Id.*) Moreover, Plaintiffs allege that pursuant to their agreement, REL and Varian began acquisition of surplus tubes and tube carcasses, and thus actually did reduce competition for sales of socket-interchangeable tubes with rebuilt tubes. (*Id.* P 74.) As a result, Defendants did increase prices of such [*52] tubes, injuring Plaintiffs and other members of the proposed class by charging substantially higher prices for electron power tubes than they would have had to pay absent the alleged § 1 violations. (*Id.* P 76.) Plaintiffs argue that under § 5(a) of the Clayton Act, 15 U.S.C. § 16, Varian's § 1 conviction -- its guilty plea to felony violations of § 1, based on the JV Agreement "insofar as it related to power grid tubes" ¹⁹ -- is, "at a minimum, prima facie evidence in this action that defendants committed such violations." (*Id.* P 71.)

Varian points out that it pleaded guilty only to agreeing "to adopt a program to collect rebuildable tube carcasses to keep them from being rebuilt," and not to the actual "collection of significant amounts of duds." (Varian's Memorandum, at 11 (citing *Banks*, 977 F.2d at 1087 n.9 and 1089).) [*53] Varian argues that Plaintiffs' allegations of a dud tube conspiracy must fail because they do not allege that Defendants' agreement resulted in any specific anticompetitive effect on the relevant market, as is required for claims of non-*per se* violations of § 1. (Varian's Memorandum, at 11.) Without citing any supporting case law, Varian argues that "whether VASCO began to collect duds is irrelevant," (Varian's Reply, at 15); to plead an anticompetitive effect, Plaintiffs must allege (1) that Varian and REL collected a substantial number of duds; (2) that they collected enough duds to drive up rebuilders' costs; (3) that collection of duds pursuant to Defendants' agreement did in fact drive up rebuilders' costs; and (4) that dud

¹⁹ Plaintiffs assert that "power grid tubes constituted most of the electron power tubes which were subject of the VASCO Agreements and related transactions." (Complaint II P 71).

collections drove any rebuilder out of business. (Varian's Memorandum, at 11.) Moreover, Varian claims that since the alleged "conspiracy to adopt a dud program was abandoned at the outset," Plaintiffs "cannot plead that any significant collection was made." (*Id.* at 11-12 n.11.) Varian insists that Plaintiffs have failed to allege, as they must, "not that Varian and Richardson decided to raise their prices but that the rebuilders -- the object [*54] of the conspiracy -- were forced to raise theirs." (Varian's Reply, at 15-16.)

Finally, Varian argues that the dud tube conspiracy allegations should be dismissed because Plaintiffs have not alleged that they purchased tubes that were socket-interchangeable with rebuildable tubes. (Varian's Memorandum, at 13 n.13.) Varian asserts that because "there are hundreds of tube types, each fitting different sockets," only some of which are rebuildable, Plaintiffs' failure to plead that they purchased rebuildable tubes renders their complaint insufficient for lack of standing to challenge the alleged dud tube conspiracy. (*Id.* (citing [Turner v. American Bar Ass'n, 407 F. Supp. 451, 480 \(D.C. Tex. 1975\)](#)).

As Plaintiffs point out, however, they have alleged not only that Defendants began the collection program, but also that the program reduced competition for sales of socket-interchangeable tubes with rebuilt tubes and that the prices of such tubes increased. (*Id.* P 74.) Plaintiffs have also alleged that being charged substantially higher prices for tubes than they would have been charged absent the alleged § 1 violations injured their business and property [*55] and that of the other members of the proposed class. (*Id.* P 76.) All of these allegations are presumed true for purposes of this motion. If Plaintiffs' allegations of anticompetitive effect are as demonstrably false as Varian insists they are, then this issue will be an appropriate subject for a summary judgment motion.²⁰ [*56] At this stage, however, this court concludes that Plaintiffs have sufficiently alleged an anticompetitive effect of Defendants' alleged dud-tube conspiracy to withstand Varian's motion to dismiss.²¹

As for Varian's second argument, Plaintiffs have brought this action on behalf of a proposed class of purchasers who bought electron power tubes from Defendants. [HN28](#)[] For the purposes of the motion before this court, and pending a ruling on class certification, Plaintiffs' class allegations [*57] must also be presumed true. Because the class allegations are broad enough to include purchasers of rebuildable tubes, Varian's argument is without merit, and its motion to dismiss Plaintiffs' claim of a dud-tube conspiracy under § 1 of the Sherman Act should be denied.

II. Sherman Act § 2 Claims

[HN29](#)[] To establish a conspiracy to monopolize under § 2 of the Sherman Act, a plaintiff must show (1) a conspiracy, (2) overt acts in furtherance of the conspiracy, (3) an effect upon a substantial amount of interstate commerce, and (4) the existence of specific intent to monopolize in a relevant market. [Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 540-41 \(7th Cir. 1986\)](#) (citations omitted); see also [American Tobacco Co. v. United States, 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 \(1947\)](#) (proof of conspiracy to monopolize does not

²⁰ Moreover, in this instance, Varian's reliance on Banks is misplaced. At issue in [Banks, 977 F.2d at 1087-88](#), was whether defendant NCAA's no-draft rule restrained trade in an identifiable market. The Seventh Circuit concluded that although the rule merely served as NCAA's eligibility requirement, plaintiff "could have alleged the manner in which the no-draft and no-agent rules have an anti-competitive impact on a relevant market," had he properly identified "college football labor" as the relevant market. *Id. at 1090-91*. In contrast, in this case, Plaintiffs have alleged a restraint of trade in the market for electron power tubes by pleading that Defendants' collection program reduced competition for such tubes and thereby increased prices for such tubes.

²¹ As this court noted in its earlier Report and Recommendation, however, the charges to which Varian pleaded guilty are significantly narrower than Plaintiffs' allegations here. (R & R, at 39-42). Thus, although [HN27](#)[] Section 5(a) of the Clayton Act, [15 U.S.C. § 16\(a\)](#), affords private plaintiffs the right to use guilty pleas as all-purpose admissions in civil antitrust actions, [Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412, 415 \(7th Cir. 1963\)](#), cert. denied, [376 U.S. 939, 11 L. Ed. 2d 659, 84 S. Ct. 794 \(1964\)](#), that is, as *prima facie* evidence of an antitrust violation, the court reminds Plaintiffs that Varian's guilty plea provides little support for their broad allegations here.

require plaintiff to show an exercise of monopolistic power nor that defendants actually excluded existing or potential competitors).

A. Count V: Overall Conspiracy

Plaintiffs allege that the agreement between JV and REL also violated § 2 of [*58] the Sherman Act, 15 U.S.C. § 2. (Complaint II P 92.) Plaintiffs allege that Varian and REL, in addition to engaging in the collection of surplus tubes and tube carcasses, engineered acquisitions and transactions "to eliminate the remaining competition for U.S. buyers." (*Id.* P 97.) Plaintiffs assert that this conspiracy reduced or eliminated competition in the U.S. for the sale of electron power tubes and increased prices in the U.S. for such tubes, (*id.* P 98), thereby affecting a substantial amount of interstate commerce. (*Id.* P 99.)

In response, Varian states only that because Plaintiffs' allegations are "insufficient to establish that Varian participated in the Amperex/Philips acquisition, or that either that acquisition or the Machlett acquisition had an adverse effect on competition, Count V, like Count VI, fails to state a § 2 claim." (Varian's Memorandum, at 13 n.14.) Plaintiffs contend that they have sufficiently alleged an adverse effect on competition. By forming VASCO, argue Plaintiffs, REL and Varian "eliminated any threat that they would compete with each other" and "with their backs protected, they turned to the task of acquiring [*59] or otherwise eliminating the remaining obstacles to their total domination of the U.S. market." (Plaintiffs' Opposition, at 19.) Thus, according to Plaintiffs, between 1986 and 1989, "REL and Varian, acting in their own names or through VASCO, systematically gained control of other sources of supply to the U.S. market, amassing overwhelming market shares." (*Id.* at 19.) This resulted in diminishing competition and increasing prices to the detriment of the proposed class of tube purchasers, they claim.

As discussed above, HN30[[↑]] the element of anticompetitive effect required for claimed violations of § 1 corresponds with that required for claimed violations of § 2. Furthermore, as direct purchasers of Defendants' products, Plaintiffs need only allege that they paid inflated prices as a result of Defendants' alleged anticompetitive conduct to sufficiently allege antitrust injury. Insofar as Varian's motion to dismiss Plaintiffs' § 1 allegations should be denied, therefore, so too should its motion to dismiss Plaintiffs' allegations of an overall conspiracy to monopolize under § 2.

B. Count VI: Dud Tube Conspiracy

In Count VI, Plaintiffs repeat the allegations in Count II, asserting [*60] that the agreement between Varian and REL to collect dud tubes also violated § 2 of the Sherman Act, 15 U.S.C. § 2. (Complaint II P 101.) Specifically, Plaintiffs allege that Defendants entered into a "combination and conspiracy with the specific intent to monopolize interstate trade and commerce consisting of the manufacture and sale of electron power tubes that are socket-interchangeable with tubes that could be rebuilt from the surplus tubes and tube carcasses that Varian and REL agreed to collect." (*Id.* P 104.) In furtherance of this conspiracy, Plaintiffs allege that pursuant to its agreement with Varian, REL began to acquire surplus tubes and tube carcasses. (*Id.* P 105.) REL did this, Plaintiffs contend, to prevent tube rebuilders from rebuilding tubes and selling them in competition with the socket-interchangeable new tubes that Varian produced and that REL sold through VASCO in the U.S. (*Id.*) As a result, assert Plaintiffs, they and other class members were injured by being charged substantially higher prices for electron power tubes than they would have had to pay absent the alleged § 2 violations. (*Id.* P 106.)

Varian argues [*61] that Plaintiffs have not satisfactorily alleged the third required element of a cause of action under § 2 of the Sherman Act -- that Defendants' conduct affected a substantial amount of interstate commerce. As with the § 1 claim alleged in Count II, Varian argues that Plaintiffs' § 2 claim in Count VI fails because Plaintiffs have not alleged that Varian and REL ever collected significant numbers of dud tubes; if Defendants failed to collect a substantial amount of carcasses, then the conspiracy could not have had "an effect upon a substantial amount of interstate commerce." (Varian's Memorandum, at 12.) Again without citing any supporting case law, Varian contends that to plead an anticompetitive effect, Plaintiffs must allege not that Varian and REL decided to raise their prices but that "enough duds were collected to drive up the rebuilders' prices or to prevent customers from purchasing rebuilt tubes," which Plaintiffs have not done. (Varian's Reply, at 15.) In addition, Varian asserts that Plaintiffs' allegations fail to satisfy § 4 of the Clayton Act, 15 U.S.C. § 15, which creates a private remedy in antitrust

cases, and which requires Plaintiffs [*62] to establish antitrust injury or injury "by reason of" a violation of the antitrust laws. (Varian's Memorandum, at 12.) According to Varian, this claim must fail because if Defendants did not collect a significant number of duds, Plaintiffs could not have sustained injury "by reason of" an alleged conspiracy. (*Id.*)

Judge Nordberg's earlier Opinion recognized Plaintiffs' failure to allege both that Defendants' conspiracy had a substantial effect on interstate commerce, and the existence of the conspiracy and overt acts in furtherance of it. *Panache Broadcasting, 1993-1 Trade Cas. (CCH) P 70,169, at 69,818*. As noted earlier, however, *HN31*[¹] Plaintiffs' factual allegations must be presumed true. Viewing these allegations in the light most favorable to Plaintiffs, this court concludes that Plaintiffs have sufficiently cured the deficiencies in their earlier complaint and have sufficiently alleged an anticompetitive effect of Defendants' alleged dud-tube conspiracy to withstand Varian's motion to dismiss.

Courts and commentators have recognized that a *HN32*[¹] § 1 restraint-of-trade claim and a § 2 conspiracy-to-monopolize claim under the Sherman Act require the same [*63] threshold showing: the existence of an agreement to restrain trade. See *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1576 (11th Cir. 1991)*; Richard A. Posner, **ANTITRUST LAW: AN ECONOMIC PERSPECTIVE** 216 (1976) (stating that any conspiracy to monopolize is also a conspiracy to restrain trade in violation of § 1). After plaintiff makes a showing of such an agreement, then § 2 requires plaintiff to show that the conspiracy was formed with the specific intent to obtain or maintain a monopoly. *Seagood Trading, 924 F.2d at 1576*. It is this additional requirement that imposes a greater burden on a plaintiff claiming a § 2 conspiracy-to-monopolize violation than on one claiming a § 1 restraint-of-trade violation. *Id.*; *International Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 793* (2nd Cir.), cert. denied, 482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987). Varian does not dispute that Plaintiffs have adequately pleaded an allegation of specific intent to monopolize. Having concluded earlier that Varian's motion [*64] to dismiss Plaintiffs' § 1 dud-tube conspiracy claim should be denied, this court further concludes that Varian's motion to dismiss Plaintiffs' § 2 dud-tube conspiracy claim should also be denied.

Varian also argues that the § 1 claim concerning the Amperex acquisitions are not actionable because Plaintiffs fail to allege facts to establish their standing, specifically, facts to show that Plaintiffs purchased Amperex tube types. (Varian's Reply, at 7.). It is well-established that *HN33*[¹] direct purchasers of a product, the price of which has been inflated by anticompetitive conduct, have standing to sue under the antitrust laws. See *Reiter v. Sonotone Corp., 442 U.S. 330, 339, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)*; see also *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*. Plaintiffs here have standing to sue under § 4 of the Clayton Act because their alleged injury occurred within the market endangered by Defendants' allegedly anticompetitive conduct.

III. Count VIII: Clayton Act § 7 Claim

In Count [*65] VIII, Plaintiffs allege that by forming the VASCO joint venture, Varian and REL violated § 7 of the Clayton Act, *15 U.S.C. § 18*. (Complaint II P 114.) They assert that Defendants' direct and indirect acquisitions of stock and assets of other corporations substantially lessened competition in the markets for electron power tubes throughout the United States. (*Id.*) Specifically, Plaintiffs allege that the acquisitions reduced or eliminated actual and potential competition between Varian and REL at both the manufacturing and distribution levels, and reduced or eliminated actual and potential competition between Defendants and tube rebuilders. (*Id. P 115(a) and (b).*) Moreover, they allege that the acquisitions caused a monopolistic accumulation of the already-concentrated electron power tube market, and that Defendants' pervasive control of supply further increased the already high barriers to entry. (*Id. P 115(c) and (e).*) Because of the absence of vigorous competition, Plaintiffs allege, Defendants repeatedly raised prices for electron power tubes and maintained prices at artificially high levels. (*Id. P 115(d).*) Thus, Plaintiffs assert, [*66] the VASCO joint venture's anticompetitive effect outweighed "any purported increase in 'efficiency,'" (*Id. P 116*), and injured Plaintiffs and other proposed class members by charging them substantially higher prices than they would have been charged absent the alleged § 7 Clayton Act violation. (*Id. P 117.*)

Varian argues that Count VIII fails to state a claim under [§ 7](#) of the Clayton Act because Plaintiffs have alleged (1) that "although styled as a 'joint venture,' VASCO was an insubstantial shell entity which functioned as nothing more than a conduit for collusive transactions," and (2) that "VASCO had no other assets other than the receivables generated by paper transactions which transferred or allocated money between REL and Varian." (Complaint II P 42; Varian's Memorandum, at 14.) Without citing any supporting case law, Varian claims that [§ 7](#) "applies only to those ventures that constitute true acquisitions of stock or assets"; because Plaintiffs have pleaded that VASCO was not a true joint venture, but "merely a sham designed as a cover for allegedly anticompetitive activity," their [§ 7](#) claim must fail. (*Id.*)

Plaintiffs contend that VASCO was a "true joint venture" [*67] for jurisdictional purposes. Moreover, citing [United States v. Penn-Olin Chemical Co., 378 U.S. 158, 168, 12 L. Ed. 2d 775, 84 S. Ct. 1710 \(1964\)](#), they argue that [§ 7](#) of the Clayton Act is mainly concerned with "threatened elimination of competition *between the founding parents*, an inquiry which is unaffected by the size of the joint venture's own holdings." (Plaintiffs' Opposition, at 22.) Plaintiffs further contend that their complaint need do no more to survive Defendants' 12(b)(6) motion than, as it has done, to set forth the requisite elements and factual predicate of their claim that the joint venture substantially lessened competition in the U.S. electron power tube market. (*Id.* at 20-21.) According to Plaintiffs, courts focus on the impact of joint ventures on customers and hold presumptively illegal joint ventures that further concentrate already concentrated markets. (*Id.* at 21 (citing [United States v. Ivaco, Inc., 704 F. Supp. 1409, 1418-19 \(W.D. Mich. 1989\)](#), and [F.T.C. v. Great Lakes Chemical Corp., 528 F. Supp. 84 \(N.D. Ill. 1981\)](#))).

[HN34](#) [↑] [Section \[*68\]](#) [7](#) of the Clayton Act forbids mergers and other acquisitions that are reasonably likely to substantially lessen competition in the relevant market.²² [Penn-Olin, 378 U.S. at 171](#); [F.T.C. v. Elders Grain, Inc., 868 F.2d 901, 906 \(7th Cir. 1989\)](#). A plaintiff need not show a certainty or even a high probability of lessened competition, but only a tendency toward monopoly or reduced competition in the present and in the future.²³ [*70] [Penn-Olin, 378 U.S. at 171](#). In assessing the probability of a substantial lessening of competition, the relevant criteria²⁴ include (1) the market power of the joint venturers, (2) the relationship of their lines of commerce, (3) the reasons underlying the joint venture, and the (4) joint venture's line of commerce and its relationship to that of its

²² The Seventh Circuit has noted that [HN35](#) [↑] judicial interpretations of the standards for judging the lawfulness of transactions under [section 7](#) of the Clayton Act and under [section 1](#) of the Sherman Act have "converged." [United States v. Rockford Memorial Corp., 898 F.2d 1278, 1281-82](#) (7th Cir.), cert. denied, [498 U.S. 920, 112 L. Ed. 2d 249, 111 S. Ct. 295 \(1990\)](#).

²³ [HN36](#) [↑] The Supreme Court has described the basic implications of any joint venture on competition in these terms:

The joint venture . . . is the chosen competitive instrument of two or more corporations previously acting independently and usually competitively with one another. The result is a "triumvirate of associated corporations." If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce. Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture's market.

[Penn-Olin, 378 U.S. at 169](#).

²⁴ [HN37](#) [↑] The complete list of the Court's recommended criteria includes:

The number and power of the competitors in the relevant market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessity for its existence; the joint venture's line of commerce and the relationship thereof to that of its parents; the adaptability of its line of commerce to non-competitive practices; the potential power of the joint venture in the relevant market; an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through [the joint venture]; the effect, in the event of this occurrence, of the other joint venturer's potential competition; and such other factors as might indicate potential risk to competition in the relevant market.

parents. [Penn-Olin, 378 U.S. at 177](#). Assuming that the relevant market is properly defined, "an acquisition which reduces the number of significant sellers in a market already highly concentrated" is [*69] unlawful under [section 7](#); courts must resolve doubts against the acquisition. [Elders Grain, 868 F.2d at 906](#).

[*71] For several reasons, Varian's argument that Plaintiffs' [§ 7](#) claims must fail because VASCO is not a true joint venture but only a sham is unavailing. First, in paragraphs 31 and 32 of their Second Amended Complaint, Plaintiffs allege that Varian and REL "together have accounted for at least 70% of electron power tube sales in the United States" and that Defendants have accounted for over 85% of sales of electron power tubes which are socket-interchangeable with tubes sold by Defendants in the U.S. between February 26, 1986 and the present. These allegations must be accepted as true in considering a motion to dismiss. It is precisely such [HN38](#)[[↑]] immense market shares that strengthen the inference of market power and create a presumption of illegality. [United States v. Rockford Memorial Corp., 898 F.2d 1278, 1283-85](#) (7th Cir.) (stating that three firms with a combined market share of 90% "can raise prices with relatively little fear that the fringe of competitors will be able to defeat the attempt by expanding their own output"), cert. denied, 498 U.S. 920, 112 L. Ed. 2d 249, 111 S. Ct. 295 (1990). [*72]

Second, [HN39](#)[[↑]] there is no support in this Circuit for Varian's argument that [§ 7](#) "applies only to those ventures that constitute true acquisitions of stock or assets." In a footnote, Varian cites [Ernest W. Hahn, Inc. v. Codding, 423 F. Supp. 913, 919 \(N.D. Cal. 1976\)](#), rev'd on other grounds, [615 F.2d 830 \(9th Cir. 1980\)](#), and [United States v. Carilion Health Sys., 707 F. Supp. 840, 841 n.1](#) (W.D. Va.), aff'd without opinion, [892 F.2d 1042 \(4th Cir. 1989\)](#), as examples of [§ 7](#) claims dismissed because the acquisitions at issue involved neither stock nor assets. (Varian's Memorandum, at 14 n.15.) Not only are both cases inapposite here, but also, contrary to Varian's assertion, the Seventh Circuit has expressly *disapproved* the ruling in Carilion. See [Rockford Memorial Corp., 898 F.2d at 1281](#).

Plaintiffs allege that through the VASCO joint venture, Defendants directly and indirectly acquired the stock and assets of other corporations, consequently reducing or eliminating actual and potential manufacturing and distribution competition between [*73] Varian and REL and between Defendants and tube rebuilders. (*Id.* PP 114, 115(a), 115(b).) [HN40](#)[[↑]] The test of [§ 7](#) is the effect of the acquisitions at issue, [Penn-Olin, 378 U.S. at 168](#), not, as Plaintiffs correctly point out, the size of the joint venture's holdings. The effect on competition is determined in part by the nature of the relevant market and by the nearness of the absorbed company to it. [Id. at 174](#). Here, Plaintiffs have alleged that the market was already highly concentrated; that the acquisitions further concentrated the market; and that Defendants' control of supply further increased the already high barriers to entry. Thus, Plaintiffs have sufficiently pleaded that Defendants' acquisitions were reasonably likely to substantially lessen competition in the relevant market. Varian's motion to dismiss their [§ 7](#) allegations should therefore be denied.

CONCLUSION

Varian's motion to dismiss Plaintiffs' Second Amended Complaint should be granted in part and denied in part. Count I of the Complaint should be dismissed only as to a claim of *per se* [*74] unlawful customer allocation, and as to a claim of reduction or elimination of competition from tubes manufactured in the People's Republic of China. Defendant Varian's motion to dismiss all other claims in Count I, and all of Counts II, IV, V and VIII, should be denied.

ENTER:

REBECCA R. PALLMEYER

United States Magistrate Judge

Date: April 14, 1994



Thompson Everett, Inc. v. National Cable Advertising, L.P.

United States District Court for the Eastern District of Virginia, Richmond Division

April 18, 1994, Decided ; April 18, 1994, Filed

Civil Action No. 3:93CV452

Reporter

850 F. Supp. 470 *; 1994 U.S. Dist. LEXIS 5168 **; 1994-1 Trade Cas. (CCH) P70,602

THOMPSON EVERETT, INC., Plaintiff, v. NATIONAL CABLE ADVERTISING, L.P., et al., Defendants.

Disposition: [**1] GRANTED.

Core Terms

cable, advertising, spot, cable system, media, antitrust, contracts, television, defendants', firms, buying, summary judgment, competitor, compete, advertising agency, exclusive contract, restrictions, conspiracy, consumer, vertical, regional, distributorship, manufacturers, broadcast, relevant market, anticompetitive, contractual, products, courts, buyer

LexisNexis® Headnotes

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

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

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

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

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

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

HN1[] Entitlement as Matter of Law, Appropriateness

Summary judgment is proper if, viewed in the light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#) requires that the court enter judgment against a party who, after adequate time for discovery fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. The essence of the inquiry that the court must make is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

HN2 [down] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is an important tool for dealing with antitrust cases. In fact, the very nature of antitrust litigation encourages summary disposition of such cases when permissible. A party opposing summary judgment in the antitrust context must do more than simply show that there is some metaphysical doubt as to the material facts; the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.

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

HN3 [down] **Private Actions, Remedies**

An antitrust plaintiff must prove "antitrust injury," which is injury of the type the antitrust laws were intended to prevent and that flows from that which makes a defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of 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. Injury, although causally related to an antitrust violation, nevertheless will not qualify as "antitrust injury" unless it is attributable to an anticompetitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition.

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

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

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

HN4 [down] **Private Actions, Standing**

Although the existence of "antitrust injury" helps courts determine whether a plaintiff has standing, the absence of "antitrust injury" is alone fatal.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Business & Corporate Law > Distributorships & Franchises > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN5 Causes of Action, Restraints of Trade

Exclusive distributorship arrangements do not violate the antitrust laws unless they foreclose competition in the relevant market. Thus, only a plaintiff qualifying as a competitor or consumer in that market could suffer antitrust injury from an unlawful exclusive distributorship arrangement, because only those two categories of plaintiffs could be injured by such a restraint on competition.

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

HN6 Regulated Practices, Market Definition

The plaintiff in an antitrust case bears the burden of proof of the relevant market. The relevant product market is composed of those products or services which are reasonably interchangeable by consumers for the same purposes.

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

HN7 Regulated Practices, Market Definition

The outer boundary of the relevant product market is reached, if one were to raise the price of the product or limit its volume of production, while demand held constant, and supply from other sources beyond the boundary could not be expected to enter promptly enough and in large enough quantities to restore the old price or volume. A relevant market, then, is 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

HN8 Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 1](#).

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

Business & Corporate Law > Foreign Corporations > General Overview

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

HN9 Conspiracy to Monopolize, Sherman Act

There are three basic elements of a Sherman Act, [15 U.S.C.S. § 1](#) violation: the existence of a contract, combination or conspiracy among two or more separate entities that unreasonably restrains trade and affects interstate and foreign commerce.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN10[] **Antitrust & Trade Law, Sherman Act**

To survive a motion for summary judgment, a plaintiff asserting a Sherman Act, [15 U.S.C.S. § 1](#), claim must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. The plaintiff, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed the plaintiff. Stated yet another way, there must be direct or circumstantial evidence that reasonably tends to prove that the parties had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN11[] **Antitrust & Trade Law, Sherman Act**

Because proving a conspiracy is difficult without direct evidence, the United States Supreme Court has allowed courts to infer the existence of a conspiracy based on several factors. First, courts may consider a pattern of uniform conduct among competitors, which is commonly referred to as "conscious parallelism." In addition, courts look at various "plus factors," such as an opportunity for collusion, evidence showing the parties would benefit only through concerted action, and evidence showing legitimate business reasons should have motivated independent action.

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

HN12[] **Regulated Industries, Higher Education & Professional Associations**

Once a conspiracy is established, most business combinations are judged under a "rule of reason." This involves an in-depth market analysis to determine whether the combination in question unreasonably restrains trade. Under this inquiry, the key question is whether the restraint is one that promotes competition or one that suppresses competition. Despite this customary analysis, certain restraints are held to constitute a per se violation of the Sherman Act without necessitating a detailed consideration of the reasonableness of the impact on competition.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN13 [blue icon] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Generally, most vertical, non-price restrictions are judged under the rule of reason. The federal courts have applied the rule of reason analysis in the vast majority of exclusive distributorship cases. In analyzing the effect of exclusive distributorships on competition, courts have considered such factors as the strength of inter-brand competition, the duration of the exclusive distributorship, and the geographic extent of the distributorship.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN14 [blue icon] **Price Fixing & Restraints of Trade, Vertical Restraints**

Vertical restrictions reduce intra-brand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers. Location restrictions have this effect because of practical constraints on the effective marketing area of retail outlets. Although intra-brand competition may be reduced, the ability of retailers to exploit the resulting market may be limited both by the ability of consumers to travel to other franchised locations and, perhaps more importantly, to purchase the competing products of other manufacturers.

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

HN15 [blue icon] **Price Fixing & Restraints of Trade, Vertical Restraints**

Vertical restrictions promote inter-brand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions under the rule of reason.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN16 [blue icon] **Intentional Interference, Elements**

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 may otherwise be impaired or destroyed by the performance of the contract or transaction.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

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

HN17 [+] **Trade Dress Protection, Causes of Action**

See [15 U.S.C.S. § 1125\(a\)](#).

Counsel: For THOMPSON EVERETT, INC., plaintiff: Stephen Earl Baril, John Luther Walker, III, Curtis McKinley Hairston, Jr., Dana Duane McDaniel, Glen Andrew Lea, Williams, Mullen, Christian & Dobbins, Richmond, VA.

For NATIONAL CABLE ADVERTISING, INC., defendant: Charles Manley Allen, Jr., Wright, Robinson, McCammon, Osthimer & Tatum, Richmond, VA. Daniel G. Swanson, Julia A. Dahlberg, Robert H. Wright, Gibson, Dunn & Crutcher, Washington, DC. For CABLE NETWORKS, INC., defendant: Stephen Atherton Northup, Robert Dale Seabolt, Mays & Valentine, Richmond, VA. Yvonne S. Quinn, Sullivan & Cromwell, New York, NY. For CABLE MEDIA CORPORATION, defendant: Thomas Edward Spahn, McGuire, Woods, Battle & Boothe, Richmond, VA. Gerald J. Fields, Battle, Fowler, New York, NY. For NATIONAL CABLE ADVERTISING, L.P., defendant: Charles Manley Allen, Jr., David Ernest Boelzner, Daniel G. Swanson, Julia A. Dahlberg, Robert H. Wright, Wright, Robinson, McCammon, Osthimer & Tatum, Richmond, VA.

For COX CABLE COMMUNICATIONS, interested party: Charles Manley Allen, Jr., Daniel G. Swanson, Julia A. Dahlberg, Wright, Robinson, McCammon, Osthimer & Tatum, Richmond, VA.

Judges: Spencer

Opinion by: JAMES R. SPENCER

Opinion

[*472] MEMORANDUM [*2] OPINION

THIS MATTER comes before the Court on the defendants' Joint Motion for Summary Judgment. For the reasons stated herein, the defendants' motion will be GRANTED.

I.

Plaintiff Thompson Everett, Inc. ("TE"), is a corporation organized in Virginia with its principal place of business located in Glen Allen, Virginia. TE claims that it is a regional, [*473] independent cable television advertising representative and a full service advertising agency with affiliated offices in North Palm Beach, Florida and

Louisville, Kentucky. The company is engaged in the business of buying broadcast, cable, radio, and print media advertising time for its clients, and offers consulting and television market research services to them as well.

The defendants are representatives of cable television systems ("cable rep firms") that sell advertising time ("spots") to national advertisers. The defendants seek out the advertisers, who are themselves represented by advertising agencies, and attempt to convince those agencies to buy time on the cable systems. The defendants are the three largest cable rep firms in the United States.

Defendant National Cable Advertising, L.P. ("NCA"), is a Massachusetts limited [**3] partnership with its principal place of business located in Boston, Massachusetts. NCA is a national cable rep firm that is owned by four of the largest national cable system owners and operators in the United States: Continental Cablevision, Inc., Comcast Cable Corp., Cox Cable Communications, and Time Warner Cable.

Defendant Cable Networks, Inc. ("CNI"), is a Delaware corporation with its principal place of business located in New York. CNI is a national cable rep firm owned by Cablevision Systems Corp., a cable system owner and operator.

Defendant Cable Media Corporation ("CMC") is a Michigan corporation with its principal place of business located in Farmington Hills, Michigan. CMC is a national cable rep firm owned by Katz Communications, Inc., a network television rep firm, and Barrett J. Harrison, the president of CMC.

The plaintiff filed this lawsuit to challenge the defendants' exclusive contractual arrangements with their represented cable systems ("exclusive rep contracts"), in which the cable system operator commits to use the cable rep firm exclusively in exchange for the cable rep firm's agreement to make sales of advertising time on the cable system's behalf. Plaintiff [**4] raises various antitrust claims and supplemental common law business tort claims.¹ In turn, all defendants have filed counterclaims against Thompson Everett, alleging tortious interference with contractual relations.

[**5] II.

HN1 [↑] Summary judgment is proper if, viewed in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; see also *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). *Federal Rule of Civil Procedure 56(c)* requires that the court enter judgment against a party who, "after adequate time for discovery . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The essence of the inquiry that the court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106

¹ Counts I and II allege a horizontal conspiracy to fix prices, divide markets, exclude competition, coerce TE through exclusive contracts, in violation of [15 U.S.C. § 1](#). Counts III and IV claim the defendants entered into vertical conspiracies with cable system operators to restrain trade and coerce TE's clients, also in violation of [15 U.S.C. § 1](#). Count V claims the defendants monopolized access to local cable systems, in violation of [15 U.S.C. § 2](#). Counts VI and VII assert that the preceding actions constitute violations of the Virginia antitrust statutes, [Va. Code § 59.1-9.5](#), -9.6, and business conspiracy statutes, [Va. Code § 18.2-499](#), -500. Count VIII claims the defendants interfered with TE's business relations. Finally, the remaining counts allege that the defendants made defamatory statements about TE in violation of state law and Section 43(a) of the Lanham Act, [15 U.S.C. § 1125](#).

Although TE also claimed at the summary judgment stage that it made a "tying" claim in its Amended Complaint, the pleading obviously does not give notice of such a claim.

S. Ct. [**474] 2505 (1986). **[**6]** Summary judgment is proper "if the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id. at 248.*

HN2[] "Summary judgment is an important tool for dealing with antitrust cases." *Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991), cert. denied, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992).* In fact, "the very nature of antitrust litigation encourages summary disposition of such cases when permissible." *Id.* (quoting *Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 475 (7th Cir. 1988)*). As the Supreme Court stated in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, a party opposing summary judgment in the antitrust context "must do more than simply show that there is some metaphysical doubt as to the material facts . . . ; the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id. at 586-87;* **[**7]** see also *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 542* (2d Cir.), cert. denied, 126 L. Ed. 2d 337, 114 S. Ct. 388 (1993).

III.

The defendants' main argument in support of their motion for summary judgment focuses on the Plaintiff's role in the advertising business. To consider this argument, some background material on the industry will be helpful.

In addition to the actual buyers and sellers of advertising, the advertising business includes a variety of entities with roles in facilitating the purchase or sale of the advertisements. These entities generally fit either of two categories: (i) buyer representatives that create and purchase advertising for advertisers, and (ii) seller representatives that sell ads for the different advertising media. The buyer reps include "advertising agencies," such as full service advertising agencies, "creative boutiques," and media buying services. (Joseph Michael Everett Tr. 96-108; Peter J. Moran Tr. 80-81.) The seller reps include "representative firms," such as radio representatives, cable television representatives and broadcast television **[**8]** representatives (See Julianne Arena Tr. 183-84; Jane F. Berry Tr. 69-71.)

Although some advertisers create their own advertisements and then purchase their advertising directly from the desired media, many hire an agency to perform this task. A "full-service" agency typically studies an advertiser's product, creates a strategy for advertising the product, designs ads to implement that approach, selects the media to distribute the ads, and then negotiates and purchases the time or space from the selected media. (See Everett Tr. 97-100; Jon Sanders Tr. 131-33; Bunny Tiner Tr. 6; John R. Klein Tr. 30-31.)

Over time, two general types of advertising agencies have evolved. "Creative boutiques" concentrate on designing an advertising approach and creating and producing the advertisements but do not actually select or purchase the advertising media. (See Moran Tr. 80-81.) In contrast, "media buying services" focus upon selecting the mix of advertising to be used in an advertising campaign that has been created and designed elsewhere and upon negotiating with and purchasing advertising from the various media. (Everett Tr. 101, 103-104; Robert Fennimore Tr. 71; Susanne Moore Tr. **[**9]** 48; Kay Franks Tr. 87-88; Sanders Tr. 192-93; Robert Williams Tr. 362.) Advertising agencies, whether full service agencies, creative boutiques, or media buying services, are all hired by the advertiser and thus work for and represent the interests of that advertiser. (Everett Tr. 97-98; Fennimore Tr. 71; Williams Tr. 362, 795; Sanders Tr. 213-14.)

Most advertising media retain sales staffs to sell ads to advertisers or advertising agencies. Most media have in-house advertising staffs that focus on sales to advertisers in the immediately surrounding geographic areas, and arrange for nationally based representatives to sell advertising to national and regional advertisers on their behalf. (See, e.g., Albin J. Seethaler Tr. 52.) These representatives are agents of the media and act as an extension of the media's own sales staff. (Moore Tr. 79-80, 85; Klein Tr. 49.) They **[*475]** traditionally have been paid a percentage commission based on the amount of advertising revenues they generate on behalf the cable system operator. (Barrett J. Harrison Tr. 52-53.)

The instant litigation focuses on a particular advertising medium -- spot cable. Spot cable is advertising time sold by cable television **[**10]** operators throughout the country on the cable programming that they deliver to the homes of their subscribers. (Moran Aff. P 3; Harrison Decl. P 3.) Cable systems sell most of their spot cable advertising time through their own sales staffs to local advertisers, but a portion of the systems' available spot cable time is sold to

national and regional advertisers. Thompson Everett now challenges the method in which cable rep firms sell spot cable to national and regional advertisers.

The defendants have attempted to characterize cable rep firms as "quite simply sales people for hire." They argue that cable rep firms are mere extensions of the cable systems' sales forces, and that their job is to maximize the advertising revenues of the systems that hire them. (Defts. Mem. 7.) Their responsibilities vary. Some cable rep firms, referred to as "turnkey operations," are hired as a total substitute for the cable operator's own internal sales staff. (Defs. Mem. 8.) Other representative firms handle only sales to national and regional advertisers, while the cable operator employs its own internal staff to sell to local advertisers. (*Id.*)

The defendants claim that they compete "aggressively [**11] and regularly with one another for the right to be, or to replace one another as, exclusive sales agents for cable television systems and interconnects² [**12] pursuant to exclusive representation agreements." (Defts. Mem. 13.) According to defendants, these representation agreements are short-term contracts by which the exclusive representative promises to use its best efforts to sell advertising to national and regional advertisers. The cable television system or interconnect, in turn, retains the right to control prices and reject sales that are unacceptable. (Defts. Mem. 14.) The contracts also contain performance standards that allow the cable systems to terminate the agreement if the standards are not met. (*Id.*) The defendants assert that a variety of legitimate business reasons exist to support the practice of forming exclusive contracts, such as tradition, convenience, efficiency, and to prevent "free riding."³

Given this background, the defendants argue that TE is not a true cable rep firm, but is instead a "media buying service." According to defendants, there is no question that TE works for and wants to serve the interests of advertisers and advertising agencies, not cable operators and interconnects.

While accepting the defendants' general description of the advertising business, TE disagrees about what produced the structure of the industry. First, TE argues that defendants' own deposition testimony contradicts their argument that exclusive contracts are motivated by a concern about "free riders." For example, CMC's president stated that CMC does not make extensive marketing efforts:

We don't go in and pitch our product to be honest with you. I mean, we get a phone call and they're buying ten markets . . . and it's a [**13] case of just fulfilling their [order].

(TE Exh. 11 at 60.) Second, as it explains more completely in its Motion for Partial Summary Judgment, TE argues that the defendants have misled advertisers into believing they should not do business with TE because TE does not have exclusive contracts with cable systems.

Finally, and most importantly, TE maintains that it is a "cable rep firm," and not merely a "media buying service." TE asserts that the defendants' own evidence belies any notion that TE is a media buying [*476] service. For example, an internal CNI document identifies TE as one of five independent rep firms and states that TE is a "fairly well-respected regional firm." (TE Exh. 20 at 19-20.) Likewise, other internal documents from NCA identify TE as a cable rep firm. (TE Exh. 47, at N208303.)

TE states that "it is not surprising that defendants view TE as a cable rep firm (and a competitor). TE performs the same functions as defendants. Like defendants, TE brings advertising revenue to cable systems, and historically, cable systems have paid TE commissions." (TE Mem. in Opp. at 14 (citing TE Exh. 49 at 73, 74, 113-116, 169, and TE Exh. 50 at 247-48).) TE argues that defendants' [**14] have concocted a description of TE as a "media buyer" because:

² An "interconnect" is a group of cable systems located within a given geographic area that have entered into an arrangement enabling advertisers to purchase advertising time on the entire group of systems in one purchase. (Defts. Mem. 7, at note 3.)

³ The defendants claim that "exclusive sales agent arrangements are necessary to support defendants' considerable investments in market and demographic research and in technological innovations that facilitate the actual placement of spot cable advertising." (Defts. Mem. 17.)

In those rare but increasing instances in which a cable system refuses to commission TE, TE tries to negotiate a spread between the price the agency is willing to pay for a spot and the price the cable system charges to create a profit on the transaction. That TE on occasion negotiates a profit and that it negotiates the best rate it can for advertising agencies does not make TE a media buyer and certainly does not mean that TE does not compete with the defendants for ad agency business. TE is, in fact, an independent cable rep firm that competes with defendants and other independent rep firms such as CTV, for limited national spot cable advertising dollars.

(TE Mem. in Opp. at 15-16 (citations omitted).)

IV.

HN3 [↑] An antitrust plaintiff must prove "antitrust injury," which is "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 anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would **[**15]** be likely to cause.'" [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#) (quoting [Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 23 L. Ed. 2d 129, 89 S. Ct. 1562 \(1969\)](#)).

The Supreme Court has stated that:

injury, although causally related to an antitrust violation, nevertheless will not qualify as "antitrust injury" unless it is attributable to an anticompetitive aspect of the practice under scrutiny, "since 'it is inimical to [the antitrust] laws to award damages' for losses stemming from continued competition."

[Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 1889, 109 L. Ed. 2d 333 \(1990\)](#) (quoting [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109-110, 93 L. Ed. 2d 427, 107 S. Ct. 484 \(1986\)](#)).

HN4 [↑] Although the existence of "antitrust injury" also helps courts determine whether a plaintiff has standing, the absence of "antitrust injury" **[**16]** is alone fatal. See *id.*; [Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 219 \(4th Cir. 1987\)](#) (factor in determining antitrust standing is relationship of injury alleged to the forms of injury Congress targeted).

HN5 [↑] Exclusive distributorship arrangements ⁴ do not violate the antitrust laws unless **[*477]** they foreclose competition in the relevant market. See [Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 45, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). Thus, only a plaintiff qualifying as a competitor or consumer in that market could suffer antitrust injury from an unlawful exclusive distributorship arrangement, because only those two categories of plaintiffs could be injured by such a restraint on competition. See *id.*; see also [White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 104 \(4th Cir. 1987\)](#) (doctor could not prevail on monopolization claim against hospital because

⁴ The parties have referred to the spot cable contracts as "exclusive dealing" contracts. Such a categorization is only partly accurate. An "exclusive dealing" contract is "an agreement by a distributor to refrain from dealing in goods of a competitor." ABA Antitrust Section, [Antitrust Law Developments](#), 117 n.631 (3d ed. 1992). On the other hand, "an exclusive distributorship typically provides a distributor with the right to be the exclusive outlet for a manufacturer's products or services in a given geographic area. It restricts the manufacturer from competing with a distributor by preventing the manufacturer from establishing its own sales outlet in the area as well as from appointing or selling to other distributors located in the area." [Id. at 117](#); see also Steuer, Richard M., [Exclusive Dealing in Distribution](#), [69 Cornell L. Rev. 101, 102 n.4 \(1983\)](#) ("Exclusive [distributorships] do not in themselves limit the distributors, although they are frequently coupled with territorial restraints to keep the dealers out of each other's exclusive territories.").

The contracts at issue in this case are between cable systems and cable rep firms in which the systems appoint the rep firms as exclusive representatives for national and regional advertising directed to the cable systems' respective geographic markets. Regardless of which label is used, the ultimate question is whether the contracts unreasonably restrain competition. See, e.g., [Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289, 86 L. Ed. 2d 202, 105 S. Ct. 2613 \(1985\)](#) (every commercial agreement restrains trade; key is whether restraint is reasonable).

However, the term "exclusive distributorship" best describes the arrangements in this case, because the rep firms commonly act as a substitute or extension of the cable systems' internal sales staffs.

doctor was neither a competitor nor consumer in the relevant market); *Ficker v. Chesapeake & Potomac Tel. Co., 596 F. Supp. 900, 904 (D. Md. 1984)* [**17] (whether plaintiff is consumer or competitor in market is frequently dispositive).

[**18] **HN6** [↑] The plaintiff in an antitrust case bears the burden of proof of the relevant market. *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (4th Cir.), cert. denied, 465 U.S. 1027, 79 L. Ed. 2d 688, 104 S. Ct. 1285 (1984). The relevant product market is composed of "those products or services which are 'reasonably interchangeable by consumers for the same purposes.'" *714 F.2d at 355* (quoting *United States v. E.I. du PONT de NEMOURS & Co.*, 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)).

A problem with defining the product market in this case is that the cable systems possess legal monopolies in their geographic areas of service. Despite this fact, they must compete with other media for advertising revenue, such as broadcast television, radio, newspapers, etc. This competition among the different media could easily qualify as "interbrand" competition even though the cable systems have a monopoly on the spot cable "brand" of advertising. The Fourth Circuit considered a similar issue in *Satellite Television*. [**19] The court explained the *Dupont* standard by stating that

HN7 [↑] The outer boundary of the relevant product market is reached, if one were to raise the price of the product or limit its volume of production, while demand held constant, and supply from other sources beyond the boundary could not be expected to enter promptly enough and in large enough quantities to restore the old price or volume. "A 'relevant market', then, is 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."

Satellite Television, 714 F.2d at 356 (footnotes omitted).

In *Satellite Television*, one cable company sued another on various antitrust claims, alleging that the defendant had entered into unlawful exclusive dealing contracts with apartment complexes in the metropolitan Richmond area. The Fourth Circuit upheld the district court's conclusion that the product market included "cinema, broadcast television, video disks and cassettes, and other types of leisure and entertainment-related businesses for customers who live in single-family [**20] dwellings and apartment houses . . ." *Id. at 355*. Although the plaintiff in that case stipulated that movies shown in theaters were "reasonably interchangeable" with the services offered (in the early-1980s) by cable television, the court stated that the plaintiff cable company might still recover by showing "economic factors or consumers' perceptions limit the [movie theater's] ability to compete . . ." *Id. at 356*. However, TE has not raised such an argument in this case.

Even assuming that the relevant market should be confined analytically to [*478] spot cable advertising in particular,⁵ TE must prove that it is a competitor of the defendants within the spot cable market. Evidence from TE's corporate officers dispels any notion that TE actually competes with the defendants as a cable rep firm. The evidence instead demonstrates that TE is a "media buying service" whose primary allegiance is to the advertisers -- not to the cable systems with which it seeks to do business. The deposition testimony from TE's chief operations officer, Amy Venhuizen, is illustrative of TE's role in the spot cable market:

Q: You don't like [**21] [exclusive rep contracts] because they create a loyalty to the cable side of the business; isn't that right?

⁵ In the present case, Thompson Everett has not offered any evidence that the product market should be confined to the "spot cable" industry instead of the advertising industry. It is clear that spot cable competes with broadcast television for advertising dollars, but most courts allow the fact-finder to determine the relevant market. See *Storer Cable Communications v. City of Montgomery*, 826 F. Supp. 1338 (M.D. Ala. 1993) (relevant market usually determined only after fact-finding has been conducted). For summary judgment purposes, the Court will consider the effect of exclusive contracts on the narrow spot cable market as well.

A: We don't sign exclusivities because we do other things.

Q: Could you explain what those other things are?

A: A client may think they are interested in spot cable when, in fact, it would be more efficient to go network cable.

It is my opinion, if Thompson Everett doesn't sign an exclusive contract with a cable system, then we can meet the agency's needs by flipping the buy to network.

Q: So, in other words, you want -- you don't want to feel obligated to sell spot cable on behalf of any cable operator; is that correct?

A: I want to buy spot cable for the client when it meets the client's needs.

Q: You want to serve the interests of the client, which I understand is the advertiser; right?

A: That's correct.

Q: You want to serve the interests of the advertiser; is that correct?

A: That's correct.

Q: If the interests of the advertiser are inconsistent with selling spot cable for a particular cable operator, you're going to do what is in the advertiser's interests, not what is in the interests of the cable operator; is that correct?

A: That's correct.

[**22] (Amy B. Venhuizen Tr. 364-65.)

In *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983), the plaintiff union alleged that a multiemployer bargaining association and its members coerced third parties and some of the association's [**23] members to do business with nonunion firms. As part of a general inquiry into whether the plaintiff union had antitrust standing, the Court determined that the union had not suffered antitrust injury because it was neither a competitor nor a consumer in the relevant market. See *id. at 539-40*. Central to this conclusion was the fact that the union, "in its capacity as a 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." *Id. at 540*. Along these lines, the Court noted that the union's "labor-market interests seem to predominate . . ." *Id.*

Responding to the defendants' description of its status in the spot cable market, TE contends that: (1) the defendants viewed TE as a competitor; (2) TE brings advertising revenue to the cable systems; and (3) cable systems have paid TE commissions. Accepting these disputed issues of fact as true for the purpose of the summary judgment analysis, the evidence offered still demonstrates that TE is not a competitor [**24] of the defendants in the spot cable market. In determining whether the Plaintiff is a competitor, the key question is not what labels the parties use to describe their business activities. Instead, as *Associated General Contractors* makes clear, the Court must focus on how the business actually operates in [*479] the marketplace. See *id. at 539-40*.

TE's own officers testified during depositions that upon receiving an order from an advertiser, TE will serve the advertiser client by determining the best media vehicle for the advertiser's message. If TE decides that spot cable advertising will not serve the client's needs effectively, TE will buy advertising time from other media, such as broadcast television. (See Venhuizen Tr. 364-65, 419; Everett Tr. 109; see also Franks Tr. 87.) As was the case in *Associated General Contractors*, the antitrust plaintiff's interests in this case are anticompetitive. See *Associated General Contractors*, 459 U.S. at 539. Forcing the defendants to do business in the same manner that TE conducts its operations would endanger [**25] the burgeoning spot cable advertising industry. Cable system operators would be forced to rely on firms with loyalty to the advertiser to sell their spot cable time. Inevitably, cable systems would have no alternative to placing greater reliance on their internal sales staffs to sell time, with a corresponding loss in efficiency.

Although TE has produced evidence that it brings revenue to the cable systems, that evidence equally demonstrates that it diverts revenue from the cable systems. In the event that exclusive rep contracts in the spot

cable industry result in artificially high advertising prices,⁶ there is no reason why the advertisers themselves could not challenge the practice as consumers. Similarly, an independent cable rep firm closed out of bidding for exclusive contracts by an unlawful conspiracy could also seek recourse as a competitor.⁷

[**26] Therefore, TE has not offered evidence sufficient to show that it has suffered an "antitrust injury."⁸ Accordingly, summary judgment must be granted with respect to Counts I, II, III, IV, V and VI.

V.

Even if TE had met its burden with respect to the antitrust injury requirement, summary judgment would still be appropriate on the substantive issues raised in this case.

Section 1 of the Sherman Act states that: [HN8](#) "Every [**27] contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U.S.C. § 1 \(1988\)](#). [HN9](#) There are three basic elements of a Section 1 violation: "(1) the existence of a contract, combination or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate and foreign commerce." ABA Antitrust Section, *supra*, 2 (and cases cited). TE has alleged that the exclusive rep contracts constitute unlawful horizontal and vertical conspiracies, in violation of Section 1.

[HN10](#) To survive a motion for summary judgment, a plaintiff asserting a § 1 claim must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. [The plaintiff], in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiff]."[Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#) [**28] (citations omitted). Stated yet another way, "there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective."[\[*480\] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#).

[HN11](#) Because proving a conspiracy is difficult without direct evidence, the Supreme Court has allowed courts to infer the existence of a conspiracy based on several factors. First, courts may consider a pattern of uniform conduct among competitors, which is commonly referred to as "conscious parallelism." See ABA Antitrust Section, *supra*, at 5. In addition, courts look at various "plus factors," such as an opportunity for collusion, evidence showing the parties would benefit only through concerted action, and evidence showing legitimate business reasons should have motivated independent action. See [id. at 9-10](#) (citations omitted).

Although the Plaintiff has offered evidence of frequent business contacts among the defendants, joint presentations to industry trade groups, and strategic [**29] plans that discuss the need for organizing the spot cable market, much of the events giving rise to the alleged conspiracy occurred only after the defendants began using exclusive contracts. In fact, the defendants' evidence proves that such contracts are used throughout the advertising industry, and that they have used these agreements since the inception of their respective businesses. Therefore, there is no genuine issue of material fact supporting the existence of a unlawful horizontal agreement among the defendants.

⁶ It is unclear whether TE would suffer at all from artificially high prices, because its commissions would increase as a direct consequence.

⁷ This does not include TE. It has chosen not to compete for those contracts because of the conflict of interest those arrangements would create with its advertiser clients. (Venuhuizen Tr. 364-65.)

⁸ TE argues, in the alternative, that its claims should survive summary judgment even if it is deemed not to compete with the defendants, citing [Engine Specialties, Inc. v. Bombardier, Ltd., 605 F.2d 1 \(1st Cir. 1979\)](#), cert. denied 446 U.S. 983, 64 L. Ed. 2d 839, 100 S. Ct. 2964 (1980). However, *Engine Specialties* cannot rescue TE's claims. The plaintiff in that case actually competed with the defendant pursuant to its own exclusive distributorship contract. See [id. at 13](#).

Furthermore, [HN12](#) once a conspiracy has been proved, most business combinations are judged under a "rule of reason." This involves an in-depth market analysis to determine whether the combination in question unreasonably restrains trade.⁹ [\[**31\]](#) Under this inquiry, the key question is whether the restraint "is one that promotes competition or one that suppresses competition." [*National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 \(1978\)*](#); see also [*Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)*](#); [\[**30\]](#) ABA Antitrust Section, *supra*, at 42. Despite this customary analysis, certain restraints have been held to constitute a *per se* violation of the Sherman Act without necessitating a detailed consideration of the reasonableness of the impact on competition.¹⁰

As the defendants contend, the undisputed facts show that the defendants have entered independently into a series of vertical, [\[**32\]](#) exclusive distributorship contracts with the cable system operators.¹¹ [HN13](#) Generally, most vertical, nonprice restrictions are judged under the rule of reason. [*Blanton Enterprises, Inc. v. Burger King Corp., 680 F. Supp. 753 \(D. S.C. 1988\)*](#). The federal courts have applied the rule of reason analysis [\[*481\]](#) in the vast majority of exclusive distributorship cases. See ABA Antitrust Section, *supra*, at 123 n.666. "In analyzing the effect of exclusive distributorships on competition, courts have considered such factors as the strength of interbrand competition, the duration of the exclusive distributorship, and the geographic extent of the distributorship." ABA Antitrust Section, *supra*, at 118-119 (and cases cited). The impact of each of these considerations will be examined in turn.

[\[**33\]](#) As discussed earlier, spot cable competes with other media, such as broadcast television, for advertising dollars. Even if the product market is confined more narrowly to the spot cable market itself, the evidence shows that the defendant cable rep firms compete for exclusive contracts. (See Declaration of Robert D. Williams at P 15; Declaration of Barrett J. Harrison at P 24; Affidavit of Peter J. Moran at P 14 (noting competition between NCA and CNI over right to represent Cable AdNet of Pittsburgh, Inc. and TCI Cablevision of Central Connecticut); Everett Tr. at 581.) Such competition will inevitably encourage the defendants to reduce their commissions or to offer additional services to lure business away from the other cable rep firms.

⁹ Justice Brandeis stated the rule of reason this way in [*Board of Trade v. United States, 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242 \(1918\)*](#):

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

[*Id. at 238.*](#)

¹⁰ As Justice Black stated:

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. 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 -- an inquiry so often wholly fruitless when undertaken.

[*Northern Pac. Ry. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\).*](#)

¹¹ The contracts between the cable operators and the representative firms create an agency relationship. Under the intra-corporate conspiracy doctrine, a corporation cannot conspire with its own agents. See [*Buschi v. Kirven, 775 F.2d 1240, 1241-552 \(4th Cir. 1985\)*](#).

This competition is enhanced by the nature and scope of the contracts themselves. CMC's contracts typically allow the cable system to terminate the contract at any time upon one year's notice. (See Albin J. Seethaler Tr. at 42; Harrison Decl. at P 15.) CNI has entered into contracts with termination provisions that range from 30 days (Moran Aff. Exh. A at P 23.) to five years (Moran Aff. Exh. C at P 8(a)). NCA's contracts typically last [**34] for one to three years. (See Williams Decl. Exhs. C at P 1, D at P B(6), E at 3, F at P 8, G at P 9, and H.) Many of these contracts also allow the parties to terminate the arrangement early if revenue goals are not met, or if the cable system gives reasonable notice. (See, e.g. Williams Decl. Exh. D at P 9; Moran Aff. Exh. C at P 8(b).)

The geographic scope of the exclusive rep agreements also varies widely. CMC's contracts provide that national spot cable advertising time may be purchased from the system only through CMC. (Harrison Decl. P 16.) The majority of CNI's agreements also are national in scope, but some of its contracts appoint CNI as an exclusive representative only in cities where CNI maintains an office or regularly does business. (See Moran Aff. Exhs. A, B and C.) The territorial limitations of NCA's exclusive rep contracts vary, with the clients adopting national, regional and local approaches. (Williams Decl. PP 7-11, and Exhs. B, D, E, F and G.)

The Supreme Court's decision in [*Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#), suggests that, under [**35] these facts, the vertical, nonprice restrictions in this case are manifestly reasonable. The Court there, which was faced with a territorial restraint, based its conclusion on the fact that vertical agreements commonly have both pro-competitive and anticompetitive effects.

HN14[] Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers. Location restrictions have this effect because of practical constraints on the effective marketing area of retail outlets. Although intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be limited both by the ability of consumers to travel to other franchised locations and, perhaps more importantly, to purchase the competing products of other manufacturers

HN15[] Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use [**36] such restrictions to compete more effectively against other manufacturers. For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of [*482] products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products

[*Sylvania*, 433 U.S. at 54-55](#) (citations omitted).

The *Sylvania* Court's recognition of the "efficiencies" produced by vertical, nonprice restrictions applies with equal force in the present case. As the defendants contend, traditional antitrust concerns such as "free riding" have prompted the use of exclusive contracts throughout spot cable. The evidence has also demonstrated that such contracts have attracted investment capital to the industry, and have produced competition within the spot cable industry and with other advertising vehicles such as broadcast television. [**37] Finally, TE presents no evidence which suggests that the exclusive contracts have resulted in output restriction. Cf. [*Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 \(1979\)](#) (output restriction factor in determining whether restraint is unlawful *per se*).

In short, the Plaintiff would not be able to prove at trial that exclusive representation agreements have had a substantial anticompetitive effect. To the extent that TE's claims are premised on the theory that such contracts violate the antitrust laws, summary judgment must be granted.¹²

[**38] VI.

Count VIII of TE's Amended Complaint alleges a claim for tortious interference with contractual relations and business expectations. Under [section 773 of the Restatement \(Second\) of Torts](#):

HN16 [↑] 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 may otherwise be impaired or destroyed by the performance of the contract or transaction.

[Restatement \(2d\) of Torts § 773](#) (1979).

The evidence submitted to the Court shows that the defendants acted in good faith to protect their contractual rights. None of the evidence presented shows that the defendants used wrongful means to enforce those agreements. Therefore, summary judgment in the defendants' favor is appropriate.

VII.

TE's remaining claims concern alleged common law defamation and "commercial defamation" under Section 43(a) of the Lanham Act, [15 U.S.C. § 1125\(a\)](#).¹³ [*39] Both [*483] claims are based on the assumption that exclusivity in the spot cable advertising business violates the antitrust laws. In light of the Court's ruling on that issue, none of the defendants' statements could be held defamatory under state law or federal law.

[**40] TE points out that the Lanham Act was recently amended to include commercial defamation claims. Previously, false representations about the plaintiff's product or service were not considered actionable. See

¹² Thus, summary judgment also will be granted in favor of the defendants on TE's monopolization claim under [Section 2](#) of the Sherman Act, and on its Virginia antitrust claims. See [White v. Rockingham Radiologists, Ltd.](#), 820 F.2d 98, 105 (4th Cir. 1987) (plaintiff must show jury could find defendant had no valid business reason or concern for efficiency); [Satellite Television](#), 714 F.2d at 358 n.13 (reasoning applicable to Sherman Act claims governs Virginia antitrust statutes). For the same reasons, summary judgment will be granted for the defendants on the Virginia business conspiracy claims. Such claims require proof that the conspiracy had the purpose of "willfully and maliciously injuring" the plaintiff in his business, which could not be proved at trial on the facts submitted to this Court. [Va. Code Ann. §§ 18.2-499, - 500; Allen Realty Corp. v. Holbert](#), 227 Va. 441, 318 S.E.2d 592, 596 (Va. 1984).

¹³ That statute provides:

HN17 [↑] Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Monoflo International, Inc. v. Sahm, 726 F. Supp. 121, 126 n.10 (E.D. Va. 1989). The amendments extend the act to cover commercial defamation against any person. See *id.* (citing 15 U.S.C. § 1125).

However, the amendments do not save TE's Lanham Act claim. In *Monoflo International*, Judge Ellis ruled that the defendant's misrepresentations about the status of its relationship with the plaintiff did not trigger the Lanham Act. In an attempt to obtain Monoflo's product, the German corporate defendant sent a letter to Monoflo's distributor claiming that it was Monoflo's exclusive European sales agent. *Id. at 123*. The court ruled that the Lanham Act "reaches only misrepresentations that tend falsely to represent some aspect of a product or service; it does not reach, as here, misrepresentations essentially unconnected to a product or service. In misrepresenting its status as Monoflo's [**41] exclusive European sales agent, [the defendant] said nothing that would tend falsely to represent anything about the quality, nature, or characteristic of any product or service." *Id.*

Although TE claims the defendants misrepresented its capability to deliver spot advertising time to its clients, the real dispute concerned only TE's status. *Monoflo* makes it clear that this is not actionable under the Lanham Act, even as amended.

VIII.

For the reasons hereinbefore stated, the defendants' Joint Motion for Summary Judgment will be GRANTED. An appropriate Order shall issue.

James R. Spencer

UNITED STATES DISTRICT JUDGE

Date: APR 18 1994

FINAL ORDER - April 18, 1994, Filed

THIS MATTER comes before the Court on the parties' cross-motions for summary judgment. For the reasons stated in the accompanying Memorandum Opinion, the defendants' Joint Motion for Summary Judgment is hereby GRANTED. Accordingly, the Plaintiff's claims are hereby DISMISSED WITH PREJUDICE. The defendants' counterclaims for tortious interference with contractual relations are hereby DISMISSED WITHOUT PREJUDICE.

And it is SO ORDERED.

James R. Spencer

UNITED STATES DISTRICT JUDGE

Date: [**42] APR 18 1994

End of Document



State ex rel. Fisher v. Louis Trauth Dairy

United States District Court for the Southern District of Ohio, Western Division

April 20, 1994, Decided ; April 23, 1994, Filed

CASE NO. C-93-0553

Reporter

856 F. Supp. 1229 *; 1994 U.S. Dist. LEXIS 8467 **; 30 Fed. R. Serv. 3d (Callaghan) 956; 1994-2 Trade Cas. (CCH) P70,682

STATE OF OHIO EX REL. LEE FISHER, ATTORNEY GENERAL, Plaintiff, v. LOUIS TRAUTH DAIRY, INC., et al., Defendants.

Core Terms

conspiracies, school board, fraudulent concealment, Valentine Act, Dairy, joinder, bids, school district, due diligence, concealed, Defendants', allegations, occurrences, sovereign, motion to dismiss, discovery, parties, statute of limitations, tolling statute, transactions, antitrust, rigging, expressio unius est exclusio alterius, government entity, affirmative act, public entity, Overlapping, trusts

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN1 [down arrow] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss for failure to state a claim upon which relief can be granted under [Fed. R. Civ. P. 12\(b\)\(6\)](#) must be viewed in the light most favorable to the party opposing the motion. A court must accept as true all allegations in the well pleaded complaint under attack. A court may grant the motion only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN2 [down arrow] **Settlements, Settlement Agreements**

It is established law in Ohio that settlement with one Defendant, with a reservation of rights against other Defendants does not act as bar to suit against another Defendant who may also be liable.

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

Torts > Procedural Matters > Commencement & Prosecution > Venue

856 F. Supp. 1229, *1229A 1994 U.S. Dist. LEXIS 8467, **8467

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN3 Justiciability, Standing

See [Ohio Rev. Code § 1331.01\(A\)](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN4 Public Enforcement, State Civil Actions

A public board of education is not a "person," as defined in [Ohio Rev. Code § 1331.01\(A\)](#), when the board operates within its clear legal authority.

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

HN5 Case or Controversy, Standing

Where a public entity is found to be a "person" for purposes of a statute the entity is usually engaged in a commercial or business activity rather than acting in its governmental capacity.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6 Public Enforcement, State Civil Actions

See [Ohio Rev. Code § 109.81](#).

Governments > Legislation > Interpretation

HN7 Legislation, Interpretation

It is the duty of a court called upon to interpret a statute to breathe sense and meaning into it; to give effect to all its terms and provisions; and to render it compatible with other and related enactments whenever and wherever possible.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

HN8 Tolling of Statute of Limitations, Fraud

856 F. Supp. 1229, *1229LÁ994 U.S. Dist. LEXIS 8467, **8467

The statute of limitations applicable to private antitrust actions may be tolled where a plaintiff did not file its action in time because of ignorance resulting from a defendant's fraudulent concealment.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN9[] Heightened Pleading Requirements, Fraud Claims

There are strong policy reasons for the enforcement of statutes of limitations. They are vital to the welfare of society and are favored in the law. Stale conflicts should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain. For this and other reasons the Federal Rules require that fraud which would toll the statute must be plead with particularity. [Fed. R. Civ. P. 9\(b\)](#).

Governments > Legislation > Statute of Limitations > Time Limitations

HN10[] Statute of Limitations, Time Limitations

The Sixth Circuit has clarified that three elements must be pleaded in order to establish fraudulent concealment: (1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Tolling

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

HN11[] Tolling of Statute of Limitations, Fraud

The bedrock threshold for granting the equitable tolling of the statute of limitations for fraudulent concealment must be whether a plaintiff knew or through due diligence should have known of the existence of his claims.

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

Civil Procedure > Parties > General Overview

Civil Procedure > Parties > Joinder of Parties > General Overview

HN12[] Joinder of Parties, Permissive Joinder

The Federal Rules of Civil Procedure allow for joinder of parties. All persons may join in one See [Fed. R. Civ. P. 20\(a\)](#).

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > Parties > General Overview

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > General Overview

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > Joinder of Claims

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > Joinder of Remedies

[HN13](#) [blue icon] **Parties, Joinder of Parties**

Joinder is generally favored under the federal rules. Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged. The intent of the rules is that all issues be resolved in one action, with all parties before one court, complex though the action may be. Joinder promotes judicial economy, trial convenience and expedites the final determination of disputes.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

[HN14](#) [blue icon] **Judges, Discretionary Powers**

Permissive joinder rests with the sound discretion of the district court.

Counsel: [\[**1\]](#) For THE STATE OF OHIO, plaintiff: Doreen Claire Johnson, Ohio Attorney General, Columbus, OH. For LEE FISHER, plaintiff: James Rubin Cummins, Brown, Cummins & Brown -1, Cincinnati, OH. Stanley Morris Chesley, Waite, Schneider, Bayless & Chesley - 1, Cincinnati, OH. Doreen Claire Johnson, Ohio Attorney General, Columbus, OH.

For LOUIS TRAUTH DAIRY INC, DAVID E TRAUTH, defendants: G Jack Donson, Jr, Taft, Stettinius & Hollister - 1, Cincinnati, OH. For DAN SMITH, defendant: Brian Edward Hurley, Crabbe, Brown, Jones, Potts & Schmidt - 1, Cincinnati, OH. For H MEYER DAIRY COMPANY, defendant: Donald L Stepner, Adams, Brooking, Stepner, Woltermann & Dusing - 1, Covington, KY. For BORDEN INC, As a successor to Meadow Gold Dairies Inc, MEADOW GOLD DAIRIES INC, BORDEN INC AS SUCCESSOR TO VALLEY BELL DAIRY, VALLEY BELL DAIRY, defendants: William J Brown, Emens, Kegler, Brown, Hill & Ritter - 2, Columbus, OH. For REITER DAIRY INC, BROUGHTON FOODS CO, defendants: Donald S Scherzer, Kohrman, Jackson & Krantz, Cleveland, OH. For COORS BROTHERS COMPANY INC, defendant: Edward Schmertz Dorsey, Lindhorst & Dreidame -1, Cincinnati, OH. For SMITH DAIRY PRODUCTS COMPANY INC, defendant: John J Eklund, [\[**2\]](#) Calfee, Halter & Griswold, Cleveland, OH. For GOSHEN DAIRY COMPANY, defendant: Ralph E Cascarilla, Cavitch, Familo & Durkin, Cleveland, OH. For HILLSIDE DAIRY CO, defendant: Stephen J Squeri, Jones Day Reavis & Pogue, Cleveland, OH. For SUPERIOR DAIRY INC, defendant: Richard L Stoper, Jr, Gold Rotatori & Schwartz Co LPA, Cleveland, OH. For UNITED DAIRY INC, defendant: Robert P Fitzsimmons, Fitzsimmons & Associates, Wheeling, WV.

For UNITED STATES OF AMERICA, for Limited Intervention under Rule 24, intervenor: Gerald Francis Kaminski, US Attorney, Cincinnati, OH.

Judges: Spiegel

Opinion by: S. ARTHUR SPIEGEL

Opinion

[*1232] ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This matter is before the Court on Motions To Dismiss or for a More Definite Statement filed individually and jointly by the various Defendants (docs. 31, 32, 33, 35, 36, 41, 43, 63, 85, 93, and 94). The Plaintiff has responded to these motions (docs. 58, 86, and 106). The Defendants, in turn, have replied (docs. 72, 80, 81, and 99). The Plaintiff has requested leave to file a Surreply (108). The Defendants then filed a Joint Response to Plaintiff's request to surreply (doc. 114) and the Defendants themselves have asked for leave to file their own Supplemental [**3] Memorandum (doc. 140).

In addition, the Defendants from Northeast Ohio have separately moved to be dropped from this suit or to sever and transfer the claims against them (doc. 115). The Plaintiff has responded (doc. 129), and the Northeast Defendants have replied (doc. 142). The Borden Defendants have also replied (doc. 138) in support to the Northeast Defendants.

Initially, we will grant all requests for leave to file additional briefs beyond those ordinarily permitted under Local Rule 7.2(a)(2). Due to the complexity and interdependence of these motions and out of an abundance of caution, we intend to consider all relevant arguments of the parties.

BACKGROUND

The Secretary of State has sued fifteen dairies doing business in Ohio, alleging price fixing in the sale of milk to schools. In addition the Amended Complaint names certain officers of the Defendant Dairies personally. Subsequent to the filing of some of the Defendants' Motions to Dismiss, the Plaintiff, as directed by the Court, filed Plaintiff's Outline Description of Overlapping Conspiracies (doc. 75). This document was ordered by the Court in response to the Defendants' requests for a more clear statement of the charges [**4] leveled against them. At this time two dairies, Meyer Dairy and Coors Dairy, have settled with the Plaintiff and have been dismissed from this case. The Defendants have cooperated in the filing of these motions and many Defendants incorporate the motions of the others.

STANDARD OF REVIEW

HN1 [↑] A motion to dismiss for failure to state a claim upon which relief can be granted under *Fed. R. Civ. P. 12(b)(6)* must be viewed in the light most favorable to the party opposing the motion. *Great Lakes Steel v. Deggendorf*, 716 F.2d 1101, 1105 (6th Cir. 1983). A court must accept as true all allegations in the well pleaded complaint under attack. *Id.* A court may grant the motion only "if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *Balderaz v. Porter*, 578 F. Supp. 1491, 1494 (S.D. Ohio 1983).

DISCUSSION

Failure to State a Claim

The Defendants' original Motion to Dismiss or For a More Definite Statement challenged [**5] the adequacy of Plaintiff's First Amended Complaint. Initially, the Defendants noted that the Complaint failed to name the actual school boards on whose behalf the Secretary is acting. Further, the Defendants protested that the allegations in the Complaint were conclusory and failed to give them adequate notice of the claims made against them. In the alternative the Defendants prayed for a more definite statement of the Plaintiff's claims. The Court found merit in these assertions by the Defendants and ordered in our Preliminary Pretrial Order [*1233] that the Plaintiff supplement his Amended Complaint as follows:

By November 15, 1993, the Plaintiff will file with the Court an Outline Description of the Overlapping Conspiracies alleged in the Complaint, including:

- (1) which dairies were involved in each conspiracy,
- (2) which school districts were the target of each conspiracy,
- (3) when each conspiracy began and ended,
- (4) what were the geographic boundaries of each conspiracy,
- (5) what overt acts by the dairies tend to prove the conspiracy theory.

Preliminary Pretrial Order, October 24, 1993, Document 38. The Plaintiff has submitted the Description (doc. 75) as ordered. Some Defendants [\[**6\]](#) contend that even with this information the Plaintiff's Amended Complaint is inadequate. However, we hold that with the filing of the Plaintiff's Description of the Conspiracies, the requirements of notice pleading are satisfied. See [Fed. R. Civ. P. 8\(a\)](#).

Satisfaction

Next the Defendants argue that the Settlement Agreement between Meyer Dairy and the State of Ohio constitutes full restitution, thereby leaving no claim for damages against the remaining Defendants. However, [HN2](#)[↑] it is established law in Ohio that settlement with one Defendant, with a reservation of rights against other Defendants does not act as bar to suit against another Defendant who may also be liable. See [Whitt v. Hutchison, 43 Ohio St. 2d 53, 60, 330 N.E.2d 678 \(1975\)](#). Therefore, the Defendants' Motion to Dismiss based on the Meyer Dairy settlement must be denied.

Standing

The Defendants argue that the Plaintiff lacks standing to bring their Valentine Act claims for damages. They base their contention primarily on the language of the Act in conjunction with the *Thaxton* case. [Thaxton v. Medina City Board of Education, 21 Ohio St. 3d 56, 488 N.E.2d 136 \(1986\)](#). [\[**7\]](#)

There is nothing in the language of the Act which would prevent a school district from bringing an action. The Act states in pertinent part that:

[HN3](#)[↑] The person injured in his business or property by another person by reason of anything forbidden or declared to be unlawful in [this Act], may sue therefor in any court having jurisdiction and venue thereof,

[Ohio Rev. Code § 1331.01\(A\)](#). The Act provides this definition of "person":

(A) "Person" includes corporations, partnerships, and associations existing under or authorized by any state or territory of the United States, and solely for the purpose of the definition of division (B) of this section, a foreign governmental entity.

[Ohio Rev. Code § 1331.01\(A\)](#). As the Ohio Supreme Court has noted, the definition is not exclusive, and gives no indication that the legislature intended to eliminate school boards. *Thaxton*, 21 Ohio St. at 57.

The Defendants maintain that a school board is not a "person" within the meaning of the Act. They base this contention on the holding in *Thaxton*. In that case a school board was sued for Valentine Act violations. The Ohio Supreme Court held in the syllabus: [\[**8\]](#)

[HN4](#)[↑] A public board of education is not a "person," as defined in [R.C. 1331.01\(A\)](#), when the board operates within its clear legal authority.

[Thaxton v. Medina City Board of Education, 21 Ohio St. 3d 56, 488 N.E.2d 136 \(1986\)](#). It would, at first glance, appear that *Thaxton* not only protect a school district from suit under the Valentine Act, but also would exclude school districts from becoming a plaintiff under the Act. However, upon closer analysis, we are persuaded that despite the broad language of the syllabus, the intent of the Ohio Supreme Court was only to provide protection

from lawsuits against school boards. We do not find that it intended to deprive school districts the right to sue, if the districts should become the victims of price fixing.

[*1234] We must begin this analysis with a consideration of the significance of the syllabus in Ohio cases. The Ohio Supreme Court is required by statute to make a brief statement of the new and important points of law which each case establishes. [Ohio Rev. Code § 2503.42](#). It is axiomatic that this brief statement, the syllabus, states the law of the case, and that all courts applying Ohio [**9] law are bound to adhere to the principles set forth there. [Smith v. Klem, 6 Ohio St. 3d 16, 18, 450 N.E.2d 1171 \(1983\)](#); [Grange Mut. Cas. Co v. Smith, 80 Ohio App. 3d 426, 431, 609 N.E.2d 585 \(Washington Cty. 1992\)](#). However, the syllabus cannot be understood in a vacuum, but must be read in the context of the facts of the particular case upon which it is premised. It is not to be regarded as absolutely controlling authority in other cases where the material facts are different. [Fenner v. Parkinson, 69 Ohio App. 3d 210, 214, 590 N.E.2d 339 \(Franklin Cty. 1990\)](#). The Supreme Court of Ohio Rules for the Reporting of Opinions declares that "the syllabus . . . states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication." S. Ct. R. Rep. Op. 1(B) (emphasis added). Therefore, the syllabus in the *Thaxton* case must be understood in terms of the facts of that case. Our analysis then must turn to those facts.

In *Thaxton* three school boards were being sued under [**10] the Valentine Act. The plaintiffs claimed that the school boards were enforcing a monopoly on the students in regard to year book photographs. [21 Ohio St. 3d at 56](#). The court held that the school boards could not be sued under the Valentine Act, because the boards were not "persons" within the meaning of the Act. [Id. at 57](#). The *Thaxton* court reached this conclusion on two grounds.

The first basis for the *Thaxton* court's holding is that [HN5](#) where a public entity is found to be a "person" for purposes of a statute "the entity is usually engaged in a commercial or business activity rather than acting in its governmental capacity." [21 Ohio St. 3d at 57](#). For this proposition the court cites the case of *United States v. Coumantaros*, 165 F. Supp. 695, 698 (D. Md. 1958). In that case the United States was attempting to sue an individual person in the Superior Court of Baltimore City, in order to recover on a debt. The Baltimore ordinance allowed "persons" to sue and the defendant contested whether the United States had standing [**11] as a "person." The *Coumantaros* court articulated several factors which when present make it reasonable to construe the sovereign to be a "person" under a statute.

Generally the sovereign entity involved is acting not in its sovereign capacity but rather is engaging in commercial and business transactions such as other persons, natural or artificial, are accustomed to conduct. Usually, in addition, when a statute is construed so as to include the sovereign within its terms *no impairment of sovereign powers results thereby and remedies are given rather than taken away*.

* * *

'When a state enters the market place seeking customers it divests itself of its quasi sovereignty, pro tanto, and takes on the character of a trader' [Ohio v. Helvering, 292 U.S. 360, 369, 78 L. Ed. 1307, 54 S. Ct. 725 \(1934\)](#).

Coumantaros, 165 F. Supp. at 698 (emphasis added). It is clear from these criteria that the standard the *Coumantaros* court is relying upon is basically the proprietary versus governmental function distinction. See [Hack v. Salem, 174 Ohio St. 383, 387, 189 N.E.2d 857 \(1963\)](#). [**12] This proprietary versus governmental analysis is primarily concerned with whether a public entity is entitled to the protection of sovereign immunity. See *id.* Likewise, the *Thaxton* court's commercial versus governmental analysis, is essentially a sovereign immunity analysis. As such, since sovereign immunity is exclusively concerned with the public entity as defendant, the holding in *Thaxton* should be limited to a school board as defendant.

The second basis the *Thaxton* court offers for its holding that a school board is not a "person" under the Valentine Act is by application of the statutory principle "*expressio unius est exclusio alterius*." Under this principle "the express mention of but one class of persons in a statute implies the exclusion of all others." [Thaxton, 21 Ohio St. 3d](#)

856 F. Supp. 1229, *1234-994 U.S. Dist. LEXIS 8467, **12

at 57 [*1235] (quoting *State, ex re. Boda v. Brown*, 157 Ohio St. 368, 372, 105 N.E.2d 643 (1952)). In this argument, it is even clearer that the Ohio Supreme Court viewed the school boards only as defendants.

Thaxton's expressio unius est exclusio alterius analysis focuses upon the last clause in [**13] the Valentine Act's "person" definition:

(A) "Person" includes corporations, partnerships, and associations existing under or authorized by any state or territory of the United States, *and solely for the purpose of division (B) of this section, a foreign governmental entity.*

Ohio Rev. Code § 1331.01(B) (emphasis added). The *Thaxton* court held that the express mention of foreign governmental entities in the statute, makes the exclusion of any express reference to other governmental entities, such as school boards, fatal to the extension of the definition of "person" to school boards.

On closer inspection the application of the statutory principle of *expressio unius est exclusio alterius* reinforces the interpretation that the statute speaks only to government bodies as defendants. The phrase at issue begins "solely for the purpose of division (B) of this section . . ." When we look at division (B) of the Act, we find that it is the definition of a "trust," that is to say the target of the Valentine Act. Therefore, foreign governmental bodies are expressly included within the definition of trusts under the statute. Under the strict rule of *expression unius* [**14] *est exclusio alterius*, this would mean that school boards are excluded from being Valentine Act trusts. Thus the holding of *Thaxton* is: school boards may not be trusts, that is they may not be Valentine Act defendants. Since the Act's express reference to foreign governmental bodies is explicitly limited by the language of the statute to foreign governmental bodies as defendants, the principle of *expressio unius est exclusio alterius* would only allow an inference about school boards as defendants. However, the exclusion of school boards from consideration as "trusts" or from being Valentine Act defendants does not prevent them from being plaintiffs under the Act.

The *Thaxton* case was applied by an Ohio appellate court in *Stow v. Summit County*, 70 Ohio App. 3d 298, 590 N.E.2d 1363 (Summit Cty. 1990). In *Stow* one city, Stow, sued another city, Akron, and a county, Summit County, under the Valentine Act. interestingly, while following the second *Thaxton* argument, the court specifically held that the defendants were not "persons" within the meaning of the Valentine Act, but made no mention of the standing of the plaintiff, [**15] the City of Stow. *Stow*, 70 Ohio App. 3d at 300.

Both of the arguments which the *Thaxton* court offers for its holding are directed toward the exclusion of school boards as Valentine Act defendants. However, these arguments offer no impediment to school boards using the Valentine Act as plaintiffs. The first argument is at heart based on sovereign immunity, a defense. The second, based on *expressio unius est exclusio alterius*, excludes school boards from the definition of trusts, that is Valentine Act defendants.

Finally, the *Thaxton* holding, though directed at school districts in particular, by its own language applies to all Ohio government entities. *Thaxton*, 21 Ohio St. 3d at 57 (holding applies to a "board of education or other public entity"). If this were to be taken literally it would severely conflict with *Section 109.81 of the Ohio Revised Code*. That section explicitly empowers the Ohio Attorney General to bring lawsuits on behalf of Ohio's public entities:

HN6[] (A) The attorney general shall act as the attorney at law in any antitrust case for the state. He may act as the [**16] attorney at law in any antitrust case for *any political subdivision* of the state, for the governing body of any political subdivision of the state, or, as *parens patriae*, for any natural person residing in the state.

Ohio Rev. Code § 109.81 (emphasis added). We are instructed by the Ohio courts, when interpreting the Revised Code to attempt to reconcile possible conflicts:

HN7[] It is the duty of a court called upon to interpret a statute to breathe sense and meaning into it; to give effect to all its terms and provisions; and to render it [*1236] compatible with other and related enactments whenever and wherever possible.

[Commonwealth Loan Co. v. Downtown Lincoln Mercury Co., 4 Ohio App. 2d 4, 6, 33 Ohio Op. 2d 6, 7, 211 N.E.2d 57 \(Hamilton County 1964\).](#)

Therefore, we hold that there is no impediment in Ohio law to a school district asserting the rights of a plaintiff under the Valentine Act. Accordingly, the Attorney General has standing to bring this action on behalf of the school boards of Ohio.

Fraudulent Concealment

The statute of limitations for an action under the Clayton Antitrust Act is four years. [15 U.S.C. § 15](#) [**17] (b). Having filed this suit August 11, 1993, under this statute of limitations the Plaintiff would be limited to claims which arise after August 11, 1989. However, the First Amended Complaint alleges bid rigging which began as early as 1977 and continued until "at least 1989." In order to recover for this period the Plaintiff must overcome the statute of limitations. [HN8](#) [↑] The statute of limitations applicable to private antitrust actions may be tolled where a plaintiff did not file its action in time because of ignorance resulting from a defendant's fraudulent concealment. [Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 \(6th Cir. 1975\)](#); [Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230 \(6th Cir.\), cert. denied, 419 U.S. 997, 42 L. Ed. 2d 270, 95 S. Ct. 310 \(1974\)](#).

[HN9](#) [↑] There are strong policy reasons for the enforcement of statutes of limitations. They are vital to the welfare of society and are favored in the law. [Wood v. Carpenter, 101 U.S. 135, 139, 25 L. Ed. 807 \(1879\)](#). "Stale conflicts should be allowed to rest [**18] undisturbed after the passage of time has made their origins obscure and the evidence uncertain." [Dayco, 523 F.2d at 394](#). For this and other reasons the Federal Rules require that fraud which would toll the statute must be plead with particularity. [Fed. R. Civ. P. 9\(b\)](#). [HN10](#) [↑] The Sixth Circuit has clarified that three elements must be pleaded in order to establish fraudulent concealment:

(1) wrongful concealment of their actions by the defendants.

(2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and

(3) plaintiff's due diligence until discovery of the facts.

Id. (citing [Weinberger v. Retail Credit Co., 498 F.2d 552 \(4th Cir. 1974\)](#)). We find that the Plaintiffs have met their pleading requirement in regard to these three elements.

The first element that must be pleaded in order to establish fraudulent concealment is "wrongful concealment of their actions by the defendants." [Dayco, 523 F.2d at 394](#). When the underlying cause of action is for violations of [antitrust law](#), the Plaintiff must allege some affirmative [**19] misconduct preventing discovery and excusing delay. [Pinney Dock & Transport Co. v. Penn Central Corp., 838 F.2d 1445, 1468-69 \(6th Cir.\) cert. denied, 488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 \(1988\)](#).

In his Amended Complaint the Plaintiff has alleged:

36. Despite the exercise of due diligence, Plaintiff was unaware of and did not discover the existence of the claim sued under because Defendants and their co-conspirators fraudulently concealed the existence of the combinations and conspiracies by the following affirmative acts:

(a) Submitting prearranged, complementary losing bids on milk supply contracts previously allocated for the purpose of concealing their contract allocation scheme and in order to give the illusion of competition among the Defendants and their coconspirators;

(b) Secretly conducting activities in furtherance of the conspiracies, avoiding reference to the conspiracies in documents, and confining information concerning the conspiracies to only key responsible individuals of involved companies; and

(c) Engaging in other fraudulent acts not now known to Plaintiff [**20] in an attempt to continue to conceal as much of their illegal conduct as possible.

[*1237] *First Amended Complaint* at P 36, Document 25. The Plaintiff school districts created a system of sealed bids for milk contracts in order to assure the integrity of the bidding process. We are satisfied that the allegation of the use of prearrange rigged bids, which were secretly negotiated and subsequently concealed is sufficient to meet the affirmative misconduct requirement of fraudulent concealment.

The Defendants argue that the Plaintiff merely alleges silence on the part of the Defendants. See [*Pinney Dock, 838 F.2d at 1472*](#) ("Mere silence, where there is no duty to speak, does not toll the statute.") The *Pinney Dock* court considered the issue of what constitutes an affirmative action sufficient to rise to the level of fraudulent concealment at some length. That court clarified with this example:

"In [the Complaint] the plaintiffs allege that the defendants performed certain acts in furtherance of the conspiracy which created the false impression that project bids were competitively made rather than rigged. This is something more than silence; if true, [**21] it constitutes an attempt to deceive both the competition and the public into the belief that all of their bids were made legitimately and as the result of competitive considerations. It is precisely the sort of affirmative act of deception required by the jurisprudence." [*Ingram Corp. v. J. Ray McDermott & Co., 1980-1 Trade Cas. \(CCH\) P 78,414 \(E.D. La. 1980\)*](#). The affirmative acts referred to in [the Complaint] included submitting prearranged losing bids by the company that had agreed not to receive the award, in order to give the illusion of competition among the corporate defendants,

[*Pinney Dock, 838 F.2d at 1473*](#). This citation give us ample grounds for finding that the sort of bid rigging alleged by the Plaintiffs constitutes affirmative acts, which if proved will be sufficient to meet the first element of the Sixth Circuits test for fraudulent concealment. See [*Dayco, 523 F.2d at 394*](#).

The second element and third elements which the Sixth Circuit requires a plaintiff to plead in order to establish fraudulent concealment are (2) the failure of the plaintiff to discover the operative [**22] facts of the alleged violation and (3) the plaintiff's due diligence until discovery. [*Dayco, 523 F.2d at 394*](#). These two are closely related since the Supreme Court long ago recognized that in respect to fraudulent concealment "the means of knowledge are the same thing as actual knowledge" [*Wood v. Carpenter, 101 U.S. 135, 143, 25 L. Ed. 807 \(1879\)*](#). A plaintiff therefore must prove that he neither knew nor should have known of his potential claims, despite his due diligence. In the instant case, the Plaintiff claims that the school districts

were unaware of and did not discover the existence of the claim sued upon because Defendants and their co-conspirators fraudulently concealed the existence of the combinations and conspiracies"

First Amended Complaint, at P 36, Document 25. In addition the Plaintiff claims that the school districts showed due diligence through their use of sealed bids and their diligent inquiry which finally lead to the discovery of their alleged claims. [*Id. at P 35*](#).

As noted earlier, the Sixth Circuit has given abundant guidance in regard to the requirements [**23] for pleading fraudulent concealment.¹ [*\[**25\]*](#) In particular both the Plaintiff and the Defendants have referred repeatedly the *Pinney Dock* case, and rightly so, because the thorough analysis in that case has gained wide acceptance.² It is instructive that at the end of the Court of Appeals detailed discussion in *Pinney Dock*, the issue upon which the court focused for its decision [*1238] concerning fraudulent concealment is that the plaintiffs knew of the acts of the defendants well in advance of the filing of their complaint. [*Pinney Dock, 838 F.2d at 1477*](#). The question of

¹ [*Pinney Dock & Transport Co. v. Penn Central Corp., 838 F.2d 1445*](#) (6th Cir.) cert. denied, **488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 (1988); Campbell v. Upjohn, 676 F.2d 1122 (6th Cir. 1982); Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975); Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230 (6th Cir.), cert. denied, **419 U.S. 997, 42 L. Ed. 2d 270, 95 S. Ct. 310 (1974).****

² See, for example, In [*Re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1179 \(3rd Cir. 1993\); Conmar Corp. v. Mitsui & Co. \(U.S.A.\) Inc., 858 F.2d 499, 505 \(9th Cir. 1988\); State of South Dakota v. Kansas City Southern Industries, 880 F.2d 40, 46 \(8th Cir. 1989\).*](#)

affirmative acts of concealment which the Court of Appeals considered at great length, and which the Defendants rely heavily upon for this motion was in the end not dispositive. The Court of Appeals concluded:

that [the relationship between the parties] may contain the seeds of support for the finding of the district judge that factual questions of actual concealment was presented. However, we also concluded that the record leads us to . . . the . . . conclusion . . . that the time eventually arrived when "the alleged conspiracy was no longer concealed and could have been discovered [**24] by due diligence well within the statutory period."

[Pinney Dock, 838 F.2d at 1477](#) (quoting from [Gaetzi v. Carling Brewing Co., 205 F. Supp. 615 \(E.D. Mich. 1962\)](#)). Therefore, the Court of Appeals based its final decision to deny the plaintiffs' claim of fraudulent concealment on its determination that the plaintiffs knew of their claims and had not exercised due diligence in pursuing them. The Court of Appeals pointed to evidence in the record that the *Pinney Dock* plaintiffs were advised by counsel that the defendants were engaging in acts in violation of the antitrust laws. Internal documents indicate that those plaintiffs were convinced that their attorneys' advice was correct. The Court of Appeals concluded:

To hold that a tolling or suspension of the limitations of action must continue unless or until proof positive existed of a wrong (which might never be established in fact) would abort the policy of the law of repose in statutes of limitations of diligence in the equitable principles permitting suspension of them.

[Pinney Dock, 838 F.2d at 1478.](#)

Indeed, in those fraudulent concealment cases where the courts have denied the plaintiffs the benefit of tolling of the statute of limitations, the courts repeatedly have focused on knowledge and due diligence. See [Pinney Dock & Transport Co. v. Penn Central Corp., 838 F.2d 1445](#) (6th Cir.) cert. denied, 488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 (1988); [Campbell v. Upjohn, 676 F.2d 1122 \(6th Cir. 1982\)](#) (holding that the plaintiff was not entitled to a tolling of the statute when he did not read the merger agreement at the time he signed it and should have learned of the alleged scheme more than two years [**26] before suit was actually filed); [Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 \(6th Cir. 1975\)](#) (denying tolling of statute when congressional hearings and press coverage should have alerted the plaintiff); [Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230](#) (6th Cir.), cert. denied, 419 U.S. 997, 42 L. Ed. 2d 270, 95 S. Ct. 310 (1974) (holding that ignorance by the plaintiff of his legal rights would not toll the statute).

We find this emphasis on discovery and due diligence in the fraudulent concealment cases to be well taken. [HN11](#)[
▲] The bedrock threshold for granting the equitable tolling of the statute of limitations for fraudulent concealment must be whether a plaintiff knew or through due diligence should have known of the existence of his claims. In the case at bar, the Defendants make no allegations that the school boards had discovered the operative facts that form the basis of their bid rigging claims, or that the Plaintiffs could have discovered the alleged bid rigging through due diligence. The main thrust of the Defendants arguments in regard [**27] to the issue of the Plaintiff's knowledge and diligence is that the Plaintiff has not pleaded these claims with sufficient particularity. We find that the Plaintiff's allegations are sufficient to overcome this motion to dismiss.

In ruling that the Plaintiff's Complaint, taken in conjunction with the Outline Description of Overlapping Conspiracies, contains allegations sufficient to survive these Motions to Dismiss, we make no judgment as to the actual merits of the Plaintiff's case. We must deny the Defendants' motion unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claims which would entitle him to relief. See [Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#); [Balderaz v. Porter, 578 F. Supp. 1491, 1494 \(S.D. Ohio \[*1239\] 1983\)](#). At trial the Plaintiff, after the benefit of discovery, bears the considerably greater burden of proving his allegations, in particular the threshold burden of proving fraudulent concealment, with respect to each defendant, individually.

Northeastern Districts Request to Sever

Defendants Smith Dairy Products [**28] Company, Hillside Dairy, Goshen Dairy, and Superior Dairy have moved that the school districts and the six Defendants described by the Plaintiff as participants in the Northeast conspiracy be dismissed from this case or in the alternative that they be severed and transferred to the Northern District of Ohio. Defendant Borden Dairy has filed a Reply in support of this motion. These Defendants argue that their joinder

in this case under the Plaintiff's First Amended Complaint is improper. They contend that the rights to relief asserted by the Plaintiff against them do not arise out of the same transaction, occurrence, or series of transactions or occurrences as the claims against the other Defendants.

HN12[] The Federal Rules of Civil Procedure allow for joinder of parties.

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative *in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences* and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo ****29** or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief *in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences* and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Fed. R. Civ. P. 20(a) (emphasis added).

There is no dispute that common questions of law exist among the claims against various Defendants. However, the moving Defendants contest whether the occurrences or transactions are the same. They argue that the Plaintiff has alleged three separate conspiracies and that even if these allegations were correct, the existence of separate, similar conspiracies is not sufficient to permit joinder under this rule. See Saval v. BL Ltd., 710 F.2d 1027 (4th Cir. 1983) ****30** (plaintiffs with similar complaints against same defendant denied joinder); Kenvin v. Newburger, Loeb and Company, 37 F.R.D. 473 (S.D.N.Y. 1965) (investor claiming fraud in identical manner by four separate investors denied joinder).

HN13[] Joinder is generally favored under the federal rules. United Mine Workers v. Gibbs, 383 U.S. 715, 724, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966) ("Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."); Lasa Per L'Industria Del Marmo Soc. Per Azioni v. Alexander, 414 F.2d 143, 147 (6th Cir. 1969) ("The intent of the rules is that all issues be resolved in one action, with all parties before one court, complex though the action may be."). Joinder promotes judicial economy, trial convenience and expedites the final determination of disputes. Mosley v. General Motors Corp., 497 F.2d 1330, 1332 (8th Cir. 1974); Peffers v. Bowman, 599 F. Supp. 353, 356 (D. Idaho 1984). ****31** In Mosley the Eighth Circuit held that the terms "transaction or occurrence or series of transactions or occurrences" should be broadly interpreted to

permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary.

Mosley, 497 F.2d at 1333. Finally, **HN14**[] permissive joinder rests with the sound discretion of the district court. Swanigan v. Amadeo Rossi, S.A., 617 F. Supp. 66, 67 (E.D. Mich. 1985).

[*1240] The Plaintiff has claimed a series of overlapping and interwoven conspiracies. He has alleged three main conspiracies. However, individual Defendants are alleged to have participated in more than one of these three conspiracies. In exercising discretion under Rule 20, the district court must determine whether joinder will comport with principles of fundamental fairness. McIntyre v. Codman & Shurtleff, Inc., 103 F.R.D. 619, 622 (S.D.N.Y. 1984). We realize that the size and complexity of this suit is a burden for all the Defendants. However, we must balance the problems raised by joinder with the ****32** advantages both judicial and practical of trying all the Attorney General's overlapping conspiracy claims together. We have attempted through the creation in Columbus of one central document depository to avoid some of the onus of document discovery. Therefore, we deny the Northeast Defendants motion to dismiss or to transfer to the Northern District of Ohio.

The McClave Report

Throughout their various Motions to Dismiss, the Defendants have argued that the First Amended Complaint, even as supplemented by the Plaintiff's Outline, is insufficient to put them on notice of the claims against them and consequently insufficient to allow them to properly prepare their defense. In their Supplemental Memorandum for a More Definite Statement (doc. 140), the Defendants, with the benefit of evidence uncovered in discovery, have renewed this contention. They have deposed what they represent as the Plaintiff's "key witnesses" with respect to the conspiracy. The Defendants contend that:

These depositions reveal that the Plaintiff's case against 10 of 13 Defendants rests entirely on a "market analysis" using methodology developed by James T. McClave and Info Tech. To date, Plaintiff has refused [**33] to provide this "market analysis" to Defendants.

Defendants' Supplemental Memorandum at 2, Document 140. We agree that the Defendants should be entitled to the information in the McClave report.³ Accordingly, when the Plaintiff produces his list of expert witnesses on May 15, 1994, in accord with our Preliminary Pretrial Order, he will also provide the Defendants with any expert reports, preliminary or otherwise, including the McClave "market analysis."

CONCLUSION

Accordingly, the Defendants' Motions to Dismiss or for a More Precise Statement are hereby denied. The Northeast Defendants' Motion that they be dropped or transferred is also denied. Finally, the Plaintiff is ordered to provide the Defendants with the McClave market analysis, as directed herein.

SO ORDERED.

Dated: April [**34] 20, 1994

S. Arthur Spiegel

United States District Judge

End of Document

³ In ordering the discovery of this report we find ourselves in agreement with Judge Bertelsman, in the Eastern District of Kentucky. *Commonwealth v. Louis Trauth Dairy, Inc.*, No. 92-50 *slip op.* (E.D. Ky., June 25, 1992).



Seabury Management v. Professional Golfers' Ass'n of Am.

United States District Court for the District of Maryland

April 25, 1994, Decided ; April 26, 1994, FILED

CIVIL ACTION NO. MJG-92-530

Reporter

878 F. Supp. 771 *; 1994 U.S. Dist. LEXIS 20311 **

SEABURY MANAGEMENT, INC., Plaintiff vs. PROFESSIONAL GOLFERS' ASSOCIATION OF AMERICA, INC., et al., Defendants

Core Terms

golf, trade show, matter of law, monopolization, sectional, new trial, conspiracy, conspired, relevant market, east coast, damages, Antitrust, entitled to judgment, punitive damages, Sherman Act, subsidiary, entities, estimate, award of punitive damages, compensatory damages, actual malice, ambiguous, licensing, trademark, anti trust law, calculating, territorial, Counts, costs, logo

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN1 [down arrow] Relief From Judgments, Altering & Amending Judgments

A motion for a new trial involves a comparison of opposing proofs. These opposing proofs are based on the judge's interpretation of the evidence. A motion for a new trial under [Fed. R. Civ. P. 59](#), unlike a motion for a directed verdict under [Fed. R. Civ. P. 50\(a\)](#), may be based on the judge's personal weighing of the evidence and his own evaluation of the credibility of the witnesses.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN2 Judgment as Matter of Law, Directed Verdicts

On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.

[Civil Procedure > Trials > Judgment as Matter of Law > General Overview](#)

[Civil Procedure > Judgments > Relief From Judgments > General Overview](#)

[Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials](#)

HN3 Trials, Judgment as Matter of Law

A judgment as a matter of law should be granted where there is no substantial evidence in opposition and, without weighing the credibility of witnesses, there can be but one reasonable conclusion as to the verdict. Unlike a motion for a new trial, where the court examines the quality of the evidence, a motion for judgment as a matter of law requires the court to examine the sufficiency of the evidence. Under this standard, the court is required to view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence.

[Contracts Law > Defenses > Ambiguities & Mistakes > General Overview](#)

[Contracts Law > Contract Interpretation > General Overview](#)

HN4 Defenses, Ambiguities & Mistakes

Where there is an ambiguity in a contract, the question of interpretation is, generally, a question of fact to be resolved by the finder of fact.

[Civil Procedure > Trials > Judgment as Matter of Law > General Overview](#)

[Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview](#)

HN5 Trials, Judgment as Matter of Law

Only an unambiguous writing justifies judgment as a matter of law without resort to extrinsic evidence, and no writing is unambiguous if 'susceptible of two reasonable interpretations.'

[Antitrust & Trade Law > Sherman Act > Claims](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act](#)

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview](#)

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

To prevail on a [15 U.S.C.S. § 1](#) claim under the Sherman Act, a plaintiff must establish a contract, combination or conspiracy in unreasonable restraint of trade. [15 U.S.C.S. § 1](#). This section does not prevent business decisions made and behavior engaged in by a single economic unit. Rather, this section focuses on the joining of two groups whose actions then result in an unreasonable restraint of trade.

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

[**HN7**](#) [down] Regulated Practices, Price Fixing & Restraints of Trade

[Section 11-204\(a\)\(1\)](#) of the Maryland Antitrust Act indicates that courts are to be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. [Md. Code Ann. Com. Law II § 11-204\(a\)\(1\)](#) (1990).

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

[**HN8**](#) [down] Monopolies & Monopolization, Conspiracy to Monopolize

A parent corporation is not legally capable of conspiring with its wholly-owned subsidiary corporation for purposes of the antitrust laws.

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

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

[**HN9**](#) [down] Monopolies & Monopolization, Conspiracy to Monopolize

To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of [15 U.S.C.S. § 1](#) must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

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

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

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

[**HN10**](#) [down] Monopolies & Monopolization, Actual Monopolization

To prevail on a monopolization claim, a plaintiff must demonstrate possession of monopoly power in a relevant market, willful acquisition or maintenance of that power in an exclusionary manner and causal injury. For attempted monopolization, the plaintiff must prove a specific intent to monopolize a relevant market, predatory or anticompetitive behavior, and a high probability of successful monopolization.

878 F. Supp. 771, *771 (1994 U.S. Dist. LEXIS 20311, **20311

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

[**HN11**](#) [L] **Regulated Practices, Market Definition**

The determination of a relevant market is a question of fact.

Evidence > ... > Testimony > Expert Witnesses > General Overview

[**HN12**](#) [L] **Testimony, Expert Witnesses**

When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury verdict.

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

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

[**HN13**](#) [L] **Regulated Practices, Monopolies & Monopolization**

To prove monopolization, a plaintiff must show that defendant possesses monopoly power in relevant market.

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

[**HN14**](#) [L] **Relief From Judgments, Additur & Remittitur**

A jury is permitted to consider all the evidence in the record when calculating damages and that a damage award should not be overturned on the basis of speculation as to the manner in which the jurors arrived at it. However, there must be evidence in the record to support the verdict.

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

[**HN15**](#) [L] **Relief From Judgments, Additur & Remittitur**

Once liability is established, a reasonable estimate may be used to prove the amount of damage where such a measure is ordinarily difficult.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

[**HN16**](#) [L] **Types of Damages, Compensatory Damages**

Under Maryland law, a plaintiff may use a "yardstick" measure of proving its damages, as long as its assumptions rest on adequate bases and there is a "reasonable compatibility" between the businesses.

Civil Procedure > Remedies > Damages > Types of Damages > Punitive Damages

Evidence > Privileges > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN17 [] **Types of Damages, Punitive Damages**

A parent corporation has a privilege to interfere to protect its economic interests absent clear evidence that the parent employed wrongful means or acted with an improper purpose. To determine whether interference in a given case is proper, the court must examine a number of factors and decide "whether, upon consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. Those factors include "(a) the nature of the actor's conduct, (b) the nature of the expectancy with which his conduct interferes, (c) the relations between the parties, (d) the interest sought to be advanced by the actor and (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

Torts > ... > Contracts > Intentional Interference > Elements

Civil Procedure > Remedies > Damages > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN18 [] **Damages, Punitive Damages**

In a tort case where punitive damages are permitted, in order to obtain such an award a plaintiff must prove actual malice or its legal equivalent.

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

HN19 [] **Damages, Punitive Damages**

A basic but justified disagreement regarding the terms of the contract does not support an award of punitive damages.

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

HN20 [] **Damages, Punitive Damages**

It is well settled law in Maryland that punitive damages may not be awarded in a pure breach of contract action.

Counsel: **[**1]** FOR SEABURY MANAGEMENT, INC., plaintiff: Ty Cobb, Hogan & Hartson, Baltimore, MD. John B. Williams, Collier, Shannon and Scott, Washington, DC. James R. Loftis, III, Collier, Shannon and Scott, Washington, DC.

FOR PROFESSIONAL GOLFERS' ASSOCIATION OF AMERICA, INC., DICK SMITH, defendants: David Stewart Eggert, Stephen M. Sacks, Arnold and Porter, Washington, DC. John Henry Lewin, Jr., Venable, Baetjer and Howard, Baltimore, Md. FOR MIDDLE ATLANTIC SECTION, PROFESSIONAL GOLFERS' ASSOCIATION OF AMERICA, INC., defendant: Steven M. Nemeroff, Law Office, College Park, Md. Stephen M. Sacks, Arnold and Porter, Washington, DC. John Henry Lewin, Jr., Venable, Baetjer and Howard, Baltimore, Md. FOR THE PROFESSIONAL GOLFERS' ASSOCIATION, PHILADELPHIA SECTION, INC., defendants: Stephen M. Sacks, Arnold and Porter, Washington, DC. Gary R. Leadbetter, Clark, Leoner, Fortenbaugh and Young, Conshohocken, Pa. John Henry Lewin, Jr., Venable, Baetjer and Howard, Baltimore, Md.

FOR MIDDLE ATLANTIC SECTION PROFESSIONAL GOLFERS' ASSOCIATION OF AMERICA, INC., counter-claimant: Steven M. Nemeroff, Law Office, College Park, Md.

FOR SEABURY MANAGEMENT, INC., counter-defendant: Ty Cobb, Hogan & Hartson, Baltimore, MD.

Judges: Marvin J. Garbis, United States District Judge

Opinion by: Marvin J. Garbis

Opinion

[*774] MEMORANDUM AND ORDER

The Court has before it Defendants' Professional Golfers' Association of America, Inc. ("the PGA") and Middle Atlantic Section Professional Golfers' Association of America, Inc. ("the MAPGA") Post-Trial Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial. The Court has considered the legal memoranda submitted by the parties and has had the benefit of the arguments of counsel.

I. BACKGROUND

At issue in this jury trial was a dispute over a five-year contract ("the Contract") entered into by Plaintiff Seabury Management, Inc. ("Plaintiff" or "Seabury") and Defendant MAPGA in 1989 which allowed Seabury to "promote, produce, and conduct" a golf trade show. Seabury claims that this contract gave it the right to use the MAPGA name and logo to conduct and promote a golf trade show anywhere in the United States. The Defendants claim that the contract (consistent **[*775]** with the parties' intent) limited any MAPGA-sponsored golf trade show to an area within the MAPGA's territorial boundaries.

The case proceeded to trial on eleven Counts,¹ including: **[**2]**

Count 1 Breach of Contract against the MAPGA

Count 2 Tortious Interference with Contract against the PGA

Count 3 Tortious Interference with Prospective Business Relations against the PGA

Count 4 Violation of § 2 of the Sherman Act (monopolization) against the PGA

Count 5 Violation of § 2 of the Sherman Act (attempted monopolization) against the PGA

Count 6 Violation of § 2 of the Sherman Act (conspiracy/combination to monopolize) against both Defendants

¹ Two Counts (8 and 13) alleging price-fixing practices had been dismissed on the Defendants' motion for summary judgment. In this memorandum, the Counts are referred to by their original numbers.

Count 7 Violation of [§ 1](#) of the Sherman Act (restraint of trade) against both Defendants

Count 9 Violation of Maryland's Antitrust Act (monopolization) against the PGA

Count 10 Violation of Maryland's Antitrust Act (attempted monopolization) against the PGA

Count 11 Violation of Maryland's Antitrust Act (conspiracy/combination to monopolize) against both Defendants

Count 12 Violation of Maryland's Antitrust Act (contract, combination or conspiracy to unreasonably restrain trade) against both Defendants

Plaintiff sought actual damages, treble damages, punitive damages and reimbursement of Seabury's costs and fees, including attorney's fees.

[**3] A special verdict form having been submitted to the jury, the jury returned a verdict for Plaintiff, finding specifically that: (1) the MAPGA breached its contract with Seabury; (2) the PGA and the MAPGA were not part of a single economic unit; (3) the PGA had conspired with both the MAPGA and the Golf Manufacturers and Distributors Association ("the GMDA") to illegally restrain trade; and (4) Seabury had established its monopolization and attempted monopolization claims against the PGA. The jury awarded Plaintiff \$ 2.6 million in compensatory damages and \$ 4.8 million in punitive damages.

The Defendants now move for judgment as a matter of law or, in the alternative, a new trial.

II. *LEGAL STANDARDS*

A. New Trial

[HN1](#)[] A motion for a new trial involves a "comparison of opposing proofs." [Williams v. Nichols, 266 F.2d 389, 393 \(4th Cir. 1959\)](#). These opposing proofs are based on the judge's interpretation of the evidence. A motion for a new trial under [Fed. R. Civ. P. 59](#), unlike a motion for a directed verdict under [Fed. R. Civ. P. 50 \(a\)](#), may be based on the judge's personal weighing of the evidence and his own evaluation of the credibility of the witnesses. [**4] [Wyatt v. Interstate Ocean and Transport Co., 623 F.2d 888 \(4th Cir. 1980\)](#). As stated by the Fourth Circuit:

[HN2](#)[] On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.

[Aetna Casualty and & Surety Co. v. Yeatts, 122 F.2d 350, 352 \(4th Cir. 1941\)](#). See also [Gill v. Rollins Protective Services, 836 F.2d 194, 196 \(4th Cir. 1987\)](#); [Ellis v. International Playtex, Inc., 745 F.2d 292, 298 \(4th Cir. 1984\)](#); [Wyatt, 623 F.2d 888](#).

B. Judgment as a Matter of Law

[HN3](#)[] A judgment as a matter of law should be granted "where there is no substantial evidence in opposition and, without weighing the credibility of witnesses, there can be but one reasonable conclusion as to the verdict." [*776] [Poynter v. Ratcliff, 874 F.2d 219, 222-23 \(4th Cir. 1989\)](#). Unlike a motion for a new trial, where the Court examines the quality of the evidence, a motion for judgment as a matter of law [**5] requires the Court to examine the sufficiency of the evidence. Under this standard, the Court is required to view the evidence "most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence." 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524, at 544-45. The Court notes that this is a stricter standard than that for granting a new trial.

III. *DISCUSSION*

A. Contract Claim

At the core of this dispute is the scope of the Contract rights Plaintiff received. Plaintiff asserts it could have held a MAPGA-sponsored golf trade show anywhere in the United States and Defendants assert that the contract limited this right to the MAPGA's territorial boundaries. As discussed below, the Court concludes that the Contract was ambiguous on the point at issue.

It is necessary to consider the Contract in its entirety, including the September 1989 amendment. When so read, there is a reasonable basis for a jury verdict for either side. Plaintiff's strongest argument is derived from Paragraph 3, which states, without reference to any geographic limitation, that Seabury was [**6] responsible for selecting the location of the golf trade show. Of course, that is not the only pertinent provision. If it were, Seabury would likely have been entitled to summary judgment. However, there are also Contract provisions which support - but do not definitely establish - the Defendants' position.

Paragraph 1 reads, in pertinent part, "Seabury shall not use, display, make reference to, or otherwise incorporate the MAPGA name, logo, affiliation, sponsorship, etc., for any reason other than in furtherance of the purposes set forth in this Agreement, outside the territorial limits of MAPGA at any time without the express written consent of MAPGA."

Paragraph 2 contains a non-compete clause that prevents Seabury from holding a golf trade show within the MAPGA's boundaries for a two-year period of time should Seabury terminate its contract with the MAPGA.

The Defendants argue that these references to the MAPGA's geographic boundaries necessarily imply such limitations to the entire contract. Of course, this language permits such an implication but, in the view of the Court does not compel it.

The words of language of paragraph 1 could reasonably be interpreted as a limitation [**7] on promotional materials only. In other words, they can be read as providing Seabury with the ability to use the MAPGA name and logo outside of the territory for any purpose related to the golf trade show but for no other purpose. The words of paragraph 2 could reasonably be viewed as a deliberate restriction of the "non-compete" protection given the MAPGA to an area less than, rather than co-extensive with, the geographical scope of the Contract.

HN4 [↑] Where there is an ambiguity in a contract, the question of interpretation is, generally, a question of fact to be resolved by the finder of fact. See *Martin Marietta Corp. v. INTELSAT*, 978 F.2d 140, 143 (4th Cir. 1992) ("The construction of ambiguous contract provisions is a factual determination."). In cases of contract ambiguity the Fourth Circuit has stated: "**HN5** [↑] Only an unambiguous writing justifies [judgment as a matter of law] without resort to extrinsic evidence, and no writing is unambiguous if 'susceptible of two reasonable interpretations.'" *World-Wide Rights Ltd. Partnership v. Combe, Inc.*, 955 F.2d 242, 245 (4th Cir. 1992) (quoting *American Fidelity & Cas. Co. v. London & Edinburgh Ins. Co.*, 354 F.2d 214, 216 (4th Cir. [**8] 1965)).

Since the contract language is ambiguous, it was necessary for the jury to consider evidence extrinsic to the four corners of the Contract to ascertain the parties' intent. In this case, the extrinsic evidence by no means pointed in only one direction. There was adequate evidence to support a verdict for either side. In the end, Plaintiff got the [*777] verdict on the breach of contract claim.² Since the verdict was a reasonable one - although by no means the only reasonable one - the Court will not grant the Defendants' judgment as a matter of law nor a new trial on Count 1.

B. Antitrust Conspiracy Claims

² The Court addresses Counts 2 and 3, tortious interference with contractual or prospective business relations, in its discussion of the punitive damages award.

HN6 To prevail on a § 1 claim under the Sherman Act, a plaintiff must establish a contract, combination or conspiracy in unreasonable restraint of trade. 15 U.S.C. § 1 (1973). This section does not prevent business decisions made and behavior **[**9]** engaged in by a single economic unit. Rather, this section focuses on the joining of two groups whose actions then result in an unreasonable restraint of trade. Thus, the critical inquiry here is whether the Defendants were legally capable of conspiring under the Sherman Act.

Plaintiff argued that the PGA and the MAPGA, a PGA section, conspired to limit Seabury's ability to conduct a golf trade show in violation of the Sherman Act and/or the Maryland Antitrust Act.³ The Defendants assert that as a matter of law the PGA cannot conspire with its sections under the doctrine established in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984). Accordingly, the Defendants argue, the conspiracy claims must be resolved in their favor.

[10]** In *Copperweld*, the Supreme Court held that HN8 a parent corporation was not legally capable of conspiring with its wholly-owned subsidiary corporation for purposes of the antitrust laws. In reaching this result, the Supreme Court recognized that the corporations involved functioned as one integrated business entity despite being separately incorporated. The Supreme Court carefully limited its holding to the specific relationship of parent and wholly-owned subsidiary and expressly refused to decide under what circumstances, if any, affiliated but not wholly-owned entities could conspire. Rather, the *Copperweld* Court recommended that, in the future, courts consider whether affiliated corporate entities have a complete unity of interest in determining whether the entities could legally conspire for purposes of the antitrust laws. Copperweld, 467 U.S. at 771-72. This is a functional inquiry that looks to substance over form, id. at 773 n.21, and one which focuses on whether the "parent" organization controls the "subsidiary" (without regard to the particular corporate form involved). See, e.g., Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991), cert. denied, **[**11]** 502 U.S. 1074, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992).

Following the Supreme Court's guidance in *Copperweld*, this Court concludes that the Defendants are legally incapable of conspiring and that judgment as a matter of law in favor of the Defendants on this issue is appropriate. While the MAPGA is not a wholly-owned subsidiary of the PGA and these entities are separately incorporated, the evidence at trial established that as pertinent to this case the PGA and its member sections function as a single economic unit with the PGA possessing ultimate control over the actions of individual sections.

The Court finds it significant that the sections are governed by the PGA Constitution, by policies adopted either at PGA annual meetings or by the PGA Board of Directors, and by other pertinent policy documents, such as trademark licensing agreements. See Williams v. I.B. Fischer Nevada, 794 F. Supp. 1026, 1032 (D. Nev. 1992) ("The threshold requirement of concerted activity is missing among multiple corporations operated as a single entity when corporate policies are set by one individual or by a parent corporation."), aff'd, 999 F.2d 445 (9th Cir. 1993).

[*778] It is true that **[**12]** each section maintains its own revenues, has its own by-laws, elects its own officers and often conducts programs intended to benefit members of that section only. The sections' actions, however, must be approved by the PGA to ensure that they are in the best interests of the organization as a whole. For example, when the MAPGA sought to enter into a credit card program for its membership, the PGA vetoed it because it conflicted with a program the PGA had in place to benefit the organization as a whole. More importantly, when the MAPGA sought to enter into the Contract and its amendments with Seabury, the PGA had to approve these actions.⁴ **[**13]** This type of "ability to control" is perhaps the determinative factor in the *Copperweld*

³ The same result applies under the federal or state antitrust statutes. **HN7** Section 11-204(a)(1) of the Maryland Antitrust Act indicates that courts are to be "guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters." Md. Code Ann. Com. Law II § 11-204(a)(1) (1990 Repl. Vol.).

⁴ In this instance, while the PGA did approve the contract, it was Dan Daniels, in his capacity as PGA general counsel, who approved the contract immediately prior to resigning from the PGA to go to Seabury.

analysis. See Philip Areeda, VII ***Antitrust Law*** P 1467f, at 267 (1986) ("[Copperweld's] stress on the power to control as distinct from its day-to-day exercise seems equally apt when ownership is not totally in common.")⁵

Based on the evidence presented at trial and the dictates of the Supreme Court in *Copperweld*, this Court finds that the PGA and its member sections, as a matter of law, are not capable of conspiring in violation of the antitrust laws.⁶ Accordingly, the Defendants are entitled to judgment as a matter of law on Counts 7 and 12.

[**14] C. The GMDA Conspiracy

Seabury claims that the PGA and the GMDA, an association of exhibitors, entered into an illegal conspiracy to limit the number of golf trade shows and to restrict non-PGA, third-party involvement in these shows, an agreement which restrained competition in violation of the antitrust laws.

Seabury argued that its East Coast Show was contrary to the financial interests of both the PGA and the GMDA and offered a document mentioning the PGA's concern that the growth of regional shows could "erode vendor dollars." Pl.'s Ex. 206, at 4. There was also evidence of the PGA's desire to control all national golf trade shows. In one document, the PGA states: "We believe there is an opportunity to operate up to three highly successful national trade shows and eliminate all other regional Section shows. One show would be conducted on the east coast." Pl.'s Ex. 83. In another document summarizing the activity of a September 11, 1990 meeting at Dulles airport, Rod Thompson wrote, "[The] PGA wants total control of all golf shows!" Pl.'s Ex. 278.

In addition, the PGA had discussed the significant concerns on the GMDA's part about the proliferation of golf trade shows [**15] and the lack of PGA involvement. Pl.'s Ex. 83.⁷ The PGA was also aware that the GMDA "felt comfortable dealing with the PGA in the production of shows." Pl.'s Ex. 84. And at the famed "Basement Meeting," Jesse Holhouser, Deputy Executive Director and Chief Financial Officer of the PGA, "stressed the unification of PCA and GMDA on all shows." *Id.*

[*779] In reviewing the evidence presented with regard to this conspiracy, the Court is mindful of the Supreme Court's statement in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) that

antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 [conspiracy] case. . . . Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. **HNG** To survive a motion for summary [**16] judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.

Id. at 588 (citations omitted).

⁵ Seabury points to the fact that at one point the MAPGA refused PGA's request for information because the information sought was proprietary to the MAPGA. See Defs.' Ex. 73. There were also allegations that the MAPGA was denied a request to view PGA's exhibitor waiting list because the waiting list was "proprietary." That a parent company would keep information from its subsidiary is not as troublesome to the Court as a subsidiary keeping information from the parent company; controlling information from the top down is consistent with a parent exercising control over a subsidiary.

⁶ Seabury presented evidence at trial that the PGA purchased the International Golf Show ("the West Coast Show") from the Southern California section. While it is true that the PGA did not simply pay a token sum for the purchase of the Show, there were several unrebutted reasons offered by the PGA for pursuing the transaction: (1) to be fair to the Southern California section members, who had developed the Show and (2) to support the Section's programs which had become dependent on revenues from the Show. Even assuming that the PGA made the payment to purchase an asset from the section, the fact remains that the PGA always had ultimate control over the section, which could not function as a section independent of the PGA.

⁷ "Recent discussions with GMDA indicate significant concerns about proliferation of Shows and lack of PGA involvement."

With this standard in mind, the Court finds that there is insufficient evidence to support a jury finding that the PGA and the GMDA conspired. None of the evidence offered by plaintiff, including that discussed above, establishes that the GMDA and Defendants *agreed to act together* either to control the number of successful golf trade shows or to eliminate third-party involvement, like Seabury, in golf trade shows. At no time did Plaintiff produce evidence that the GMDA did more than voice the concerns and preferences of its membership or that the PGA acted in response to the complaints and concerns of its customers. There is similarly no evidence that the PGA requested any action on the part of the GMDA. In essence, there is no evidence of any illegal agreement between the PGA and the GMDA.

Accordingly, judgment as a matter of law shall be entered for the Defendants on Counts 7 and 12 with regard to that part of the jury's verdict finding **[**17]** that the PGA and the GMDA conspired to illegally restrain trade.

D. Monopolization Claims

HN10 [+] To prevail on a monopolization claim, a plaintiff must demonstrate possession of monopoly power in a relevant market, willful acquisition or maintenance of that power in an exclusionary manner and causal injury. See *Advanced Health-Care Services, Inc. v. Radford Community Hosp.*, 910 F.2d 139, 147 (4th Cir. 1990). For attempted monopolization, the plaintiff must prove a specific intent to monopolize a relevant market, predatory or anticompetitive behavior, and a high probability of successful monopolization. *Id.*

1. Relevant Market

The Defendants assert that they are entitled to judgment as a matter of law or a new trial on the monopolization claims because the evidence did not establish Plaintiff's market definition of "large golf merchandise trade shows" or that such a product market, if it exists, should be limited to the PGA Orlando Show and Seabury's East Coast Show.

HN11 [+] The determination of a relevant market is a question of fact. See *International Boxing Club v. United States*, 358 U.S. 242, 245, 251, 3 L. Ed. 2d 270, 79 S. Ct. 245 (1959); *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 381 (1956). Thus, the issue presented is whether Plaintiff produced adequate evidence to support a jury finding that (1) the goods and services provided by golf trade shows are sufficiently distinct from marketing and distribution alternatives to constitute a relevant product market and (2) that such a market should include only the PGA Orlando Show and Seabury's East Coast Show.

Plaintiff describes the market at issue as the production of golf trade shows for professional golf buyers and their suppliers. Plaintiff further asserts that golf trade shows provide an opportunity for golf manufacturers and distributors to market their equipment and apparel to golf professionals and other buyers for later resale to the general public as well as to introduce new lines of golf equipment and apparel. A significant amount of the concentrated marketing of golf equipment and apparel occurs at golf trade shows. (Daniels Aff. P 4.)

At trial, Plaintiff presented evidence distinguishing golf trade shows from other alternative methods of marketing and distributing **[*780]** golf equipment and apparel, including direct mail, door-to-door and catalog sales. Besides having the **[**19]** advantage of gathering together multiple retailers under one roof, golf trade shows offer a wide variety of "services," including business seminars, product demonstrations, apparel fashion shows, meeting opportunities and the ability to "network." See Martin Tr. at 24-26, 176; Maxwell Tr. at 19-20; Larner Tr. at 66-70. Thus, the package of products and collateral services present at a golf trade show is different from and appeals to buyers in a manner distinct from the sale of the various individual products when sold separately.

This Court does not believe that Plaintiff's evidence on the relevant market would have been inadequate to establish a relevant market including golf trade shows, and maybe even golf trade shows over a certain size (appropriately defined). Certainly, a level of expertise is needed in producing trade shows, whether it is for golf or any other sport, and the evidence establishes that trade shows provide sufficient collateral services that

manufacturers and distributors desire to participate in these shows despite alternative channels of distribution.⁸ In fact, at least one other court has accepted a market definition as the production/sponsorship of an [**20] industry trade show. See *Expoconsul Int'l, Inc. v. A/E Systems, Inc.*, 711 F. Supp. 730 (S.D.N.Y. 1989) (building design and construction industry; accepting market definition without discussion). Accordingly, the Court finds that Plaintiff, as a matter of law and under the standard for a new trial, has established the relevant product market definition as golf trade shows.

However, [**21] Plaintiff has sought to narrow the relevant market very substantially in order establish its monopolization claims. Seabury contends that the golf trade show market for purposes of its suit should be limited to the PGA's Orlando Show and Seabury's East Coast Show. Plaintiff's expert, Dr. Martin, excluded at least fifteen sectional golf trade shows as well as the International Golf Show ("the West Coast Show") in arriving at his market definition. Because Plaintiff has failed to produce sufficient evidence to justify excluding these regional and national golf shows, all of which provide the collateral services Plaintiff points to as distinguishing golf trade shows from other methods of marketing and distribution, the Defendants are entitled to judgment as a matter of law.

Apart from Dr. Martin's often conclusory and factually unsubstantiated opinions, Plaintiff has come forward with no evidence to support the exclusions. As the Supreme Court recently noted:

HN12[When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury verdict [**22] Expert testimony is useful as a guide to interpreting market facts, but is not a substitute for them.

Brook Group Ltd. v. Brown & Williamson Tobacco Corp., U.S. , 113 S. Ct. 2578, 2598 (1993).

With regard to the sectional shows, some of Dr. Martin's statements are simply conclusory pronouncements. See Martin Tr. at 19.⁹ [**23] When Dr. Martin did attempt to offer reasons for excluding sectional shows as ineffective competitors he was merely expressing his personal, unsubstantiated opinion.¹⁰ In [*781] short, Plaintiff submitted no evidence on the number of booths, volume of sales or other indicia of the size and scope of sectional shows (i.e., exhibitor/attendee lists) that would support the conclusion that sectional shows are not effective competitors in the golf trade show market.¹¹

⁸ The PGA's exhibitor waiting list evidences manufacturers' and distributors' desire to participate in golf trade shows despite the fact that booth prices, which continued to increase every year, were thought to be "very expensive." Vincent Tr. at 62. Notably, both the PGA Orlando Show and the West Coast Show are able to maintain extensive waiting lists, despite complaints by exhibitors of "price gouging." Pl.'s Ex. 226. This evidence tends to show that pricing at golf trade shows is inelastic and that the booth prices charged by the PGA have no real effect upon demand, facts which support a finding of a relevant product market.

⁹ "They're not really effective competitors, effective in the sense that they really don't provide the kind of competition to the large national and regional shows that the kind of competition that would cause those other shows to do -- to act differently because the sectional shows are around."

¹⁰ For example, Dr. Martin opined that PGA rules limiting sectional shows to their boundaries meant that such shows "really service the exhibitors that are . . . located within [those] boundaries and the employees that are located within the boundaries," and that sectional shows are therefore, much smaller operations. Martin Tr. at 19-20. Dr. Martin, however, referred to no evidence in support of his conclusion.

¹¹ In fact, the only concrete evidence on this issue contradicts Dr. Martin. See Maxwell Tr. at 60 (testifying that would not be surprised if show conducted by the Pacific Northwest Section had just as many exhibitors and buyers of the East Coast Show), 61 (stating that North and South Texas Show "certainly draws very good attendance with respect to attendees and manufacturers.").

Dr. Martin's exclusion of the West Coast Show suffers from the same infirmities. When asked to give his reasons for excluding the West Coast Show from the relevant market, Dr. Martin testified that "the record really shows -- the evidence really shows that it doesn't -- that it doesn't compete." [\[**24\]](#) *Id.* at 21; see also *id.* (stating that the West Coast Show "does not attract people, that is, attract buyers, in any significant numbers from the East Coast."). However, apart from deposition testimony from Mr. Sandefur that "he doesn't believe it does compete," *id.*, neither Dr. Martin nor Plaintiff cites to anything (attendance lists, surveys, etc.) that would provide an adequate evidentiary basis for Dr. Martin's opinion that the West Coast Show should be excluded from the market.

Furthermore, undisputed testimony from other witnesses contradicts and renders unreasonable Dr. Martin's opinion that the sectional shows and the West Coast Show do not compete with the PGA Orlando Show and Seabury's East Coast Show. Robert Maxwell of the Marriott Corporation, a frequent participant in golf trade shows, testified that "section shows, the East Coast show, the West Coast Show, Orlando Show, they all compete with one another for the attention of professionals to come and buy." Maxwell Tr. at 61. Maxwell also noted that he went to some sectional shows, including the North and South Texas Show. *Id.* James Vincent, national sales manager for Cobra Golf, testified that he attended [\[**25\]](#) over 100 golf shows yearly, and "over the years, the more successful shows in the northwest, truthfully the West Coast Show . . . , Denver, Salt Lake City, Dallas, New York, Boston, Florida, show in Carolina, so on a national basis, certainly." Vincent Tr. at 12. Even Seabury seemed to think that it was in competition with such shows, as indicated by its mailing to 2,000 golf industry executives advertising Seabury's first show, which stated: "You will no longer have to exhibit at several regional shows." Pl.'s Ex. 26.

Thus, because Dr. Martin's opinion that the sectional shows and West Coast Show should be excluded from the market is not supported by sufficient, much less any evidence, and since substantial record evidence provided by actual participants in the golf trade show market contradicts it, Dr. Martin's opinion that the market should include only the PGA Orlando Show and Seabury's East Coast Show cannot support a jury verdict.

The absence of an adequate market definition makes it impossible to approximate the PGA's share of the relevant market, the first step in any antitrust analysis under § 2.¹² See *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104 (4th Cir. [\[**26\]](#) 1987) ([HN13](#)[↑]) to prove monopolization, plaintiff must show that defendant possesses monopoly power in relevant market). Consequently, the Defendants are entitled to judgment as a matter of law on Counts 4, 5, 6, 9, 10 and 11.

2. *Copperweld*

The second element of a § 2 Sherman Act claim requires Plaintiff to prove that [\[*782\]](#) the Defendants exercised monopoly power [\[**27\]](#) to exclude Seabury from the relevant market. However, as this Court acknowledged at the summary judgment stage, it is not an exercise of monopoly power to actively protect the licensing and use of a properly-registered trademark. Memorandum and Order of Dec. 1, 1992, at 13-14; see also *Sun Dun, Inc. v. Coca-Cola Co.*, 740 F. Supp. 381, 393-94 (D. Md. 1990). Thus, any finding of monopolization or attempted monopolization based on the PGA's refusal to license Seabury to use its own trademark is precluded as a matter of law.

Accordingly, at trial Plaintiff contended that the PGA's unlawful exercise of monopoly power consisted of preventing the MAPGA from licensing its "separately registered" trademarks to Seabury. However, the Court's finding that the PGA and the MAPGA are a single economic entity under *Copperweld*, over which the PGA exercises ultimate control, prevents a finding that the PGA engaged in monopolistic behavior. The MAPGA's trademarks (one of which explicitly references the PGA name and logo) are, given the *Copperweld* determination, "assets" of the PGA over

¹² Plaintiff stated at argument on the Defendants' post-trial motion that the issue of whether or not the sectional shows and the West Coast Show should have been included is irrelevant, given that the PGA has market power even if these other shows are included. Plaintiff may be right, although it presented no evidence at argument to support such a bold and significant conclusion. Even so, the fact that Plaintiff submitted no evidence *at trial* on the size of these other shows or their ownership renders the jury verdict invalid because the jury did not have the opportunity to establish the PGA's market share in a market that included such shows.

which the PGA has control. The PGA's action in preventing the MAPGA from licensing its trademarks is thus [**28] no more actionable as an antitrust violation than the PGA's refusal to license a PGA trademark. Accordingly, the Defendants are entitled to judgment as a matter of law on the monopolization and attempted monopolization counts on this alternate ground.

E. The Compensatory Damage Award

The jury awarded a total of \$ 2.6 million in compensatory damages for all contract and antitrust claims. The Defendants argue that this award should be set aside as a matter of law because Plaintiff did not sufficiently establish damages, in this amount or any other, or, in the alternative, a new trial awarded. The Defendants argue that \$ 2.6 million is an inappropriate measure of Seabury's lost value for a business which operated for two years at different dates and locations, had gross revenues decline by 25% in its second year of business and had a loss in its second year of business.¹³

[**29] At the outset, the Court notes that the \$ 2.6 million figure is grossly excessive. In fact, it is \$ 300,000 greater than the highest estimate put forth by Plaintiff's expert.

Plaintiff is correct when it states that [HN14](#) [↑] a jury is permitted to consider all the evidence in the record when calculating damages and that a damage award should not be overturned on the basis of speculation as to the manner in which the jurors arrived at it. However, there must be evidence in the record to support the verdict. See [*Klein v. Sears, Roebuck and Co., 773 F.2d 1421, 1428 \(4th Cir. 1985\)*](#) (trial court may set aside verdict if it is "so excessive that it cannot be justified by anything in the record or of which the court can take judicial notice"); [*Mid-West Underground Storage, Inc. v. Porter, 717 F.2d 493, 501 \(10th Cir. 1983\)*](#) (damage award will be upheld if within the range of evidence admitted); [*Narcisse v. Illinois C.G.R. Co., 620 F.2d 544, 548 \(5th Cir. 1980\)*](#) (verdict upheld because it was "within the universe of possible awards which are supported by the evidence").

At argument, Plaintiff's counsel could not offer any principled explanation as to how the jury could have reached its verdict [**30] from the evidence presented to it. The Court, despite its own thorough review of the record, similarly cannot find any basis for the jury's "off the charts" verdict. Because the jury's verdict is not within the "universe of possible awards which are supported by the evidence," it must be set aside.

The Court has considered the possibility of remittitur. However, the Court finds that Plaintiff has failed to establish *any* amount of damages to a reasonable degree of [*783] certainty, thereby providing no basis for remittitur.

First, Plaintiff's methods for estimating its compensatory damages are insufficient as a matter of law. [HN15](#) [↑] Once liability is established, a reasonable estimate may be used to prove the amount of damage where such a measure is ordinarily difficult. [*A.W.G. Farms v. Federal Crop Ins. Corp., 757 F.2d 720, 729 \(8th Cir. 1985\)*](#). However, Plaintiff has failed to produce evidence showing that any of its methods of calculating damages are reasonable.

The "direct profits" method offered by Plaintiff, involving a disingenuous, manipulative and scientifically unacceptable calculation, generates a meaningless and artificial number, and is thus useless.¹⁴ [**32] The

¹³ The Court does not agree with the Defendants' argument that Seabury would be entitled to only the lost profits of the cancelled 1992 East Coast Show. The Defendants reason that the jury's verdict, if left intact, indicates Seabury was entitled to put on a MAPGA-sponsored show in Atlantic City. Then, according to the Defendants, Seabury could still produce the 1993-1995 golf trade shows and has simply abandoned the venture. The contractual relationship, however, has been fundamentally altered and the contract breached. Seabury is entitled to choose its remedy and is not now required to work with the breaching party.

¹⁴ In essence, under this method, Plaintiff's expert, Dr. Rey, arbitrarily subtracted certain expenses, but not others, from the gross revenues of the West Coast Show to come up with that show's "direct profits." The ratio between the price paid by the PGA for the West Coast Show and the Show's "direct profits" generated a multiplier, which Dr. Rey then applied to Seabury's "direct profits," calculated in the same fashion. Given Plaintiff's inability to explain why Dr. Rey left out certain expenses when calculating direct profits, it is apparent that Dr. Rey manipulated the calculations and in fact "invented" the concept of "direct

"discount cash-flow **[**31]** analysis" performed by Plaintiff's expert is also invalid, due to Plaintiff's failure to subtract significant ordinary and necessary operating expenses.¹⁵ And Plaintiff's damage calculation which uses a wholly irrelevant multiple generated from the earnings and stock prices of a publicly-traded company in England (the "Blenheim multiplier") is preposterous.

In arriving at its damage estimate, Plaintiff utilized two other methods, which in turn made use of: (1) an average annual growth rate derived from years seven through thirteen of the West Coast Show and (2) the multiple that the PGA paid the Southern California Section for the West Coast Show when the PGA bought the Show in its thirteenth year of business. The growth rate and/or multiplier was applied to the gross receipts of Seabury's show in 1991, its second year of operation, and to an average of Seabury's 1990 and 1991 gross revenues from the two shows.¹⁶

[33]** The growth rate derived from the West Coast Show, which excluded the first six, base-building ¹⁷ **[**34]** years of its existence, as well as the multiplier derived from the sale of the second largest golf trade show in the world in its thirteenth year of operation with revenues of over \$ 1.5 million, cannot, as a matter of law, be a "reasonably comparable" yardstick ¹⁸ with which to estimate damages for Seabury's two-year operation that had a substantial net loss.¹⁹ The comparison between Seabury's fledgling **[*784]** business, operating at, if not below the line and the established, profitable operations of the West Coast Show is simply unreasonable.²⁰ **[**35]** Furthermore, the financial data to which the growth rate and multiple were applied do not appear to be correct or consistent.²¹ Consequently, these final two methods offered by Plaintiff to prove its damages are invalid as a matter of law.

profits" in order to make Seabury, a corporation showing no net profits, and actually operating at a loss, look like it had a profit. The West Coast Show, no matter which way you calculated it, would always show a profit. Thus, the direct profits calculation produces a meaningless number.

¹⁵ At argument, Plaintiff's counsel could not provide a complete list of which expenses were taken into account in the calculation of Seabury's profit forecast and which were not. However, based on those expenses which Plaintiff's counsel conceded were not taken into consideration, it is apparent that the cash-flow analysis is fatally flawed.

¹⁶ The growth rate was also used in the discount cash-flow analysis.

¹⁷ See Maxwell Tr. at 53 (stating that the first six years of the West Coast Show gave it a "fairly stable base" and that there was "no question that [it] . . . became some of the foundation that has made [the West Coast Show] successful").

¹⁸ **HN16** Under Maryland law, a plaintiff may use a "yardstick" measure of proving its damages, as long as its assumptions rest on adequate bases and there is a "reasonable compatibility" between the businesses. See *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1044 n.21 (4th Cir. 1987), cert. denied, **486 U.S. 1017 (1988)**.

¹⁹ See, e.g., *Handley v. Guasco*, 165 Cal. App. 2d 703, 332 P.2d 354, 360 (Cal. Dist. Ct. App. 1958) ("To base prospective profits of a business in a completely new location and city upon the experience of an old established business elsewhere would be highly speculative."); *Belcher v. Import Cars Ltd.*, 246 So. 2d 584, 587 (Fla. Dist. Ct. App.) (established car dealership not comparable to new car dealership), cert. denied, **252 So. 2d 801 (Fla. 1971)**; *Evergreen Amusement Corp. v. Milstead*, 206 Md. 610, 112 A.2d 901, 904 (Md. 1955) (refusing to permit plaintiff to establish damages for start-up period by using profits that same business earned in later period); *Plummer v. Fogley*, 363 P.2d 238, 242 (Okla. 1961) (cannot compare experienced business to inexperienced business).

²⁰ Plaintiff claims in attempting to establish comparability that Seabury and the West Coast Show operating with comparable profits margins. However, in support of this claim, Plaintiff compares its "direct profits" from the 1991 East Coast Show, which as previously noted fail to take into account significant expenses, with the West Coast Show's actual profits. Seabury had no net profits from the 1991 Show, and in fact lost between \$ 20,000 and \$ 75,000 that year. It is thus clear that Plaintiff's claim regarding the comparability of the East and West Coast Shows' profit margins is incredible.

²¹ The Court also notes that using the multiple paid for the West Coast Show in its thirteenth year of operation would generate an inaccurate damage number. If usable at all, the multiple should have been discounted for one year given that the Seabury contract was only for five years and the multiple derived from the West Coast Show's thirteenth year is six years from the date from which calculation of the growth rate began.

Even if the Court were to ignore Plaintiff's proffered calculations, given the financial information in the record regarding Plaintiff's operations, any attempt to estimate Plaintiff's projected profits, much less whether Seabury would ever realize profits under the Contract, or the value of Seabury's business as a going concern would require that the Court improperly engage in speculation and conjecture.²² Between the 1990 and 1991 shows, Seabury's exhibitors declined from 269 to 193 and gross revenues declined from \$ 399,000 to \$ 293,000. (Rey Tr. at 79.) Seabury, as a corporation, experienced a loss of \$ 136,000 in 1989. And, financial statements for 1991 show that [**36] Seabury as a corporation had a loss of \$ 32,000. (*Id.* at 83, 89.) There is simply no basis for concluding that Seabury would have realized any profits had the MAPGA not breached the contract and even if it would, what they would be. Nor is it possible to estimate Seabury's "going concern" value from the evidence produced.

The jury's \$ 2.6 million verdict cannot be justified by anything in the record. Consequently, it must be set aside. In addition, because Plaintiff is unable to point to any valid method of calculating damages or to any evidence in the record which would support a reasonable estimate of damages, there is no basis for remittitur. In [**37] short, Plaintiff has failed to satisfy its burden of establishing any damages with "reasonable certainty."²³ Accordingly, the Defendants are entitled to judgment as a matter of law.²⁴

[38] F. The Punitive Damage Award**

Although convinced that the Defendants were entitled to judgment as a matter of law [*785] on Seabury's punitive damages claim, the Court permitted the issue to be presented to the jury as a matter of judicial economy.²⁵ At trial, the jury awarded Seabury \$ 4.8 million in punitive damages.

In this case, the tort of intentional interference with a contractual relationship was the only asserted predicate for Seabury's punitive damages claim. The parties stipulated that the PGA would be liable for any damages awarded against the MAPGA. Accordingly, it was not necessary to submit a jury question regarding the tort itself. For, the compensatory damages for the tort would, inevitably, be the same as the damages for the breach of contract. [**39] And, because of the stipulation, it was not necessary to establish the commission of the tort to hold the PGA liable for those compensatory damages. Therefore, as a procedural matter, the instructions regarding the tort were subsumed in the instructions and question regarding punitive damages.

²² See, e.g., *LaVay Corp. v. Dominion Federal Savings & Loan Ass'n*, 830 F.2d 522, 529 (4th Cir. 1987) ("Damages may not be awarded . . . where an award would be based on an estimate of lost profits which is speculative.") (citing *Restatement (Second) of Contracts* § 352 (1979), cert. denied, 484 U.S. 1065, 98 L. Ed. 2d 991, 108 S. Ct. 1027 (1988)).

²³ See *John D. Copanos & Sons v. McDade Rigging & Steel Erection Co., Inc.*, 43 Md. App. 204, 206, 403 A.2d 402, 404-05 (1979); *United States Life Ins. Co. v. Mechanics and Farmers Bank*, 685 F.2d 887, 895-96 (4th Cir. 1982).

²⁴ Finally, although the jury's finding that the Defendants breached the Contract might permit an award in the amount of \$ 1.00 as nominal compensatory damages, the Court's doubts concerning the propriety of setting damages by granting judgment as a matter of law compels it to exercise its discretion and deny Plaintiff nominal damages. If a \$ 1.00 nominal damage award were to be viewed by the appellate court as a remittitur of damages, the Court would be required to offer Plaintiff the option of a new trial on damages. See *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F. Supp. 1240, 1263 & n.16 (N.D. Ill. 1986) (setting aside compensatory damage award of \$ 3 million and entering judgment in favor of plaintiff for \$ 1.00 as nominal damages; however, offering option of remittitur/new trial should appellate court conclude that it is improper to set damages by granting JNOV), aff'd in part, rev'd in part, 827 F.2d 1119 (7th Cir. 1987) (not addressing issue), cert. denied, 485 U.S. 993 (1988). Because Plaintiff has utterly failed to prove that it sustained any damage as a result of the Defendants' breach or the extent of any such damage, a new trial on damages would be fruitless. Accordingly, the Court finds that Plaintiff's failure to establish any amount of damages requires that the jury verdict be set aside in its entirety and judgment entered in favor of the Defendants as a matter of law that there were no damages at all.

²⁵ The jury might have resolved the issue for the Defendants. Since it did not, in the event that the appellate court concludes that this Court should not have given the Defendants judgment as a matter of law, a new trial might not be necessary.

In analyzing the verdict to see if the punitive damages verdict can stand, it is necessary to determine whether the jury properly could find that the tort had been committed and that the standards for punitive damages had been met. As discussed below, the Court concludes that the jury properly could have found neither. That is, by virtue of the qualified privilege, discussed below, the tort was not committed. Moreover, even if the tort had been committed, Seabury has failed to establish the malice necessary to sustain a punitive damages award.

1. Tortious Interference - Qualified Privilege

HN17 A parent corporation has a privilege to interfere to protect its economic interests absent clear evidence that the parent employed wrongful means or acted with an improper purpose.²⁶ **[**41]** To determine whether interference in a given case is proper, the court must examine a number of factors and decide **[**40]** "whether, upon consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another." *Restatement (Second) of Torts § 767 cmt. b* (1979). Those factors include "(a) the nature of the actor's conduct, (b) the nature of the expectancy with which his conduct interferes, (c) the relations between the parties, (d) the interest sought to be advanced by the actor and (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand." *Id.* The Court finds that the PGA and the MAPGA are in a relationship which was effectively that of a parent corporation and its subsidiary and that the PGA's actions were proper and within the scope of the qualified privilege.²⁷

There has been no suggestion that the PGA used any improper means to get the MAPGA to breach its contract with Seabury. Seabury has, however, argued that the PGA acted with the improper purpose of "taking Seabury out." (Seabury's Resp. to Defs.' Post-Trial Mot. at 32, 36.)

The Court finds, that while the parties may dislike each other, the PGA acted to protect its business interests. The PGA had a long-standing policy not to allow its sections to license their names, initials and/or logos or to otherwise endorse third-party services or products without PGA approval and also required **[**42]** sections to sponsor events within their territorial boundaries. See, e.g., **[*786]** Pl.'s Ex. 83 ("Section entered into an agreement that is both illegal and in violation of PGA policy. This must be corrected. There is no way to correct this as long as Seabury owns the Show. The PGA is not interested in providing a third party with the use of its logo or initials to conduct a Show."); Pl.'s Ex. 91 ("We agree that it would have been in the best interests of the Association and our Members if the Section had approached us about the proposal rather than entering into an agreement with a third party without our knowledge. Rather than focusing on why this happened, however, we agreed to pursue a remedy that would be in everyone's best interests.").

The PGA was entitled to approve or disapprove the actions of its sections and to enforce the Section Guidelines to make sure that the goals of the PGA as a whole were furthered. The PGA simply required the MAPGA to follow the Section Guidelines and to abide by the PGA's interpretation of the contract. The evidence consistently indicates that the PGA, and many officials of the MAPGA, understood the contract to require Seabury to hold the East Coast **[**43]** Show within the MAPGA's boundaries while Seabury believed otherwise. See Majewski Tr. at 28-29 (MAPGA President when the contract was signed); Pl.'s Ex. 74 (Rod Thompson's statement); Pl.'s Ex. 161; Pl.'s Ex. 162. While the result of this understanding was a breach of contract by the MAPGA, this action does not simply turn into a tort action because the PGA, as was its right, directed the MAPGA to breach its contract with Seabury.

²⁶ "Commonly included among improper means are violence, threats or intimidations, deceit or misrepresentation, bribery or defamation." *Chase v. Weight*, Civ. No. 87-570- FR, 1988 WL 107051, *2 (D. Or. Oct. 12, 1988) (citations omitted). None of the improper means are at issue in this case.

²⁷ The Court previously determined, as part of its antitrust analysis, that the PGA and the MAPGA are part of a single economic unit with the PGA having the ultimate control over the MAPGA's actions. A finding that two entities are unable to conspire under the antitrust laws, however, does not require a finding that one cannot interfere with the contractual relationship of the other. The relationship between the two though, may afford the "parent" a privilege to interfere with the contracts of its "subsidiaries."

In short, the PGA cannot be held to have interfered with the contracts of the MAPGA because the PGA was entitled to approve or disapprove of contract actions taken by the MAPGA. Having discovered that the MAPGA entered into an agreement against the PGA's best interests and that this agreement was approved by Dan Daniels immediately prior to his employment with Seabury, the PGA was entitled to instruct MAPGA, as a subordinate unit, to break its contract. The PGA acted with the confines of the qualified privilege a parent organization may exert over a subsidiary to protect its own financial interests and did not engage in tortious behavior. See *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals Inc.*, 862 F.2d 597 (8th Cir. 1988) (holding that a parent [**44] corporation was, in effect, the same entity as its subsidiary and was, therefore, privileged to become involved in the relations between the subsidiary and a third party).²⁸

2. Clear and Convincing Proof of Actual Malice

Even if the tort had been established, the evidence does not permit a punitive damages award. The punitive damage standards have been recently articulated in *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992) and *Schaefer v. Miller*, 322 Md. 297, 319-20, 587 A.2d 491, 502-02 (1991). [**45]²⁹ [**46] "HN18↑" In a tort case where punitive damages are permitted, in order to obtain such an award a plaintiff must prove actual malice or its legal equivalent." *Schaefer*, 587 A.2d at 492. With regard to interference with contractual relations, the tort at issue in this case, under Maryland law, the plaintiff must establish the existence of actual malice for there to be an award of punitive damages. *Id. at 501*. "Actual or express malice ... has been characterized as the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff." *Id. at 492-93*.³⁰ As "in any tort case a plaintiff must [*787] establish by clear and convincing evidence the basis for an award of punitive damages." *Zenobia*, 601 A.2d at 657 (emphasis in original).

In the present case, Seabury did not establish actual malice under the clear and convincing evidence standard. The evidence at trial consistently indicated that the PGA, and many officials of the MAPGA, simply held a different contract interpretation than did Seabury and understood the contract to require Seabury to hold the East Coast Show within MAPGA boundaries while Seabury believed otherwise. See Majewski Tr. at 28-29 (MAPGA President when the contract was signed); Pl.'s Ex. 74 (Rod Thompson's statement); Pl.'s Ex. 161; Pl.'s Ex. 162.³¹ In fact, Plaintiff's Exhibit 152 indicates that the PGA sought legal advice from both in-house and outside legal counsel before taking the position that the contract with Seabury contemplated [**47] a show within the MAPGA's territorial boundaries. While the evidence indicates that the PGA was aware of a dispute over contractual interpretation and may have disliked Seabury management, a difference in interpretation alone is insufficient to establish actual malice

²⁸ Contrary to Plaintiff's assertion at argument, the parent/subsidiary privilege has been held applicable to tortious interference with an existing contract, and is not limited to interference with prospective business relations. See *Canderm*, 862 F.2d 597; *MNC Commercial v. Park Jensen Co.*, Civ. No. HAR-90-1055, 1991 WL 74137 (D. Md. 1991) (permitting secured creditor to interfere with debtor's existing contracts); *Bendix Corp. v. Adams*, 610 P.2d 24, 29-30 (Ala. 1980).

²⁹ *Zenobia* articulated the relevant legal standards for the award of punitive damages in non-intentional tort cases and cited with approval *Schaefer* for the standards applicable to intentional tort cases, such as tortious interference with contract. *Zenobia*, 601 A.2d at n.21.

³⁰ The Defendants argue that Seabury had to prove that "the PGA actually knew that Seabury had the contractual right to have its 1992 or subsequent trade shows in Atlantic City." (Defs.' Mot. for J. As A Matter of Law Or, In the Alternative, for A New Trial at 30-31.) This is not the standard applicable to a punitive damage award in an intentional tort action.

³¹ Plaintiff did introduce a December 1991, letter from MAPGA President Holley to Mr. Awtrey asserting that the contract did not place any limits on Seabury's right to select the show location. This evidence is contradicted by: (1) a letter written by MAPGA counsel Nemeroff one year earlier stating that "the contract clearly contemplates a show within the geographical boundaries of the MAPGA," Pl.'s Ex. 73; and (2) Mr. Awtrey's response to Mr. Holley's letter stating the PGA's disagreement with Mr. Holley's conclusions, which were based on legal advice received by the PGA. Pl.'s Ex. 152.

under the clear and convincing standard. [HN19](#)³² A basic but justified disagreement regarding the terms of the contract does not support an award of punitive damages.³²

[**48] Furthermore, much of Seabury's evidence in support of its actual malice claim is ambiguous and can just as easily support a finding that the PGA was acting to protect its own business interests.³³ Actions taken to protect one's legitimate economic or business interests does not constitute proof of actual malice. See, e.g., [Glass Design Imports, Inc. v. Import Specialties, 867 F.2d 1139, 1144 \(8th Cir. 1989\)](#) ("Legal malice for purposes of imposition of punitive damages arises when there is intentional doing of a wrongful act without just cause or excuse."); [Composite Marine Propellers v. Van Der Woude, 962 F.2d 1263, 1268 \(7th Cir. 1992\)](#) (reversing punitive award and noting the "uncharitable" and "unforgiving" nature of competition). The Court does not find the evidence adequate to support a punitive damages award.

[**49] G. Legal Fees and Costs

Paragraph 9 of the Contract provides, in relevant part, that

in the event any action or proceeding is brought by either party against the other party under this Agreement, the prevailing party shall be entitled to recover the court [*788] costs and fees of its attorney in such action or proceeding . . . in such amount as the court may adjudge [sic] reasonable as attorney's fees.

Consequently, since Seabury has "prevailed" on its breach of contract claim against the Defendants, it is entitled to the court costs and reasonable attorney's fees incurred in prosecuting its breach of contract action.

IV. Conclusion

For the foregoing reasons, Defendants' Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial is **GRANTED IN PART AND DENIED IN PART**:

1. The Defendants are entitled to judgment as a matter of law with regard to all Counts except Count 1.
2. The Defendants are entitled to judgment as a matter of law with respect to the absence of any compensatory damages associated with Count 1.

3. The Plaintiff is entitled to recover its fees and expenses incurred in regard to the breach of contract. [**50]
 - a. The parties shall make a good faith effort to stipulate to the amount of such fees.

³² [HN20](#)³² It is well settled law in Maryland that punitive damages may not be awarded in a pure breach of contract action. [Schaefer, 587 A.2d at 492](#).

³³ For example, Pl.'s Ex. 80 states:

- 1) First choice of PGA of America - terminate contract between MAPGA and Seabury at all costs. Described as thermo nuclear!
- 2) Show can continue in our Section. We can use any logo and PGA will approve a licensing agreement for Seabury to use our logo (PGA of America).
- 3) Show can go on in Atlantic City, NJ in 1991 with no logos or reference to PGA (Seabury alone)

While this document indicates that there were hostile feelings between the PGA and Seabury, it also is ambiguous enough to indicate that the PGA was concerned with protecting its trademarks and making sure these marks were not used in conjunction with events violating the PGA Section guidelines. See also Dickey Tr. at 56-57 (where Dickey testified that Mr. Awtrey "was going to try to take the show out" but never discussed how this was to happen or the basis for this statement); Anderson Tr. at 31-32 (discussing Mr. Awtrey's desire to "take out" competition without directing that desire towards any one entity); Pl.'s Ex. 83 (where discussion indicated that the show would be better business for the Defendants if there was no third party involvement: "Q: Can we live with Seabury involvement through 1991 or 1992? A: No; however, probably could if we owned show. Makes much more sense for them to leave.").

- b. Any such stipulation shall be without prejudice to any party's appellate rights with regard to any other issues.
- c. Absent a stipulation as to the amount of fees/costs by May 15, 1994, counsel for Plaintiff shall arrange a telephone conference with the Court to schedule the ADR or trial procedures to be utilized to resolve the amount of fees/costs to be awarded.
- d. Please note that in the absence of a stipulation/settlement, there should be no disclosure to the Court of the settlement positions of either side as to the amount to be awarded.

SO ORDERED this 25th day of April, 1994.

Marvin J. Garbis

United States District Judge

End of Document



Yeager's Fuel v. Pennsylvania Power & Light Co.

United States Court of Appeals for the Third Circuit

July 21, 1994, Argued ; April 26, 1994, Filed

No. 93-1098

Reporter

22 F.3d 1260 *; 1994 U.S. App. LEXIS 9150 **; 1994-1 Trade Cas. (CCH) P70,576

YEAGER'S FUEL, INC.; ATLANTIC OIL AND HEATING COMPANY; MANSFELD FUEL OIL COMPANY; DEITER BROTHERS FUEL COMPANY, INC.; RALPH D. WEAVER, INC.; C.A. LESSIG, INC.; HARNED DURHAM OIL COMPANY, INC.; SCHWANGER BROTHERS & COMPANY, INC.; SICO COMPANY; WITHLOCK & WOERTH, INC.; ZONGORA FUEL, INC.; SENICK, INC.; CARLOS R. LEFFLER, INC.; H. JOHN DAVIS, INC.; ARTHUR J. ULRICH, INC.; UNION FUEL COMPANY; GUY HEAVENER, INC.; DESOUZA OIL AND SERVICE CORP.; W. C. REICHENBACH & SONS, INC.; APGAR OIL COMPANY, INC.; FREYMAN'S FUEL OIL COMPANY, INC. v. PENNSYLVANIA POWER & LIGHT COMPANY, (D.C. Civil No. 91-05176); LOSCH BOILER SALES AND SERVICE CO., Individually and on Behalf of All Persons Similarly Situated v. PENNSYLVANIA POWER & LIGHT CO., (D.C. Civil No. 92-02359); Yeager's Fuel, Inc.; Atlantic Oil and Heating Company, Mansfeld Fuel Oil Company; Deiter Brothers Fuel Company, Inc.; Ralph D. Weaver, Inc.; C.A. Lessig, Inc.; Harned Durham Oil Company; Schwanger Brothers and Company, Inc.; SICO Company; Whitlock & Woerth, Inc.; Zongora Fuel, Inc.; Senick, Inc.; Carlos R. Leffler, Inc.; H. John Davis, Inc.; Arthur J. Ulrich, Inc.; Union Fuel Company; Guy Heavener, Inc.; Desousa Oil and Service Corp.; W. C. Reichenbach & Sons, Inc.; Apgar Oil Company, Inc.; and Freyman's Fuel Oil Company, Inc.; and Losch Boiler Sales & Service Co., individually and on behalf of all persons similarly situated, Appellants.

Subsequent History: Panel Rehearing Denied June 6, 1994, Reported at: [1994 U.S. App. LEXIS 14603](#).

Prior History: [\[*1\]](#) APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. D.C. Civil No. 91-05176 and 92-02359

Core Terms

immunity, Dealers, Oil, state action, Bureau, programs, district court, development agreement, state policy, all-electric, load, heating, electric, energy conservation, regulations, developers, summary judgment, supervised, antitrust liability, anticompetitive, articulated, merits, rates, challenged activity, anti trust law, light bulb, electric utility, tariff, electric heat, offering

LexisNexis® Headnotes

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

[HN1](#) Exemptions & Immunities, Parker State Action Doctrine

The United States Supreme Court has refused to impose antitrust liability for state action because nothing in the language of the Sherman Act, [15 U.S.C.S. § 1](#), or its history suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. Since then, state action immunity from antitrust liability -- the doctrine that federal antitrust laws are subject to supersession by state regulatory programs -- has evolved based upon the principle of freedom of action for the states, adopted to foster and preserve the federal system. Nevertheless, principles of federalism do not justify a broad interpretation of state action immunity; instead, such an interpretation is disfavored.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Governments > State & Territorial 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 > Exemptions & Immunities > Parker State Action Doctrine > Scope

[HN2](#) Parker State Action Doctrine, Local Governments & Private Parties

Private entities may claim state action immunity if their challenged activity was directed and supervised by the state. Private party conduct is immune from antitrust liability under the state action doctrine only if the party claiming immunity shows that its conduct satisfies two requirements. A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the state has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the state provides active supervision of anticompetitive conduct undertaken by private actors. There is a close relationship between the two requirements: Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

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 > Utility Companies

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Cogeneration & Independent Companies > Public Utility Regulatory Policies Act > General Overview

[HN3](#) Energy & Utilities, State Regulation

The fact that the Public Utility Regulatory Policies Act (PURPA), [16 U.S.C.S. § 2601 et seq.](#), does not affect the applicability of the antitrust laws cannot mean that PURPA reserves only antitrust liability but not antitrust defenses.

PURPA's plain statutory language establishes that it is to have no effect on the applicability of the state action doctrine to gas and electric utilities.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN4 [down] Exemptions & Immunities, Parker State Action Doctrine

State action immunity is an affirmative defense.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN5 [down] Exemptions & Immunities, Parker State Action Doctrine

A state policy need not be aimed at restraining competition for a person acting pursuant to that policy to be immune from antitrust liability. The United States Supreme Court has stated: We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition. It is enough, the court has held, if suppression of competition is the foreseeable result of what the statute authorizes. Accordingly, to satisfy the clear articulation requirement, a defendant need only show that the legislature contemplated the kind of action complained of.

Energy & Utilities Law > Energy Conservation > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN6 [down] Energy & Utilities Law, Energy Conservation

See [66 Pa. Cons. Stat. Ann. § 524\(a\)\(3\)](#).

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN7 [down] Regulators, Public Utility Commissions

See [66 Pa. Cons. Stat. Ann. § 524\(d\)](#).

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > ... > Public Utility Commissions > Authorities & Powers > Environmental Oversight

22 F.3d 1260, *1260 (1994 U.S. App. LEXIS 9150, **1

Energy & Utilities Law > Energy Conservation > General Overview

Energy & Utilities Law > Utility Companies > General Overview

HN8 **Public Utility Commissions, Authorities & Powers**

In Pennsylvania, the Pennsylvania Public Utilities Commission (PUC) has been entrusted with full power and authority to enforce, execute and carry out, by its regulations, orders, or otherwise, the provisions of the Code and the full intent thereof. The PUC has the authority to evaluate the prudence and cost-effectiveness of utilities' energy conservation and load management programs.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN9 **Exemptions & Immunities, Parker State Action Doctrine**

A private defendant reasonably relying on apparently lawful government action should not be deprived of state action immunity if the government later reverses its position.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN10 **Exemptions & Immunities, Parker State Action Doctrine**

Actual state involvement, not deference to private anticompetitive activity under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation by the state, not out of respect for the economics of the challenged activity. It is this active supervision prong of the state action immunity test which prevents states from "casting a gauzy cloak of state involvement over what is essentially private anticompetitive activity." "The active supervision prong requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Energy & Utilities Law > Antitrust Issues > Monopolization

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

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

HN11 **Summary Judgment, Evidentiary Considerations**

The United States Supreme Court has stated that a nonmovant who will bear the burden of proof at trial must go beyond the pleadings in order to survive a motion for summary judgment, even when the moving party has not produced evidence to support its motion. However, as the Court also recognized: Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

Counsel: David L. Pennington, Esquire, Catherine P. Cox, Esquire, Harvey, Pennington, Herting & Renneisen, 1835 Market Street, Eleven Penn Center, 29th Floor, Philadelphia, PA 19103, Attorneys for Appellants.

Wayne M. Thomas, Esquire (ARGUED), Kohn, Nast & Graf, 1101 Market Street, 24th Floor, Philadelphia, PA 19107, Attorney for Appellant.

Losch Boiler, Sales & Service Co., Christopher C. Fennell, Esquire, Jeffrey H. Howard, Esquire (ARGUED), Crowell & Moring, 1001 Pennsylvania Avenue, N.W. Washington, DC 20004-2505, Attorneys for Appellee.

Thomas L. Welch, Esquire, 14th Floor, Office of Attorney General of Pennsylvania, Strawberry Square, Harrisburg, PA 17120, Attorney for Amicus-appellant, Commonwealth of Pennsylvania.

Judges: BEFORE: MANSMANN, GREENBERG and LEWIS, Circuit Judges.

Opinion by: LEWIS

Opinion

[*1262] OPINION OF THE COURT

LEWIS, *Circuit Judge*.

This appeal involves two related cases that were consolidated for summary judgment [*1263] disposition in the district court. In the first case, *Yeager's [*2] Fuel, Inc. v. Pennsylvania Power & Light Co.*, 21 oil dealers and persons who supply related heating equipment sued Pennsylvania Power & Light Co. ("PP&L") alleging violations of [sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2](#); [section 2\(c\)](#) of the Robinson-Patman Act, [15 U.S.C. § 13\(c\)](#); [section 3](#) of the Clayton Act, [15 U.S.C. § 14](#); and [section 1962\(c\)](#) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), [18 U.S.C. § 1962\(c\)](#). In the second case, *Losch Boiler Sales & Service Co. v. PP&L*, a fuel oil company which supplies and installs heating equipment brought a class action lawsuit against PP&L alleging violations of [sections 1](#) and [2](#) of the Sherman Act; [sections 2](#) and [3](#) of the Robinson-Patman Act, [15 U.S.C. §§ 13, 13a](#); [section 3](#) of the Clayton Act; and state law claims of unfair competition and civil conspiracy.

We agree with the district court that PP&L is immune from antitrust liability for offering builders and developers cash grants and other incentives, and for offering consumers [*3] a special electric rate for installation of high-efficiency electric heating systems. However, we also conclude that PP&L is not immune from antitrust liability to the extent it made these offers contingent upon "all-electric development agreements." Therefore, we will affirm the judgment of the district court except as to the plaintiffs' allegations that PP&L provided benefits to builders and developers in exchange for entry into all-electric development agreements. As to those allegations, we will reverse and remand so that the case may proceed to trial on both those claims and the *Losch* plaintiffs' state-law claims.

I.

Defendant/appellee PP&L is an electric utility servicing Allentown, Pennsylvania and surrounding areas. In addition to providing the Allentown area with electricity, PP&L competes with the plaintiffs (the "Oil Dealers") and others for customers in the residential heating market in Allentown and surrounding areas. Because of the costs associated with converting from one type of home heating system to another, the most intense competition is in the new construction market. See *Losch* complaint ("Losch") P 22, appendix ("app.") at 1040.

According to the Oil [**4] Dealers' complaints, PP&L began promoting the use of electric heat pumps as conservation devices for use in new homes in the late 1970s. Yeager's amended complaint ("Yeager's") P 26, app. at 9. To encourage builders and developers to use electric heat pumps, PP&L offered them cash incentives for each new home in which an electric heat pump was installed. Yeager's PP 28-29, app. at 10; Losch P 15, app. at 1038; see app. at 1265-66, 4184-85. PP&L also provided builders and developers with other benefits by, for example, subsidizing developers' advertising efforts and paying for the installation of high-efficiency electric heat in model homes. See, e.g., app. at 4173, 4176. Although not specifically alleged in the Oil Dealers' complaints, PP&L apparently included in some of its incentive offers provisions such as the following:

Developer must agree that the entire development will consist of only electrically heated units during the term of this Agreement. Completion of a non-electrically heated unit shall void this Agreement and the System grants for future units in the development will revert to whatever applicable program, if any, is in effect at the [**5] time.

App. at 1265. See Yeager's P 29, app. at 10. See also app. at 4177, 4185. (We will refer to agreements containing clauses such as this as "all-electric development agreements.")¹

[*1264] PP&L also offered reduced electric rates for a limited time to persons purchasing "Four-Star" homes equipped with electric [**6] heat pumps and residential off-peak thermal heating ("RTS") systems.² Yeager's P 31, app. at 11; Losch PP 18-19, app. at 1038-39. RTS systems promote load management³ by heating water during off-peak hours (times during which the demand for electricity is at the lowest) and storing it for use during peak hours (times of highest demand). PP&L offered a special rate (the "RTS Rate") to homeowners purchasing homes with these units because RTS systems are more expensive than electric baseboard heating.

[**7] The Oil Dealers allege that PP&L approached builders and developers about these programs and incentives shortly after receiving requests from them to provide electricity during construction. Losch P 15, app. at 1038. Thus, the Oil Dealers contend that PP&L is using its status as the sole provider of electricity in the Allentown area to monopolize the home heating market in that area. Losch P 25, app. at 1042. As support for this allegation, they allege that more than 70 percent of new homes constructed in the Allentown area since the early 1980s use electric heat rather than oil or other heating systems. Yeager's P 32, app. at 11; Losch P 20, app. at 1039.⁴

¹

Significantly, these agreements require only that all units in the development use electric heat, not that they utilize high-efficiency electric heating systems. Thus, while a builder or developer would not receive a grant for a home using less efficient electric baseboard heating, it would not lose potential grants for other homes in the development by building such a home. Through these agreements then, PP&L made a unit containing inefficient electric baseboard heating preferable to a unit using efficient gas or oil heating systems. The agreements would assist in efforts to "block the entry of fossil fuels, especially gas, into new developments." App. at 1624; see also app. at 4156.

²

It is unclear whether, as alleged in the complaints, a home had to use a high-efficiency heat pump to be designated as a Four-Star home. From the record, it appears that to qualify as a Four-Star home, and thus to receive the reduced rate, a home had to contain an RTS system and energy-efficient appliances. See app. at 1288-89, 3967.

³

Load management is the practice of shifting energy demand, or "load," from peak daytime hours (during which there is usually the most demand) to nighttime (off-peak) hours. App. at 172. By shifting the demand on their generation facilities to off-peak times, electric companies can avoid having to increase their generating capacity to serve all their customers.

⁴

In their brief on appeal, the Oil Dealers also challenge a fourth PP&L practice -- a fossil fuel conversion program pursuant to which PP&L offers cash grants to contractors and homeowners if they replace fossil fuel heating systems with electric heating systems. While the record contains documents to support this allegation, neither the district court's opinion nor

[**8] PP&L responded to the Oil Dealers' allegations in part by claiming that it was immune from antitrust liability for the challenged activities under the state action immunity doctrine. See *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943). The district court agreed with PP&L and dismissed the Oil Dealers' antitrust claims on this basis.⁵ The Oil Dealers appeal.

II.

We need only address PP&L's state action immunity argument with respect to the RTS Rate and [**9] incentive programs which were not offered as part of all-electric development agreements, for PP&L has conceded both in its brief and at oral argument that it does not seek state action immunity for benefits provided to builders and developers pursuant to all-electric development agreements. See PP&L's brief at 41. Instead, PP&L asks us to affirm the district court's grant of summary judgment as to the alleged all-electric development agreements on the merits without resort to the immunity defense. We will first address the state action immunity issue and then turn to PP&L's arguments regarding the all-electric development agreements.

The district court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1337 and 15 U.S.C. §§ 15, 26. We exercise jurisdiction pursuant to 28 U.S.C. § 1291. Our review of a grant of summary judgment is plenary; we evaluate the evidence using the same standard the district court was to [*1265] have applied in reaching its decision. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1362 (3d Cir. 1992). [**10] In this case in particular, we exercise plenary review in any event because the state action immunity issue is a question of law. *Ticor Title Insurance Co. v. FTC*, 922 F.2d 1122, 1129 (3d Cir. 1991) (*Ticor I*), rev'd on other grounds, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992) (*Ticor II*, on remand, 998 F.2d 1129 (3d Cir. 1993) (*Ticor III*), cert. denied, 62 U.S.L.W. 3612, 3623 (March 21, 1994).⁶

In *Parker*, HN1⁷ the Supreme Court refused to impose antitrust liability for state action because "nothing in the language of the Sherman Act or its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Parker*, 317 U.S. at 350-51.⁷ Since [**11] then, state action

either complaint refers to this practice. See *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 804 F. Supp. 700, 702-03 (E.D. Pa. 1992). Because the complaints do not challenge activity other than that associated with new home construction, we will not consider the Oil Dealers' challenge to the alleged conversion program.

5

The court also dismissed the Yeager's plaintiffs' RICO claim for failure to state a claim and the *Losch* state-law claims pursuant to 28 U.S.C. § 1367(c)(3) because no federal-law claims remained in the case. The Oil Dealers do not challenge the district court's disposition of the RICO claim on appeal; our disposition of the antitrust claims will result in reversal of the district court's dismissal of the state-law claims in *Losch*.

6

All citations to *Ticor I* will be to portions which were not reversed by the Supreme Court.

7

The Supreme Court in *Parker* thus first articulated the state action immunity doctrine after consulting the text and history of the Sherman Act. *Parker v. Brown*, 317 U.S. 341, 351-52, 87 L. Ed. 315, 63 S. Ct. 307 (1943). Since *Parker*, however, when applying the state action immunity doctrine, courts and commentators have not distinguished between antitrust actions based on the Sherman Act and those based on other antitrust statutes. See, e.g., *Porter Testing Laboratory v. Board of Regents for Oklahoma Agriculture & Mechanical Colleges*, 993 F.2d 768 (10th Cir. 1993); *Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc.*, 790 F.2d 1032, 1039-40 (2d Cir. 1986); I Phillip Areeda & Donald F. Turner, Antitrust Law P 218 (1978). In *FTC v. Ticor Title Insurance Co.*, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992), the Supreme Court noted the possibility that state action immunity may not apply to alleged violations of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), but it declined to reach the issue because the parties had not raised it. Similarly, this case involves claims based on antitrust statutes other than the Sherman Act, but the Oil Dealers have not argued that the state action immunity doctrine does not apply to claims asserted under the other statutes. We therefore will not distinguish among the antitrust claims asserted in deciding the state action immunity issue.

immunity from antitrust liability -- "the doctrine that federal antitrust laws are subject to supersession by state regulatory programs" -- has evolved based upon "the principle of freedom of action for the States, adopted to foster and preserve the federal system." *Ticor II*, 112 S. Ct. at 2176. Nevertheless, principles of federalism do not justify a broad interpretation of state action immunity; instead, such an interpretation is disfavored. *Ticor II*, 112 S. Ct. at 2178.

[**12] Although *Parker* did not involve private conduct, subsequent caselaw has made it clear that [HN2](#) private entities may claim state action immunity if their challenged activity was directed and supervised by the state. E.g., *Ticor II*, 119 L. Ed. 2d 410, 112 S. Ct. 2169; *Patrick v. Burget*, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985). "Private party conduct is immune from antitrust liability under the state action doctrine only if the party claiming immunity shows that its conduct satisfies two requirements." *Nugget Hydroelectric, L.P. v. Pacific Gas & Electric Co.*, 981 F.2d 429, 434 (9th Cir. 1992). See *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980). "A state law or regulatory scheme cannot be the basis for antitrust immunity [**13] unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors." *Ticor II*, 112 S. Ct. at 2175. There is a close relationship between the two requirements: "Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Id.* at 2178.

A.

As a preliminary matter, we must decide whether state action immunity can shield electric utilities from antitrust liability. The Oil Dealers contend that to grant PP&L state action immunity based upon Pennsylvania's statutory scheme would be inconsistent with the Public Utility Regulatory Policies [\[*1266\]](#) Act of 1978, [16 U.S.C. § 2601 et seq.](#) ("PURPA"). PURPA, which the Pennsylvania statutes implement, provides that nothing in it "affects . . . the applicability of the antitrust laws to any electric utility." [16 U.S.C. § 2603\(1\)](#). The Oil Dealers thus argue that it is "totally inconsistent with PURPA to use the Pennsylvania [\[**14\]](#) legislation implementing [it] to exempt the utility's conduct from the antitrust laws." Oil Dealers' brief at 23. We disagree.

PURPA's plain language, which indicates that it is not intended to affect antitrust laws as they apply to utility companies, necessarily implies that both theories of liability and defenses apply with full force to utilities. Thus, we agree with the district court's holding that [HN3](#) the fact that PURPA does not "affect the applicability" of the antitrust laws "cannot mean that PURPA reserves only antitrust liability but not antitrust defenses." *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 804 F. Supp. 700, 710 (E.D. Pa. 1992). PURPA's plain statutory language "establishes that [it] is to have no effect on the applicability of the state action doctrine to gas and electric utilities." *Nugget Hydroelectric*, 981 F.2d at 433.

B.

Having concluded that PP&L may assert state action immunity in response to plaintiffs' claims, we must determine which party bears the burden of proving that the doctrine applies. The Oil Dealers argue that PP&L bears the burden because state action immunity is an affirmative [\[**15\]](#) defense. PP&L contends that the Oil Dealers bear the burden of showing that state action immunity does not shield the challenged activity from liability because, as plaintiffs, they bear the burden of establishing a cause of action under the antitrust laws.

In *Parker*, the Supreme Court treated the issue of state action immunity as one of preemption; it did not describe the doctrine as an affirmative defense. Cases since *Parker*, however, clarify that [HN4](#) state action immunity is an affirmative defense as to which PP&L bears the burden of proof. See *Ticor II*, 112 S. Ct. at 2172 (state action immunity was "one of the principal defenses" asserted); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985) ("municipalities must demonstrate" that their actions were taken pursuant to state policy to obtain immunity); *Patrick*, 486 U.S. at 94 ("respondents have not shown . . . the active supervision required to result in state action immunity") (emphasis added); *Ticor III*, 998 F.2d 1129, 1139 [\[**16\]](#) ("The Supreme Court, however, expressly declared that when prices are initially set by private parties, *the person claiming*

immunity must show that the state undertook steps to evaluate the rate setting scheme.") (emphasis added); *Nugget Hydroelectric*, 981 F.2d at 434 (party claiming immunity must demonstrate that its conduct satisfies requirements of state action immunity). See also *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 600, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976) (Stevens, J.) (in a section of the majority opinion which did not represent the opinion of the court, stating, "a claim of immunity or exemption is in the nature of an affirmative defense to conduct which is otherwise assumed to be unlawful").

C.

PP&L thus bears the burden of proof, and first it must demonstrate that it offered its RTS Rate to consumers, and cash grants and other incentives free of all-electric development agreements to builders and developers, pursuant to a clearly articulated and affirmatively expressed state policy. *Midcal*, 445 U.S. at 105; **[**17]** *Ticor I*, 922 F.2d at 1129. We conclude that it did.

Contrary to the Oil Dealers' contention, **HN5** a state policy need not be aimed at restraining competition for a person acting pursuant to that policy to be immune from antitrust liability. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991), the Court stated,

We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition It is enough, we have held, if suppression of **[*1267]** competition is the "foreseeable result" of what the statute authorizes

Omni, 111 S. Ct. at 1350, quoting *Hallie*, 471 U.S. at 42.⁸ See also *Ticor I*, 922 F.2d at 1130-31. Accordingly, to satisfy the clear articulation requirement, a defendant need only show that "the legislature contemplated the kind of action complained of." *Hallie*, 471 U.S. at 44 **[**18]** (quotation omitted). See also *Hancock Industries v. Schaeffer*, 811 F.2d 225 (3d Cir. 1987).

PP&L is regulated by the Pennsylvania Public Utilities Commission (the "PUC" or the "Commission"). The PUC is an independent state administrative commission authorized to regulate public utility companies doing business in Pennsylvania. **[**19]** See *66 Pa. Cons. Stat. Ann. §§ 301, 501*. Pursuant to its statutory authority, it has directed that utilities such as PP&L consider "conservation, load management, and alternate energy supply products" as alternatives to expanding capacity and cost-reduction measures. 52 Pa. Code § 69.31. See also 52 Pa. Code § 69.34. The Pennsylvania legislature requires each utility to submit annually

information concerning its future plans to meet its customer demand, including . . . :

(3) **HN6** A year-by-year examination of the potential for promoting and ensuring the full utilization of all practical and economical energy conservation for the next twenty years and a discussion of how existing and planned utility programs do or do not adequately reach this potential. Such programs should include, but not be limited to, educational, audit, loan, rebate, third-party financing and load management efforts to shift load from peak to off-peak periods.

66 Pa. Cons. Stat. Ann. § 524(a)(3).

The Oil Dealers agree that this statutory scheme expresses a state policy in favor of energy conservation and load management but argue that the policy cannot support a claim of immunity because **[**20]** it is at best neutral as to competition. *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 55, 70 L. Ed. 2d

8

Omni and *Hallie* involved immunity of municipalities under the state action immunity doctrine, but the test to be applied in determining whether a state policy can support a claim of immunity is the same for municipalities as it is for private actors. The distinction between the two types of cases lies in the fact that private actors, unlike municipalities, must prove a second proposition -- that their actions were actively supervised by the state -- to obtain immunity for their actions. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985).

810, 102 S. Ct. 835 (1982). See also Cantor, 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (state policy giving a commission power to regulate rates is only neutral as applied to an electric utility's program, approved in rate tariff, to distribute free light bulbs to customers). In fact, the legislature has admonished that

HN7 [↑] Neither the submission to the commission of the information required by subsection (a) or [sic] the issuance by the commission of a report on the information, or anything contained in such reports, or any action taken by the commission as a result of the issuance of such reports, shall be considered or construed as approval or acceptance by the commission of any of the plans, assumptions or calculations made by the public utility and reflected in the information submitted.

66 Pa. Cons. Stat. Ann. § 524(d). Thus, the Oil Dealers argue that Pennsylvania's statutory scheme does nothing more than authorize PP&L's [*21] allegedly anticompetitive activity. If that were the case, PP&L would not be immune from liability for its actions. Omni, 111 S. Ct. at 1353; Parker, 317 U.S. at 351.

State approval of PP&L's activity is not required for immunity to attach, however. Southern Motor Carriers, 471 U.S. at 61 n.23 ("clearly articulated permissive policy" will suffice). Simply accepting the proposition that Pennsylvania did not intend to regulate competition between electric utilities and fossil fuel dealers does not mean that Pennsylvania intended to refrain completely from entanglement in any issue affecting the competitive interaction between the two. As noted previously, the issue in determining whether actions were taken pursuant to a clearly articulated state [*1268] policy is whether the challenged activity is a "foreseeable result" of what the statute authorizes." Omni, 111 S. Ct. at 1350, quoting Hallie, 471 U.S. at 42. [*22] Permitting companies to grant loans or rebates for energy-saving systems could easily be foreseen to provide one company with a competitive advantage over another, whether the other company provides the same or a competing service. Therefore, it is reasonably foreseeable that rebates, loans and other load management programs utilities are required to consider could have anticompetitive effects.

The Oil Dealers respond that PP&L's practices do not represent attempts to engage in energy conservation or load-shifting. Therefore, they argue, even if Pennsylvania's statutory scheme reasonably contemplates anticompetitive effects flowing from rebates and loans offered to further energy conservation and load management, PP&L cannot be immune from liability for engaging in the challenged activities. They contend that the district court engaged in fact-finding -- which, of course, would be impermissible at the summary judgment stage -- when it ruled that PP&L's activities represented energy conservation or load-shifting efforts.

In so arguing, the Oil Dealers misconstrue the court's function when deciding whether a practice was established pursuant to a state policy. The district court did [*23] not engage in fact-finding; rather, in recognizing that state law governs the issue whether Pennsylvania has articulated a state policy favoring PP&L's activities, it merely attempted to predict how the Pennsylvania Supreme Court would rule on that issue by examining and giving deference to PUC findings. See Yeager's Fuel, 804 F. Supp. at 708, citing Ticor I, 922 F.2d at 1132, 1134. We approve of both the manner in which the district court analyzed the issue and the conclusion it reached.

The PUC's Bureau of Conservation, Economics & Energy Planning (the "Bureau"), in response to inquiries from state legislators and outcry from the petroleum industry, examined PP&L's programs in 1989. In an internal report, the Bureau found that PP&L's offering of certain incentives to owners and builders to install high-efficiency electric heating systems in new homes was a legitimate load management program. App. at 1811-12.⁹

9

PP&L apparently did not mention to the Bureau or the PUC that some of these benefits were provided pursuant to all-electric development agreements. See Pennsylvania's *amicus* brief at 5. Because PP&L does not here contend that benefits given to builders and developers as part of all-electric development agreements merit state action immunity, we need only examine the Bureau's findings as to benefits provided in the absence of such agreements. Therefore, since we are not according immunity to PP&L for activity which may not have been revealed or which may have been misrepresented to the Bureau and the PUC, there is no need either to decide whether PP&L actually misrepresented or omitted certain information when describing its activity to the PUC, or to consider the Oil Dealers' argument that a

[**24] The Oil Dealers argue that we should not consider the views of a bureau of a state commission to determine state policy. [HN8](#)[↑] In Pennsylvania, the PUC has been entrusted with "full power and authority . . . to enforce, execute and carry out, by its regulations, orders, or otherwise, . . . the provisions of [the Code] and the full intent thereof." [66 Pa. Cons. Stat. Ann. § 501\(a\)](#). The PUC has the authority to evaluate the prudence and cost-effectiveness of utilities' energy conservation and load management programs. [66 Pa. Cons. Stat. Ann. § 1319](#). Clearly, we may accord the PUC's views weight. See [Ticor I, 922 F.2d at 1134](#).

The Bureau, of course, is one step removed from the PUC. The legislature itself, however, in addition to charging the Bureau with conducting studies and research and advising the PUC, has charged the Bureau with "the development of an effective program of energy conservation." [66 Pa. Cons. Stat. Ann. § 308\(c\)](#). In an audit of the PUC, the legislature recognized that the Bureau in part "reviews company plans for new conservation programs and provides feedback to utilities on improvements for program design." App. at 2660. Therefore, it would [**25] appear that the Bureau, even though [*1269] only a PUC bureau, is the authority on Pennsylvania's conservation policy. We will accord weight to its view that PP&L's programs were legitimate load management programs. Our decision to do so, in turn, requires the conclusion that PP&L engaged in the challenged activities in accordance with a clearly articulated state policy promoting load management.

We likewise reject the Oil Dealers' argument that we should not consider the Bureau report as an indication of state policy because it is only an "informal opinion." The PUC's Rules of Administrative Practice and Procedure provide that "informal opinions, whether oral or written, expressed by Commissioners, presiding officers, legal counsel, employees or representatives of the Commission are only considered as aids to the public, do not have the force and effect of law or legal determinations, and are not binding upon the Commonwealth or the Commission." 52 Pa. Code § 1.96. This provision does not appear to apply to the Bureau's report, even if it is purely internal, for the report does not constitute an "opinion" in the sense the term is used in the rule. In any event, the rule certainly does not [**26] undermine the fact that the Bureau, which in Pennsylvania is charged with overseeing utilities' energy conservation efforts, believed that PP&L's programs, at least insofar as they did not involve all-electric development agreements, were undertaken in accordance with state conservation policy.

Since the district court's decision, the PUC has adopted new regulations which tend to discredit the Bureau's view of PP&L's activity. The PUC now requires that any demand-side management activity on the part of a utility company be approved prior to implementation. App. at 4683, 4693. It also now prohibits the use of cash to influence builders and developers. 52 Pa. Code § 57.63; see app. at 4688 (commenting that, under the new regulations, "utilities are specifically prohibited from delivery of allowances such as cash or appliances to builders and developers in order to influence their choice of energy for use in new residential developments").

The fact that the PUC now prohibits such actions does not mean that PP&L should be denied state action immunity for its past activity, however. As we recognized in *Ticor I*, [HN9](#)[↑] a private defendant reasonably relying on apparently lawful government [**27] action should not be deprived of state action immunity if the government later reverses its position. [Ticor I, 922 F.2d at 1133](#), citing P. Areeda & H. Hovenkamp, *Antitrust Law* § 212.4b at 153 (1989 supp.). See also [Lease Lights, Inc. v. Public Service Co. of Oklahoma, 849 F.2d 1330, 1334 \(10th Cir. 1988\)](#); II American Bar Association Section on *Antitrust Law, Antitrust Law Developments (Third)* 972. Indeed, it would be entirely unfair to hold that PP&L did not act in accordance with state policy when its activity had received the imprimatur of the Bureau merely because the PUC later revised this position.

We now turn to the Oil Dealers' argument that according PP&L state action immunity in this case would be inconsistent with the Supreme Court's decision in *Cantor*. Leaving aside questions regarding the continued viability of *Cantor*'s holding, see [Yeager's Fuel, 804 F. Supp. at 711 n.18](#), we find no inconsistency. To the contrary, our conclusion that Pennsylvania has clearly articulated a state policy requiring energy conservation and load management efforts such as those challenged [**28] in this lawsuit does not conflict with *Cantor* in any way.

In *Cantor*, a retail druggist who sold light bulbs alleged that the Detroit Edison Company ("Detroit Edison") was using its monopoly power as a provider of electricity to restrain competition in the sale of light bulbs. [Cantor, 428 U.S. at 581-82](#). Detroit Edison implemented a "light bulb exchange program," pursuant to which it provided limited numbers of light bulbs to its customers, in the late 1800s, before the state of Michigan began regulating electric utilities. In 1916, the Michigan Public Utilities Commission (the "Michigan PUC") approved a Detroit Edison tariff explaining the program. It also approved Detroit Edison's subsequent tariffs and a decision on Detroit Edison's part to eliminate the program for large commercial customers, thus implying continued approval of the program. See [id. I*1270\] at 583, 96 S. Ct. at 3114](#). Neither the Michigan PUC nor the Michigan legislature "ever made any specific investigation of the desirability of a lamp exchange program or of its possible effect on competition in the light-bulb [**29] market," but because the Michigan PUC had approved its tariff, Detroit Edison could not abandon the program until a new tariff was approved. [Id. at 584-85](#).

Although the case was decided before the Court clearly delineated its two-pronged test for state action immunity, the *Cantor* Court in essence ruled that Michigan had not clearly articulated a policy encompassing the light bulb program. See [Cantor, 428 U.S. at 585](#) ("We infer that the State's policy is neutral on the question whether a utility should, or should not, have such a program."). It based its conclusion on the facts that although the Michigan PUC was charged with rate regulation, Michigan did not regulate the distribution of light bulbs; no state statute mentioned light bulb exchange programs; neither the legislature nor the Michigan PUC investigated the program; the program began before the Michigan PUC was created; and no other electric utility in the state offered such a program. [Id. at 583-85](#).

In contrast, in this case, Pennsylvania [**30] statutes expressly provide for PUC regulation of rates, foresee the establishment of rebate and load management programs and authorize the PUC to evaluate such programs. The PUC has approved the RTS Rate and, acting through the Bureau, has investigated PP&L's rebate and incentive programs. Other utilities have similarly offered special rates to consumers, app. at 229-329, and may even have offered incentives to builders or developers. See, e.g., app. at 272, 285, 300, 307. *Cantor* does not compel a different conclusion from the one we reach here.

For all of these reasons, we think it is clear that PP&L offered its RTS Rate, cash grants and other incentives which were not part of all-electric development agreements pursuant to a clearly articulated and affirmatively expressed state policy of promoting load management and energy conservation.

D.

Second, PP&L must demonstrate that Pennsylvania actively supervised its incentive programs and RTS Rate. [HN10\[4\]](#) "Actual state involvement, not deference to private [anticompetitive activity] under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation [**31] by the State, not out of respect for the economics of [the challenged activity]." [Ticor II, 112 S. Ct. at 2176-77](#). It is this "active supervision" prong of the state action immunity test which "prevents States from 'casting . . . a gauzy cloak of state involvement over what is essentially [private anticompetitive activity].'" [Southern Motor Carriers, 471 U.S. at 61 n.23](#), quoting [Midcal, 445 U.S. at 106](#). "The active supervision prong . . . requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." [Ticor II, 112 S. Ct. at 2177](#), quoting [Patrick, 486 U.S. at 100-01](#).

Ticor involved title insurance rates which were set by ratesetting bureaus which, in turn, were comprised of member title insurance companies. Faced with an antitrust challenge, the insurance companies argued that their ratesetting [**32] action was immune because of their states' regulatory schemes, pursuant to which state commissions had "approved" the rates set by the bureaus by not rejecting them within a certain period of time. The Court explained:

Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played [*1271]

a substantial role in determining the specifics of the economic policy. *The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.*

Ticor II, 112 S. Ct. at 2177 (emphasis added). Because of the "negative option" method in which the rates were "approved," the Court held that the title insurance ratesetting in question was not actively [**33] supervised and thus did not qualify for state action immunity. Id. at 2179.

The PUC unquestionably has the power to review PP&L's programs. 66 Pa. Cons. Stat. Ann. §§ 501, 1309(a). Therefore, we need only consider whether it actually did so in a manner which satisfies the *Ticor* test. Such an analysis is best understood by separately examining the challenged activities. We will first consider the RTS Rate.

1.

The PUC has actually approved PP&L's RTS Rate in the tariffs PP&L must file under state law. App. at 705-35; Pennsylvania Public Utility Commission v. Pennsylvania Power & Light Co., 55 P.U.R.4th 185 (1983) and 67 P.U.R.4th 30 (1985). Furthermore, its approval of this rate has amounted to more than mere examination for mathematical accuracy, cf. Ticor II, 112 S. Ct. at 2179, for it has actually considered complaints about the RTS Rate and decided that it served energy conservation and load management purposes. By law, PP&L now must charge this rate until the PUC approves a new tariff permitting it to charge some other rate or rates. 66 Pa. Cons. Stat. Ann. § 1303.

[**34] Clearly, Pennsylvania has actively supervised the RTS Rate. Cf. DFW Metro Line Services v. Southwestern Bell Telephone Corp., 988 F.2d 601, 606 (5th Cir. 1993). The PUC has affirmatively approved it, after considered study which included more than a review for mathematical accuracy. App. at 705-35; Pennsylvania Public Utility Commission v. Pennsylvania Power & Light Co., *supra*; cf. Ticor II, 112 S. Ct. at 2179. Thus, we conclude that PP&L is immune from liability for its RTS Rate.

2.

Next, we will consider whether Pennsylvania has actively supervised PP&L's offering cash grants and other incentives to builders and developers insofar as those incentives were not part of all-electric development agreements. On this issue, PP&L makes much of the fact that, as required by statute, it annually has described its Four-Star Home program to the PUC through the Bureau. This reporting alone does not indicate active supervision because the Bureau does no more than review the reports. Cf. Ticor II, 112 S. Ct. at 2179. In fact, as [**35] noted previously, the statute itself discounts any theory that the submission of the reports constitutes approval of them. 66 Pa. Cons. Stat. Ann. § 524(d).

It is nevertheless clear that the Bureau has considered these programs more extensively than simply reviewing PP&L's reports upon submission. As explained previously, in November, 1989, the Bureau issued a final staff report reviewing PP&L's programs in response to inquiries from the legislature and protests by fossil fuel dealers. In the report, it indicated that it believed that PP&L's programs constituted valid energy conservation and load management efforts. App. at 1810 *et seq.* See also app. at 1765. We do not view the PUC's refusal to release this report as affecting whether we should accord it weight.

It is also clear that the PUC was aware that PP&L's programs involved not just incentives to homeowners themselves but incentives to builders and developers as well. See, e.g., app. at 351, 362, 366. See also Pennsylvania's *amicus* brief at 4. Through the Bureau, the PUC also knew that PP&L's programs not only shifted current use of electricity but also attracted new electrical heating accounts. App. [**36] at 1811.

Further, as noted previously, the PUC has issued new regulations governing programs such as PP&L's. These regulations were the result of meetings and planning sessions which were themselves an outgrowth of the Oil Dealers' having voiced the same complaints to the PUC as they have asserted in [*1272] this lawsuit. App. at 98-103, 361-66. The Oil Dealers have even commented on the proposed regulations which are now in effect. See app. at 339, 4681-88. Thus, the PUC heard and presumably considered the Oil Dealers' allegations but, until issuing its

new regulations, considered PP&L's programs (insofar as they did not include all-electric development agreements) to be valid attempts to engage in energy conservation as the legislature required. Therefore, we conclude that PP&L is immune from antitrust liability for those programs, for they have been actively supervised.

III.

As noted previously, PP&L does not claim to be immune from antitrust liability for actions undertaken in connection with all-electric development agreements. It thus urges us to examine the merits of the Oil Dealers' claims regarding incentives offered in conjunction with all-electric development agreements. PP&L [**37] asks that we affirm the district court's grant of summary judgment on those claims because the Oil Dealers have not advanced evidence to support them; however, a review of the procedural history of this case helps explain our disinclination to do so.

The Yeager's plaintiffs filed suit on August 12, 1991; the plaintiffs in *Losch* did not file suit until April 22, 1992. By that time, there had been a great deal of activity in the Yeager's case.

Specifically, in November, 1991, PP&L had moved for dismissal of the Yeager's case under [Fed. R. Civ. P. 12\(b\)\(6\)](#), arguing both state action immunity and failure to state a claim upon which relief could be granted. Attached to its motion were various documents offered in support of its state action immunity defense. Because it would be considering matters outside the pleadings in deciding that motion, the district court in January, 1992, ordered that PP&L's motion to dismiss be treated as a motion for summary judgment, permitted some discovery and granted the Yeager's plaintiffs additional time to reply.

In April, 1992, however, apparently for administrative reasons, the district court dismissed PP&L's pending motion to dismiss [**38] without prejudice to its being refiled as a motion for summary judgment. PP&L did just that, filing a motion for summary judgment which relied solely on the reasons set forth in its previous motion, appendix and brief. Although PP&L finally argued in its reply brief that the Yeager's plaintiffs had not produced sufficient evidence to support their claims, rather than that they had simply failed to allege claims upon which relief could be granted, the district court denied both the Yeager's plaintiffs' motion to respond to that reply and their request for additional discovery under [Rule 56\(f\) of the Federal Rules of Civil Procedure](#).

After the *Losch* complaint was filed, the plaintiff in *Losch* moved to consolidate the two cases for pretrial purposes. The court held a hearing, at which the scope of PP&L's summary judgment motion was discussed. The district court did not explicitly decide whether PP&L's challenge to the merits of the Oil Dealers' claims would be considered under a [Rule 12\(b\)\(6\)](#) or a [Rule 56](#) standard. It did, however, grant the *Losch* plaintiff's motion to consolidate "the state action immunity issue and all federal claims . . . asserted in either the [**39] Yeager or *Losch* cases." App. at 2457.

The confusion as to how the court would treat PP&L's arguments on the merits of the Oil Dealers' claims -- that is, whether it would consider only the sufficiency of their averments, or determine whether they had produced evidence sufficient to survive summary judgment -- continued through the argument on PP&L's motion. At that argument, the district court stated that a [Rule 56](#) standard would apply, app. at 106-11, but in its opinion, the court ruled that it need not address the issue of which standard it should use to address the merits because it would grant summary judgment entirely on state action immunity grounds. See [Yeager's Fuel, 804 F. Supp. at 703-04 n.3](#).

Relying upon [Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#), PP&L now argues that it should be granted summary judgment on the Oil Dealers' [*1273] claims of attempted monopolization of the heating market through all-electric development agreements because the Oil Dealers have not come forward with evidence to support their claims. In *Celotex*, [HN11](#)[] the Supreme [**40] Court stated that a nonmovant who will bear the burden of proof at trial must go beyond the pleadings in order to survive a motion for summary judgment, even when the moving party has not produced evidence to support its motion. [Celotex, 477 U.S. at 324](#). However, as the Court also recognized in *Celotex*:

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.

Id. at 323. In this case, PP&L did not meet its initial burden with respect to the merits. In its motion, it merely informed the court that the complaint itself was inadequate; it was not until it filed its reply brief, to which the Oil Dealers were precluded from responding, that it raised the argument that the Oil Dealers could not support their claims with adequate evidence.

[**41] Furthermore, even if PP&L had argued insufficiency of the evidence on the merits earlier, the Oil Dealers had a right not to be "railroaded" by a premature motion for summary judgment." *Id. at 326.* In this case, the Oil Dealers sought further discovery through a *Rule 56(f)* affidavit and an opportunity to respond to PP&L's arguments that they could not carry their evidentiary burden in a surreply brief. The district court refused both requests.

In light of the confusion surrounding PP&L's arguments on the merits before the district court, and because the Oil Dealers may not have had the opportunity for full discovery and argument with respect to the merits, we will decline at this time to entertain PP&L's arguments that the Oil Dealers have failed to produce sufficient evidence to survive summary judgment on the merits of their remaining claims. Cf. *J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1542 n.18 (3d Cir. 1990)* (recognizing that "it would be unfair" to require a plaintiff to specify evidence needed to substantiate Sherman Act claim in *Rule 56(f)* affidavit "when it was [**42] without notice that the district court intended to consider and resolve the entire Sherman Act claim").

IV.

For the foregoing reasons, we will affirm the district court's grant of summary judgment to PP&L as to the Oil Dealers' claims based upon the RTS Rate and incentives which were not offered in conjunction with all-electric development agreements. We will reverse the district court's judgment insofar as it granted summary judgment to PP&L for incentives offered in conjunction with such agreements, however. Because this partial reversal reintroduces federal claims into each of the *Losch* and the *Yeager's* cases, we will also reverse the district court's dismissal of the *Losch* state-law claims pursuant to *28 U.S.C. § 1367(c).*

End of Document



Breaux Bros. Farms v. Teche Sugar Co.

United States Court of Appeals for the Fifth Circuit

May 4, 1994, Decided

No. 92-4968

Reporter

21 F.3d 83 *; 1994 U.S. App. LEXIS 9596 **; 1994-1 Trade Cas. (CCH) P70,581

BREAUX BROTHERS FARMS, INC., Plaintiff-Appellee, TECHE PLANTING CO., INC. and FRANCIS PAT ACCARDO, Plaintiffs-Appellees, Cross-Appellants, versus TECHE SUGAR CO., INC., SOUTH COAST SUGARS, INC., Defendants-Appellants, Cross-Appellees. TECHE PLANTING CO., INC., FRANCIS PAT ACCARDO, Plaintiffs-Appellees, Cross-Appellants, versus TECHE SUGAR CO., INC., SOUTH COAST SUGARS, INC., Defendants-Appellants, Cross-Appellees.

Subsequent History: [\[**1\]](#) As Corrected.

Certiorari Denied October 31, 1994, Reported at: [1994 U.S. LEXIS 7585](#).

Rehearing denied by [Breaux Bros. Farms, Inc. v. Teche Sugar Co., 1994 U.S. App. LEXIS 40949 \(5th Cir. La., June 10, 1994\)](#)

Writ of certiorari denied *Breaux Bros. Farms v. Teche Sugar Co.*, 513 U.S. 963, 115 S. Ct. 425, 130 L. Ed. 2d 339, 1994 U.S. LEXIS 7585 (1994)

Prior History: Appeals from the United States District Court for the Western District of Louisiana. D.C. DOCKET NUMBER 90-CV-2536 c/w 90-2537. JUDGE Rebecca F. Doherty

[Breaux Bros. Farms v. Teche Sugar Co., 792 F. Supp. 1436, 1992 U.S. Dist. LEXIS 14257 \(W.D. La., 1992\)](#)

Disposition: REVERSED.

Core Terms

Sugar, sugar cane, farmers, lease, tying arrangement, market power, grinding, anti trust law, processing, conditioned, cane, sugar mill, competitors, antitrust, possessed, space

LexisNexis® Headnotes

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

Real Property Law > ... > Lease Agreements > Damages > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

See [15 U.S.C.S. § 1](#).

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

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

HN2 [down arrow] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is the sale or lease of one product on the condition that the buyer or lessee purchase a second product.

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

Real Property Law > Ownership & Transfer > Public Entities

HN3 [down arrow] **Price Fixing & Restraints of Trade, Tying Arrangements**

The essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next.

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

Contracts Law > Defenses > Illegal Bargains

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

HN4 [down arrow] **Price Fixing & Restraints of Trade, Tying Arrangements**

The fact that a case involves a required purchase of two goods that would otherwise be purchased separately does not make the contract illegal.

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

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

HN5 [down arrow] **Tying Arrangements, Defenses**

The law draws a distinction between exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other. When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act, [15](#)

[U.S.C.S. § 1](#), is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures.

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

[HN6](#) Price Fixing & Restraints of Trade, Tying Arrangements

Any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact.

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 > Per Se Rule

[HN7](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

To establish that a tying arrangement is illegal per se, the plaintiff must show that the defendant exerted sufficient control over the tying market to have a likely anticompetitive effect on the tied market, sugar cane grinding. Second, the plaintiff may prevail by establishing that the arrangement is an unreasonable restraint of trade.

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

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

[HN8](#) Price Fixing & Restraints of Trade, Tying Arrangements

The court evaluates the reasonableness of an arrangement by exploring the "actual effect of the exclusive contract on competition" in both the tying and tied markets. The court may find an antitrust violation to be an unreasonable restraint of trade only if the tying arrangement has had an actual adverse effect on competition.

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

[HN9](#) Price Fixing & Restraints of Trade, Tying Arrangements

A per se condemnation requires proof that the tying arrangement involved the use of market power to force consumers to buy goods they would not otherwise purchase.

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

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

[**HN10**](#) [down] Price Fixing & Restraints of Trade, Tying Arrangements

Possession of 17.5 percent, much less 9.4 percent, of a market is not normally sufficient to satisfy the requirements of the per se rule. Some circuit courts have used 30 percent as a rough benchmark for the minimum amount of market power necessary to give rise to a per se violation of antitrust law.

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

[**HN11**](#) [down] Price Fixing & Restraints of Trade, Tying Arrangements

The question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

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

[**HN12**](#) [down] Price Fixing & Restraints of Trade, Tying Arrangements

When a party has no control over a tied market, the dangers usually created by a tying arrangement do not exist.

Counsel: For BREAUX BROS FARMS, INC., Plaintiff-Appellee: ALLAIN & ALLAIN, Raymond E. Allain, Sr., Jeanerette, LA. BREAZEALE, SACHSE & WILSON, Claude F. Reynaud, Jr., Jude C. Bursavich, BRLA.

For Defendants-Appellants, Cross-Appellees: TALBOT, CARMOUCHE, MARCHAND, MARCELLO & PARENTON, Sidney A. Marchand, III, Donaldsonville, LA. VINSON & ELKINS, John L. Carter, Karen Jewell, Houston, TX.

Judges: Before WISDOM, HIGGINBOTHAM, and JONES, Circuit Judges.

Opinion by: HIGGINBOTHAM

Opinion

[*84] HIGGINBOTHAM, Circuit Judge:

Teche Sugar Company, Inc., offered to lease to Breaux Brothers Farms, Inc., Teche Planting, Inc., and Francis Accardo land for farming sugar cane. Teche Sugar conditioned its offer on its choice of a processing mill. All three sugar farmers sued in federal district court alleging that the lease tied land to milling in violation of the Sherman Act, [**HN1**](#) [up] [**15 U.S.C. § 1**](#). The district court ruled in favor [*85] of the farmers and awarded damages. We are not persuaded that any tie of land to milling was supported by market power in the land or, relatedly, that any tie had the requisite effect on competition. We reverse.

I.

For several years Breaux Brothers, Teche Planting, and Accardo leased land in St. Mary Parish from the Prudential Insurance Company. They grew sugar cane on the leased land each year, which they processed at a mill they selected. The right to choose the mill is valuable. A mill that can ensure a supply of sugar cane in times of low sugar prices enjoys an economic advantage. [*82] The present dispute arose when Teche Sugar, then an owner of a mill, leased the land from Prudential. In an effort to assure cane for its mill, Teche Sugar offered to sublease land to

Breaux Brothers, Teche Planting, and Accardo at a lesser rental rate than it paid Prudential. Teche Sugar conditioned its offer on a lessee's processing its cane at a mill selected by Teche Sugar. Breaux Brothers agreed, but Teche Planting and Accardo declined the offer.

Teche Sugar at first directed the sugar cane that Breaux Brothers produced to the Oak Lawn Mill, which Teche Sugar owned. Teche Sugar was still unable to generate enough cane for its mill and closed it before its lease with Prudential expired. Teche Sugar then designated the Raceland Sugar Mill--owned by South Coast Sugars, Inc., the co-defendant and Teche Sugar's sister company¹ --as the site for processing Breaux Brothers' sugar. Teche Sugar allowed Breaux Brothers to send excess sugar that Raceland could not process in a timely fashion to a nearby mill, Sterling Sugar Mill. Subsequently, South Coast sold the Raceland Sugar Mill. Teche Sugar then struck a deal with Sterling by which Teche Sugar would pay Sterling a flat rate of [**3] \$ 9 per ton to grind cane and Teche Sugar would then sell the product at whatever profit it could make. Teche Sugar had no financial interest in Sterling Sugar Mill.

II.

The farmers argue that the lease Teche Sugar offered constituted an illegal tying arrangement. [HN2](#)[↑] A tying arrangement is the sale or lease of one product on the condition that the buyer or lessee purchase a second product. See [Northern Pacific R.R. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). The land that Breaux rented and the grinding services of the mills are said to be separate products.

There is a strong support for the two product argument offered by the functional approach in [Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 21-25, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). [\[**4\]](#) Whether two products exist "depends on whether the arrangement may have the type of competitive consequences addressed by the rule." [Id. at 21](#) (footnote omitted). The argument continues that an owner of a dominant portion of a market in sugar cane land could route the cane its land produced to a mill under its control. This guaranteed source of sugar might allow it to drive other mills from the market. The land owner thus could transfer power in one market into power in another. This presents fairly straightforward antitrust doctrine, in theory. See, e.g., [Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611, 97 L. Ed. 1277, 73 S. Ct. 872 \(1953\)](#) [HN3](#)[↑] ("The essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next."). Professor Kaplow has analyzed this danger and suggested that tying arrangements may cause harm even when they do not create power in a second market. Louis Kaplow, *Extension of Monopoly Power through Leverage*, [85 Col. L. Rev. 515 \(1985\)](#). [\[**5\]](#) But we need not decide on these facts whether renting sugar cane land and grinding sugar cane constitute two separate goods. Assuming that they do and that the lease Teche Sugar offered therefore amounted to a tying arrangement, the farmers have nevertheless [\[*86\]](#) failed to establish that the lease violated the Sherman Act.

We begin with first principles. Not all tying arrangements are illegal. [Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 24-25, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#) ("[HN4](#)[↑] The fact that [a] case involves a required purchase of two [goods] that would otherwise be purchased separately does not make the . . . contract illegal.") As *Jefferson Parish* explained it:

[HN5](#)[↑] The law draws a distinction between exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other. When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the [\[*86\]](#) Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures.

¹ Teche Sugar Company and South Coast Sugars, Inc., the two defendants, are both wholly owned subsidiaries of South Louisiana Sugar, Inc.

Id. at 14.

The legality of a tying arrangement depends in part on its effect in the tied market. The farmers acknowledge that Teche Sugar could have raised the rent it charged for its land, allowing the farmers to process their sugar cane at the mill of their choice. It is doubtful that Teche Sugar's decision to seek similar gains by controlling the choice of mills violates the Sherman Act.² Our focus today is, however, whether the lease impaired competition in the sugar cane processing market such as creating barriers to the entry of new competitors into that market. *Jefferson Parish, 466 U.S. at 14.* Our analysis focuses on Teche Sugar's economic strength in the sugar cane land and milling markets. *Id. at 18* ("In sum, *HN6*[[↑]] any inquiry into the validity of a tying arrangement must focus on the market or *[[**7]]* markets in which the two products are sold, for that is where the anticompetitive forcing has its impact.").

The farmers may prevail under either of two approaches. First, *HN7*[[↑]] to establish that the tying arrangement was illegal *per se*, the farmers must show that Teche Sugar exerted sufficient control over the tying market, sugar cane land, to have a likely anticompetitive effect on the tied market, sugar cane grinding. *466 U.S. at 15-18, 26-29.* Second, the farmers may prevail by establishing that the arrangement is an unreasonable restraint of trade. *Id. at 17-18, 29-31.* See also *Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 499-500, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)* [^{**8}] ("*Fortner I*"). We evaluate the *HN8*[[↑]] reasonableness of the arrangement by exploring the "actual effect of the exclusive contract on competition" in both the tying and tied markets. *Jefferson Parish, 466 U.S. at 29.* We may find an antitrust violation to be an unreasonable restraint of trade only if the tying arrangement has had an "actual adverse effect on competition." *Id. at 31.*

A.

HN9[[↑]] A *per se* condemnation requires proof that the tying arrangement involved "the use of market power to force [consumers] to buy [goods] they would not otherwise purchase." *Id. at 26.* The *per se* rule, of course, obviates the need for full consideration of actual market conditions; it does require a finding of "significant market power" in the tying market. See *id.*

The farmers allege that Teche Sugar controlled as much as 17.5% of the land in the relevant market. They base this percentage on a narrow definition of the market of sugar cane land. Sugar cane farmers can feasibly transport their crop for processing no farther [^{**9}] than twenty five to thirty five miles from their farms. Five mills operated within approximately thirty five miles of the land that Teche Sugar offered to farmers, an area [^{*87}] encompassing the St. Mary and Iberia Parishes. Teche Sugar, South Coast and related companies controlled no more than 17.5% of the sugar cane farmland in St. Mary Parish and no more than 9.4% of the farmland in the two parishes combined.

The district court defined both products as the relevant market in sugar cane land. We find that even under the narrowest of reasonable definitions Teche Sugar lacked the requisite market power to trigger a *per se* violation.

Land that offers a distinct economic advantage based on its location may enhance market power. See *Northern Pacific R. Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958).* But *HN10*[[↑]] possession of 17.5%, much less 9.4%, of a market is not normally sufficient to satisfy the requirements of the *per se* rule. The Supreme Court in *Jefferson Parish*, for example, found control over 30% of a tying market to fall shy of "the kind of dominant market position that obviates the need for [^{**10}] further inquiry into actual competitive practices." *466 U.S. at 27.* Some circuit courts have used 30% as a rough benchmark for the minimum amount of market power necessary to give rise to a *per se* violation of *antitrust law*. See *Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 797 (1st Cir. 1988)* (finding insufficient market power for *per se* antitrust violation); *Will v.*

² See, e.g., Richard Posner, *Antitrust Law: An Economic Perspective* 173 (1976) (claiming that no difference exists between profit from increase in price of tying product and similar gains made through forcing consumer to purchase tied product). *But see* Kaplow, *supra*, at 520-25 (arguing that method in which market power is deployed may affect extent of harm to consumer).

[Comprehensive Accounting Corp., 776 F.2d 665, 672 \(7th Cir. 1985\)](#), cert. denied, 475 U.S. 1129, 90 L. Ed. 2d 201, 106 S. Ct. 1659 (1986) (same).³

[**11] The farmers contend that it is a mistake to gauge Teche Sugar's market power by considering the percentage of its holdings in the relevant land market. Sugar cane land is a rare commodity, they argue, and as a result Teche Sugar garnered significant market power. But it is only by defining the market for sugar cane land narrowly that the farmers can maintain that Teche Sugar controlled 9.4% of that market. This definition of the tying market includes only land in the St. Mary and Iberia Parishes and fully reflects the location of the land and the requirements of sugar cane production. All of the sugar cane grown in the parishes can be brought to the same set of mills for processing.

The farmers also allege that leases for sugar cane land generally span several years and that only a fraction of the sugar cane land in a market becomes available in a given year. As a result, they reason, Teche Sugar exercised considerable power over the market despite the relatively small amount of land it held. As proof of Teche Sugar's power, the farmers note that, although some sugar cane land was on the market, no adequate alternative land was available when Teche Sugar offered them a lease.

Were [**12] we to accept the farmers' theory, any land owner in a market where sales occur only periodically would possess significant market power, and every party in control of sugar cane land in St. Mary Parish would possess such power. As the Supreme Court stated in [U.S. Steel Corp. v. Fortner Enterprises, 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 \(1977\)](#) ("Fortner II"): "[HN11](#)[ The question is whether the seller has some advantage *not shared by his competitors in the market for the tying product.*" [Id. at 620](#) (emphasis added). See also [Will, 776 F.2d at 672](#) (citing *Fortner II*). The farmers offer no reason to believe that Teche Sugar had an advantage over its competitors in the market for sugar cane land in St. Mary Parish. All of the owners of sugar cane land in the parish possessed a scarce commodity. The farmers therefore provide an inadequate basis for the conclusion that Teche Sugar possessed sufficient power in the tying market to trigger *per se* condemnation of the lease.

[*88] The cases on which the farmers rely do not require [**13] the contrary conclusion. The Sixth Circuit's opinion in [Bell v. Cherokee Aviation Corp., 660 F.2d 1123 \(6th Cir. 1981\)](#), is representative. The defendant in *Bell* controlled hangar and outdoor space at an airport. The defendant conditioned lease of the space on the plaintiff's purchase of all fuel, maintenance, and parts required to service the plaintiff's airplanes. [Bell, 660 F.2d at 1125-26](#). The court found that the defendant possessed sufficient power in the market for airport space, the tying market, to render the tying arrangement a *per se* violation of [antitrust law](#). [Id. at 1127-30](#). The court based its conclusion on the fact that the defendant in *Bell* was "a dominant firm." [Id. at 1129](#). Moreover, the court found that the defendant was "in a uniquely advantageous position" to sell space to a party attempting to establish a business of the plaintiff's variety. [Id. at 1128](#) (internal quotation marks omitted). Other providers of airport space, the court noted, did not occupy the same advantageous position. See [id. at 1128-29](#). [**14] The farmers in the present case have not shown that Teche Sugar held a dominant position in the sugar cane land market or that Teche Sugar's land conferred a market advantage not possessed by its competitors.

Similarly, in [Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n, 666 F.2d 1130 \(8th Cir. 1981\)](#), the defendants conditioned purchase of cemetery lots on the plaintiffs' purchase from defendants of any foundation preparation necessary for the plaintiffs' grave memorials. [Id. at 1141](#). The defendants did not, however, merely tie purchase of one good to another; they also conspired to adopt a uniform tying arrangement policy in the industry. [Id. at 1136-40](#). The court relied on the existence of this policy in concluding that the defendants' share of the market conferred significant economic power. See [id. at 1143](#) ("[Defendants] accounted for 22 percent of the burials

³We do not imply that a plaintiff may not provide direct evidence of market power, obviating the need to inquire into the percentage of the tying market that the defendant commanded. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. ___, [112 S. Ct. 2072, 2088 \(1992\)](#) ("It is clearly reasonable to infer that [a defendant] has market power to raise prices and drive out competition in the after-markets, [where a plaintiff] offers evidence that [the defendant] did so."). Cf. Stephen Calkins, *Supreme Court Antitrust 1991-92: The Revenge of the Amici*, 61 Antitrust L.J. 269, 301 (1993) ("The words 'per se' are conspicuously absent from *Kodak's* discussion of tying.").

performed in the market area . . . , and the exclusive foundation preparation policy, upon which [plaintiff] bases its claim, is uniformly followed by nearly all of the cemeteries."). See [\[**15\]](#) also [Moore v. Jas. H. Matthews & Co., 550 F.2d 1207 \(9th Cir. 1977\)](#) (finding antitrust violation where defendants controlled 78% of market in cemetery plots, to which they tied installation of grave markers). Cf. [Ringtown Wilbert Vault Works v. Schuylkill Memorial Park Inc., 650 F. Supp. 823 \(E.D. Pa. 1986\)](#).

The farmers' reliance on [Ware v. Trailer Mart, Inc., 623 F.2d 1150 \(6th Cir. 1980\)](#), is also misplaced. The defendant in *Ware* conditioned the lease of a lot in a trailer park on the purchase of a mobile home. [Ware, 623 F.2d at 1152](#). The court held that the plaintiff had alleged in its complaint that the defendant possessed significant market power and further noted that even if the plaintiff had not made such an allegation, the omission would not preclude consideration of the plaintiff's claim under the rule of reason. [Id. at 1153-54](#) (relying on [Fortner I, 394 U.S. at 499](#)). The court did not, however, address the issue of how much power the defendant had to possess [\[**16\]](#) to render the tying arrangement a *per se* violation of [antitrust law](#).

B.

The farmers nevertheless may prevail if the lease constituted an unreasonable restraint of trade. [Jefferson Parish, 466 U.S. at 29](#). Whether this arrangement was an unreasonable restraint of trade requires an additional "inquiry into the actual effect of the exclusive contract on competition" in the market for the tied good. *Id.* We need not explore whether Teche had sufficient market power in the market for sugar cane land, under a rule of reason test, because the tying arrangement did not hamper competition in the market for sugar cane grinding.

Teche Sugar not only failed to expand its presence in the sugar cane milling market, it also failed to maintain its presence. Teche Sugar closed the mill to which it first sent the sugar cane that Breaux Brothers produced. Teche Sugar then directed the sugar cane to the mill owned by its sister company, South Coast Sugars. Despite the advantage of a guaranteed source of sugar cane, South Coast sold its mill. The withdrawal of Teche Sugar and South Coast from the sugar mill [\[*89\]](#) grinding business belies the [\[**17\]](#) claim that Teche Sugar increased its power in the tied market.

Moreover, the farmers' contentions notwithstanding, Teche Sugar's later deal with Sterling Sugar Mill posed no threat to competition. Its terms required Teche Sugar to pay Sterling a set price to grind the sugar cane that Breaux produced. Teche Sugar in essence hired out a mill for a fixed fee. Produced sugar would be sold at the market on shares with its lessee.

[HN12](#) When a party has no control over a tied market, the dangers usually created by a tying arrangement do not exist. See generally 9 Philip E. Areeda, [Antitrust Law](#) P1726a, at 331-33 (1991). Teche Sugar had no incentive to dampen competition in the sugar milling market. Any decrease in competition would be contrary to its interests. Teche Sugar would have to pay any supracompetitive price its interference sparked. See *id.* at 332. Once Teche Sugar abandoned the business of grinding sugar, any threat that the tying arrangement might harm competition disappeared.

Teche Sugar did not eliminate competition among mills by directing sugar cane to its own mill. It attempted, unsuccessfully, to survive in the sugar milling market. This futile effort had no actual [\[**18\]](#) adverse effect on competition. [Jefferson Parish, 466 U.S. at 31](#) ("Without a showing of actual adverse effect on competition, [the plaintiff] cannot make out a case under the antitrust laws" in the absence of *per se* liability.). As a result, there was no violation of [antitrust law](#).

C.

As a final note, the tying arrangement held the potential to enhance competition. The sugar cane market is volatile. When sugar cane prices drop, farmers produce less cane. Mills have a difficult time weathering long seasons with slack demand. Once a period of economic duress has passed, significant costs confront any party entering into the sugar cane grinding industry. Mills may survive hard times by securing sources of sugar. The continued existence of the mills may ensure that there is greater competition when the sugar cane grinding business once again proves lucrative. Such a procompetitive effect tends to counter the anticompetitive tendencies of a tying arrangement and

is relevant to any inquiry into an alleged antitrust violation. See *Grappone, 858 F.2d at 799-80* (reviewing this line of cases).

[**19] III.

The farmers complain about the lease terms Teche Sugar offered to them. All the farmers but Breaux rejected the lease. The problem is not, under these circumstances, a market failure. Rather, an excess of farmers eager to rent sugar cane land put the farmers in a vulnerable position. The farmers suffered because of competition, not its absence. Their personal plight is unfortunate. But competition has not been injured and the antitrust laws offer them no relief.

REVERSED.

End of Document



Lee v. Life Ins. Co. of N. Am.

United States Court of Appeals for the First Circuit

May 4, 1994, Decided

No. 93-1988

Reporter

23 F.3d 14 *; 1994 U.S. App. LEXIS 9592 **; 1994-1 Trade Cas. (CCH) P70,582

TONY LEE, ET AL., Plaintiffs, Appellants, v. THE LIFE INSURANCE COMPANY OF NORTH AMERICA, ET AL., Defendants, Appellees.

Subsequent History: [**1] Counsel Amended May 25, 1994.

Certiorari Denied October 31, 1994, Reported at: [1994 U.S. LEXIS 7596](#).

Prior History: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. Hon. Raymond J. Pettine, Senior U.S. District Judge.

Core Terms

copier, costs, lock-in, district court, supplemental, matriculation, health clinic, allegations, purchaser, switching, sales, insurance premium, replacement part, tying product, aftermarket, derivative, coverage, healthcare services, insurance coverage, summary judgment, first semester, antitrust, increases, semesters, insurer, package, premium, clinic, tie-in, buyer

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Trademark Law > Conveyances > General Overview

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

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

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

[HN1](#) [?] Antitrust & Trade Law, Sherman Act

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different or tied product, or at least agrees that he will not purchase that product from any other supplier. Generally speaking, an impermissible "tie-in" occurs if a seller enjoys either a monopoly or appreciable economic power in the tying product or service market, and uses its considerable market leverage to coerce a

buyer already intent on purchasing the tying product from the seller into buying a second, tied product that the buyer would not have bought based solely on the quality or price of the tied product itself.

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

HN2 Price Fixing & Restraints of Trade, Tying Arrangements

"Market power" is the demonstrated ability of a seller to force a purchaser to do something that he would not do in a competitive market. Market power may be demonstrated, for example, if the seller holds a monopoly in the tying product, controls a very large share of sales in the tying product market, or produces a unique tying product, and therefore faces no significant competition from functionally similar products or services.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN3 Standards of Review, De Novo Review

Review of dismissal under *Fed. R. Civ. P. 12(b)(6)* is de novo, crediting all allegations in the complaint and drawing all reasonable inferences favorable to plaintiff.

Counsel: Jay S. Goodman for The University of Rhode Island, et al.

William P. Devereaux and McGovern, Noel & Benik, Inc. on brief for The Life Insurance Company of North America.

Phillip A. Proger, with whom Gregory A. Castanias and Jones, Day, Reavis & Pogue were on brief for The Life Insurance Company of North America, and for all appellees on antitrust issues.

Judges: Before Torruella, Circuit Judge, Aldrich, Senior Circuit Judge, and Cyr, Circuit Judge.

Opinion by: CYR

Opinion

[*15] **CYR, *Circuit Judge*.** Three University of Rhode Island ("URI") students appeal from a district court order dismissing their federal antitrust, equal protection, and due process claims against URI, its Board of Governors, three URI officials, and URI's student-health insurer, Life Insurance Company of North America ("LINA"). Finding no error, we affirm the district court judgment.

I

BACKGROUND

As a precondition to reregistering each semester, URI requires all full-time undergraduate students to pay a fixed fee for the right to use URI's on-campus, walk-in medical clinic, University ****2** Health Services ("UHS").¹ All students who pay the UHS clinic fee must also carry supplemental health insurance coverage for certain medical

¹ Graduate students are not required to pay the UHS clinic fee, provided they have health insurance coverage that meets URI's requirements.

services, such as x-rays, lab tests and gynecological tests, that are available through UHS. Two supplemental insurance options are available. First, the student may obtain supplemental insurance through LINA, a private health care underwriter which URI sponsors as its "default" insurer. LINA purportedly "dovetails" its supplemental coverage so that the insured student pays an annual premium that minimizes duplicative coverage; that is, it lessens the risk that the LINA premium and the UHS clinic fee will reflect redundant coverage for the same medical procedures.² As a second option, students may secure "comparable [supplemental] coverage" from an off-campus health care insurer of their choice, except that URI does not consider either Rhode Island Blue Cross or Rhode Island-based HMOs "comparable coverage." Students who do not opt out of the LINA "default" coverage by a specified deadline are automatically billed for the annual LINA premium, and cannot reregister for the following semester until the LINA premium has been paid. The **[**3]** automatic "default" scheme notwithstanding, only about 40% of the students who pay the UHS clinic fee insure through LINA.

Appellants initiated this class action in federal district court against URI and LINA in January 1992. The amended complaint alleges that the practice of conditioning continued matriculation at URI on payment of the UHS clinic fee and/or the LINA supplemental insurance premium violates the Sherman Antitrust Act, [15 U.S.C. § 1 \(1993\)](#), as well as the equal protection and due process guarantees under the United States Constitution. Following minimal discovery, URI and LINA moved to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#),³ and the district court dismissed all **[**4]** claims. [Lee v. Life Ins. Co. of N.A., 829 F. Supp. 529 \(D.R.I. 1993\)](#).⁴

II

DISCUSSION

A. The Antitrust "Tying" Claim

Appellants challenge the dismissal of their claim that the URI health care-insurance **[*16]** scheme is an impermissible "tying" arrangement in violation of the Sherman Act, [15 U.S.C. § 1 \(1993\)](#) ("Every contract . . . in restraint of trade or commerce . . . is hereby declared to be illegal."). See [Eastman Kodak Co. v. Image Technical Servs., Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#) ("Kodak"). **[HN1]** A tying arrangement is 'an agreement by a party **[**5]** to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.' *Id. at 2079* (quoting [Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#)). Generally speaking, an impermissible "tie-in" occurs if a seller (viz., URI) enjoys either a monopoly or "appreciable economic power" ("AEP") in the "tying" product (or service) market, and uses its considerable market leverage to "coerce" a buyer already intent on purchasing the tying product from the seller into buying a second, "tied" product that the buyer would not have bought based solely on the quality or price of the tied product itself. See [Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 503, 22 L. Ed. 2d 495, 89 S. Ct. 1252 \(1969\)](#); see generally [Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794-96 \(1st Cir. 1988\)](#) (describing procompetitive policy interests **[**6]** animating *per se* tying analysis).⁵ Since many product "ties" may not prove anti-competitive, notwithstanding their somewhat misleading epithet, "*per se*" tie-ins may require a "fairly subtle antitrust analysis" of "market power," a fact-intensive inquiry aimed at winnowing out only those ties most likely to threaten anti-competitive harm. *Id. at 795*.

² LINA coverage requires the student to present for treatment at UHS in the *first* instance, pending possible referral to an outside health care provider.

³ Appellants' motion for class certification was stayed pending disposition of appellees' motions to dismiss.

⁴ At the same time, the district court declined to exercise jurisdiction over several pendent state-law claims, see [28 U.S.C. § 1337\(c\)\(3\) \(1993\)](#). Cf. *infra* note 11.

⁵ The tie-in must also affect a substantial volume of commerce in the tied market, see [Kodak, 112 S. Ct. at 2079](#), a factor not at issue in this case. Further, we assume, *without deciding*, that URI is a participant in the insurance "market," for antitrust purposes, simply because it receives a one-time \$ 10 processing fee for each LINA policy sold to a URI student.

Appellants claim three "product" tie-ins: (1) between a university education (URI) and health insurance coverage (LINA); (2) between health care services (UHS) and health insurance coverage (LINA); and (3) between a university [**7] education (URI) and health care services (UHS).⁶ We agree with the district court however, that appellants failed to allege any "tie-in" claim upon which relief could be granted. In particular, appellants failed to advance a colorable claim as to an *indispensable* element: that URI had AEP in the relevant tying markets (university education and health care services). AEP [HN2](#) or "market power" is the demonstrated ability of a seller "to force a purchaser to do something that he would not do in a competitive market." [*Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#); see also [*Grappone*, 858 F.2d at 794](#). AEP may be demonstrated, for example, if the seller holds a monopoly in the tying product (e.g., a patented product), controls a very large share of sales in the tying product market, see [*id. at 796*](#) (AEP "means significant market power" over an "'appreciable' number of buyers") (emphasis in original) (citation omitted), or produces a "unique" tying product, and therefore faces no significant competition [**8] from functionally similar products or services, see [*Jefferson Parish*, 466 U.S. at 37-38 n.7](#) (O'Connor, J., concurring) (market must be [*17] defined to include "all reasonable substitutes for the product"); [*Grappone*, 858 F.2d at 796](#) (market encompasses all "readily available substitutes").

[**9] Appellants can assert no colorable claim that URI holds AEP either in the "tying" market for a university education or in the "tying" market for health care services. URI competes for new undergraduate and graduate students on a regional and national level with dozens of universities and colleges.⁷ Although URI obviously is a "unique" institution in a colloquial sense, appellants cannot claim that other institutions of higher education do not or cannot provide "functionally similar" educational offerings to potential URI applicants. Cf. [*id. at 798*](#) (brand name alone does not establish product "uniqueness" necessary for AEP). And, of course, absent AEP in the university-education market it is a virtual given that URI cannot enjoy AEP in the student health care business.

Appellants attempt to circumvent URI's evident lack of AEP in the two relevant tying markets by contriving a so-called Kodak "lock-in." Kodak [**10] involved distinct products: Kodak copiers (the "lock-in" product), Kodak copier replacement parts (the tying product), and Kodak copier servicing and repair (the tied product). In 1985, Kodak began to confine sales of Kodak copier parts to Kodak copier owners who contracted to have their copiers serviced by Kodak, rather than by Kodak's servicing competitors ("ISOs"). [*Kodak*, 112 S. Ct. at 2077-78](#). Significantly, only Kodak parts would fit Kodak copiers. [*Id. at 2077*](#). The ISOs initiated an antitrust action against Kodak under [section 1](#) of the Sherman Act. After truncated discovery, the district court granted summary judgment for Kodak. *Id. at 2078*. The Ninth Circuit reversed, [*Kodak*, 903 F.2d 612, 617 \(9th Cir. 1990\)](#), and the Supreme Court affirmed, [*Kodak*, 112 S. Ct. at 2092](#).

By reason of Kodak's very small market share in copier sales, the parties had stipulated that Kodak had no AEP in the copier market (*assuming* copier sales to be the relevant "tying" market), and hence, no unlawful "tie" could exist between Kodak copiers and Kodak parts-servicing. [**11] [*Id. at 2081 n.10*](#). The Supreme Court accordingly focused on whether an unlawful tie-in nonetheless existed between Kodak parts and Kodak servicing. *Id.* Kodak argued for the view that, either presumptively or as a matter of law, vigorous competition in the copier market would prevent Kodak from raising its parts and servicing contract prices above competitive levels, because any such price

⁶ Notwithstanding certain misgivings, we further assume, *without deciding*, that the amended complaint adequately pleads two other essential "tying" claim elements. These assumptions merely facilitate clearer focus on the core deficiency in appellants' antitrust claim. First, we presume that the products at issue are distinct, *i.e.*, that each is distinguishable by consumers in the relevant market, and that there would be sufficient consumer demand for each *individual* product, and not merely as part of an integrated product "package." See [*Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21-22, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). But see [*id. at 39*](#) (O'Connor, J., concurring) (noting obvious policy limits of "two product" rule, since almost every product could be broken down into smaller constituent parts that might be sold separately); [*Lee*, 829 F. Supp. at 537](#) ("I do not believe plaintiffs have adequately alleged that this arrangement involved two separate products."). Second, we accept, *arguendo*, the questionable contention that URI students are "coerced" financially into buying LINA coverage because only LINA insurance "dovetails" with UHS clinic fee services.

⁷ As of 1991, for example, Rhode Island residents comprised only 56% of the URI student body.

increases in these "derivative aftermarkets" would become known to copier-equipment consumers, and eventually cause Kodak to lose ground to its competitors in copier sales. [Id. at 2081-82, 2083.](#)

The Court rejected Kodak's *per se* "cross-elasticity of demand" theory, identifying two different fact patterns which, if borne out by the evidence, might support a reasonable inference that parts and servicing contract price increases would not necessarily cause Kodak to lose copier sales. Under the first scenario, the evidence might demonstrate that a substantial number of consumers, at the time of their original copier purchases, would not enjoy cost-efficient⁸ access to the difficult-to-acquire pricing information needed to evaluate the total "life-cycle" cost of the entire [**12] Kodak "package" — namely, the price of the copier, likely replacement parts, and product-lifetime servicing. [Id. at 2085-87.](#) Under the second scenario, the Court postulated that, in a market for complex durable goods like copiers, current Kodak-copier owners might tolerate even uncompetitive price increases in Kodak parts and servicing as long as the increases did not exceed the costs of abandoning their original investment in the Kodak [*18] copier and switching, for example, to a Canon or Xerox copier. [Id. at 2087-88.](#) Since Kodak's servicing competitors had produced some evidence of "very high" switching costs for Kodak copier owners, the Court opined that such "lock-ins" attendant as they are to the original copier purchase could conceivably enable the plaintiff ISOs to establish Kodak's AEP in the derivative "tying" aftermarket for Kodak parts. The Court accordingly concluded that the undetermined "information costs" and "switching costs" represented material issues of fact, and if in *genuine dispute*, would preclude summary judgment, even though Kodak lacked AEP in the "lock-in" product market for copiers. [Id. at 2086-87.](#)

[**13] Appellants attempt to shoehorn their allegations into this *Kodak* "derivative aftermarket" mold, by proposing the following comparative model: *first-semester* matriculation at URI serves as the "lock-in" product, as did the Kodak copier; subsequent semesters at URI serve as the tying product, as did Kodak replacement parts; and health clinic services and health insurance coverage represent the tied products. Of course, URI, like Kodak, might contend, on summary judgment or at trial, that its lack of AEP in the locked-in product market ("sales" of first-semester university education) creates a "cross-elasticity of demand," which would prevent health clinic fees and LINA supplemental insurance premiums from being increased to uncompetitive levels. Nevertheless, because *Kodak* was a *summary judgment* case, rather than a [Rule 12\(b\)\(6\)](#) case, appellants argue that they did enough to withstand URI's motion to dismiss simply by alleging the existence of *unspecified* "information" and "switching" costs, which must be credited for [Rule 12\(b\)\(6\)](#) purposes. See [Rumford Pharmacy, Inc. v. City of East Providence, 970 F.2d 996, 997 \(1st Cir. 1992\)](#) [**14] ([HN3](#) review of [Rule 12\(b\)\(6\)](#)) dismissal is *de novo*, crediting all allegations in the complaint and drawing all reasonable inferences favorable to plaintiff).

Appellants challenge the district court ruling that their "information cost" allegations were insufficient to defeat the motion to dismiss. First, appellants argue that URI cannot posit a "cross-elasticity of demand" in the present context because the prices charged for health clinic services and insurance premiums are too insignificant in relation to tuition and other university-education costs to be considered a meaningful factor in determining whether potential applicants for admission will attend URI or some other university. Alternatively, appellants argue that URI would bear the burden of proof on this issue at trial, and that on appeal it has not pointed to supportive evidence of consumer "sophistication."

Appellants exaggerate the role that summary-judgment burden shifting played in the *Kodak* analysis. *Kodak* simply pointed out that summary judgment was not yet in order on Kodak's "cross-elasticity of demand" theory (1) in light of the plaintiff ISOs' proffer on "information costs" — i.e., *readily* [**15] *inferable* expenses associated with accumulating technical information relating to the costs of equipment, parts, and servicing over the lifetime of a "complex durable goods" item, and (2) in the absence of any conclusive evidence from Kodak that a substantial number of purchasers *actually* make accurate prepurchase assessments of the life-cycle "package" price of their Kodak copiers. Thus, the Court neither discussed any reallocation of burdens of proof at trial, nor in any way intimated a *shift* in the evidentiary burden of proof on the factual issues of "information costs" and "lock-in." See,

⁸The Court noted that even assuming readily available price information, consumers rationally might decide not to investigate life-cycle costs if investigation would prove more costly than the potential savings. [Id. at 2086.](#)

e.g., *Jefferson Parish*, 466 U.S. at 13-14 (assuming burden of proof rests with plaintiff to show AEP in tying-product market); *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 479 n.12 (3d Cir.) (plaintiff bears burden of proof on "tying market" definition), cert denied, 121 L. Ed. 2d 139, 113 S. Ct. 196 (1992). In order to withstand URI's motion to dismiss for failure to state a claim, therefore, it was appellants' **[**16]** burden (absent any colorable claim that URI had AEP in the locked-in product markets for university education and student health services) to allege "information costs" which would prevent a substantial number of URI students from accurately assessing the total costs of a URI education, including health **[*19]** clinic fees and insurance premiums, in determining whether to matriculate at URI.

Second, appellants argue that it is impossible to allege "information costs" because potential URI applicants cannot know or predict their future URI health clinic fees and LINA insurance premiums with any precision, since URI and LINA reserve the right to increase these charges each year. But appellants mistake the focus of the Court's concerns about the "information costs" in *Kodak*.

In *Kodak*, the information required by the customer pertained to the life-cycle pricing of a Kodak copier "package," information so patently "difficult and costly" to come by that it spontaneously gave rise to a reasonable inference that unsophisticated consumers would not have the information needed to evaluate their options at the time they made their decision to purchase a Kodak copier. *Kodak*, 112 S. Ct. at 2085. **[**17]**⁹ **[**19]** By contrast, before signing up for their first semester at URI, students are informed that their continued matriculation at URI is conditioned, *inter alia*, on their "purchase" of health clinic services at a stated annual fee, subject to historically predictable annual increases, and on their purchase of supplemental insurance coverage.¹⁰ See Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* P 1709.2, at 1174 (Supp. 1993) (*Kodak* does not focus on potential exploitation of the "irrational or foolish" purchaser, but the purchaser who makes the rational decision that comparative-shopping costs would outweigh any savings from a fully informed purchase; "the [*Kodak*] context was confined to *hard-to-obtain* information") (emphasis added); cf. *id.* at 1174 ("Relevant information need not be so comprehensive as a binding future price schedule"); see also *supra* note 8. Appellants have made no allegations sufficient to give rise to a reasonable inference that the health-care and insurance-cost information needed to make an informed decision whether to accept the preconditions to continued matriculation at URI is *either difficult or expensive to obtain* **[**18]** *or correlate*.

The district court further ruled that appellants failed to state an actionable claim that they were "locked in"; that is, they failed to plead actual costs associated with switching from URI after **[**20]** their first semester. Although

⁹ The *Kodak* Court elaborated on the complexity of the "information" needed to make an informed investment:

In order to arrive at an accurate price, a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade, or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of "down-time" and losses incurred from down-time.

Much of this information is difficult — some of it is impossible — to acquire at the time of purchase. During the life of a product, companies may change the service and parts prices, and develop products with more advanced features, a decreased need for repair, or new warranties. In addition, the information is likely to be customer specific; lifecycle costs will vary from customer to customer with the type of equipment, degrees of equipment use, and costs of down-time.

Kodak, 112 S. Ct. at 2085-86.

¹⁰ Considering the recent hyperinflationary trends in the health care industry as a whole, UHS clinic fees have increased at fairly predictable increments since 1987: 1987-88 (\$ 179); 1988-89 (\$ 188); 1989-90 (\$ 200.50); 1990-91 (\$ 227); 1991-92 (\$ 248); 1992-93 (\$ 312). LINA premiums have increased comparably over the same period, from \$ 158 in 1987-88 to \$ 369 in 1992-93. The record contains no evidence that prospective URI applicants would have great difficulty gaining access to this information from any number of reliable sources (e.g., URI application materials, URI admissions officials, past or current URI students, college entrance source books). Nor do appellants suggest that URI had any incentive to conceal the scope of past price increases. On the billing invoices it mails to students, URI routinely individualizes its charges for registration, tuition, UHS fees, LINA premiums, and taxes.

appellants now assert that they can amend their complaint to allege such costs, we conclude that further amendment to allege specific "switching costs" would be futile. See [University of Rhode Island v. A.W. Chesterton Co., 2 F.3d 1200, 1219 n. 20 \(1993\).](#)

First, there is an important distinction between *Kodak* and the present case. *Kodak* [*20] was a "derivative aftermarket" case involving "complex durable goods." Unlike the copier parts in *Kodak*, subsequent URI semesters are not "derivative aftermarket" components upon which the buyer's initial investment absolutely depends. As the Supreme Court noted, Kodak copiers are "expensive when new," incompatible with replacement parts used in other copiers, and retain "little resale value" presumably because complex durable goods depreciate so rapidly. [Kodak, 112 S. Ct. at 2077.](#) The "lock-in" would occur provided it could be shown that Kodak copier owners must either purchase replacement parts from Kodak or abandon their initial, *unamortized investment* in their Kodak copier. In contrast, a completed first semester at university [*21] is discretely priced — students do not pay for their entire four-year stint in advance — and the "college credit" value of the first semester is neither nontransferable nor without economic or educational value in the future even if the student does not remain at URI. Thus, appellants' attempt to extend *Kodak*, beyond the "derivative aftermarket" context to the educational context, is problematic at best.

Second, the *timing* of the "lock-in" at issue in *Kodak* was central to the Supreme Court's decision. Unsophisticated Kodak copier owners were destined for "lock-in" from the moment they purchased their Kodak copiers. At the time current Kodak copier owners bought their copiers, Kodak had not yet conditioned its sale of replacement parts on the purchase of Kodak servicing, and its later-announced policy to that effect was made applicable both to prospective and existing Kodak copier owners. Had previous customers known, at the time they bought their Kodak copiers, that Kodak would implement its restrictive parts-servicing policy, Kodak's "market power," i.e., its leverage to induce customers to purchase Kodak servicing, could only have been as significant [*22] as its AEP in the copier market, which was stipulated to be inconsequential or nonexistent. See [Kodak, 112 S. Ct. at 2095-96](#) (Scalia, J., dissenting) (noting that even the *Kodak* majority probably would have found no "lock-in" had Kodak announced its parts-service "tie" at the time of its market entry); see generally Philip E. Areeda, *supra*, P 1709.2, at 1164-68 (same). In the instant case, however, students know before their matriculation that they are buying a URI "package" that includes at least two "tied" products — a URI education and on-campus health care services and insurance. As appellants failed to assert a colorable claim that URI had AEP in the primary (university education) market, no *Kodak*-type "lock-in" could have occurred in subsequent semesters, and even the most detailed allegations of "switching costs" would be wholly unavailing.

B.

The "Due Process" and "Equal Protection" Claims

Appellants attempt to raise two vaguely articulated constitutional challenges to the URI health services-insurance scheme. First, they argue that URI's conditioning of continued matriculation on the [*23] payment of a health clinic fee violates their constitutional right to procedural due process, by depriving them of a property interest (fees and premiums), and a liberty-privacy interest (the alleged right to retain a physician of one's choice). Unsurprisingly, appellants cite no case authority for either contention, nor have we found any.¹¹ Appellants purchased a [*21]

¹¹ The district court interpreted appellants' complaint as alleging claims based on substantive due process and the right to contract. Appellants concede that their "cumbersome briefing" contributed to this understanding, yet did not move for reconsideration. See [Vanhaaren v. State Farm Mut. Auto. Ins. Co., 989 F.2d 1, 4-5 \(1st Cir. 1993\)](#) (issues raised for the first time on appeal are deemed waived). Unfortunately, the procedural due process claim asserted on appeal is no less unwieldy.

Inexplicably, appellants continue to urge that Rhode Island law disempowered URI from entering the "business" of health care and insurance, and that the LINA policies were merely a fraud or sham affording students no actual coverage. Although these allegations might be material to appellants' *ultra vires* claim under state law, which the district court dismissed without prejudice, cf. [Boston Envtl. Sanitation Inspectors Ass'n v. City of Boston, 794 F.2d 12, 13 \(1st Cir. 1986\)](#) (noting that state actor's "mere violation of state statutory requirements does not offend federal constitutional due process"), or conceivably may have served as a basis for some sort of consumer protection claim, appellants do not explain how URI's mere refusal to continue selling them a

"product"- "service" from URI with full knowledge from the outset that health care fees and supplemental insurance premiums were a required component of the cost. We perceive no procedural infirmity.

[**24] Second, appellants argue that the URI "package" infringes their constitutional right to equal protection of the laws because male and female students matriculating at URI must pay the same health care fees, even though male students will not utilize the UHS gynecological services. The district court aptly found that appellants failed to allege that URI imposed this unitary scheme with any discriminatory animus aimed at male students. See *Nieves v. University of Puerto Rico*, 7 F.3d 270, 276 (1993) (plaintiff contesting classification-neutral statutes on equal protection grounds must proffer not only evidence of disparate effect, but evidence that enactment resulted "because of," rather than "in spite of," classification) (citing *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 278-80, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979)); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988). Appellants advance no curative allegations for relieving this infirmity.

Affirmed.

End of Document

service (*i.e.*, education) would constitute an actionable "deprivation" of their "property rights" for federal due process purposes. Cf. *id.* (noting that "an alleged breach of contract [by a state actor] does not amount to a deprivation of property without due process"); *Jimenez v. Almodovar*, 650 F.2d 363, 370 (1st Cir. 1981) (same).

Protectoseal Co. v. Barancik

United States Court of Appeals for the Seventh Circuit

February 14, 1994, Argued ; May 5, 1994, Decided

No. 93-3229

Reporter

23 F.3d 1184 *; 1994 U.S. App. LEXIS 10108 **; 1994-1 Trade Cas. (CCH) P70,583; 28 Fed. R. Serv. 3d (Callaghan) 1090

PROTECTOSEAL COMPANY, an Illinois corporation, Plaintiff-Appellant, v. CHARLES BARANCIK, Defendant-Appellee.

Prior History: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 72 C 79. George W. Lindberg, Judge.

Disposition: Affirmed.

Core Terms

undivided profit, surplus, injunction, Manufacturing, permanent injunction, interlocking, serving, aggregating, subsidiary, threshold

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

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

See [15 U.S.C.S. § 19](#).

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Extraordinary Circumstances

HN2 [down arrow] **Grounds for Relief from Final Judgment, Order or Proceeding, Extraordinary Circumstances**

See [Fed. R. Civ. P. 60 \(b\)\(5\)](#).

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Extraordinary Circumstances

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN3 **Grounds for Relief from Final Judgment, Order or Proceeding, Extraordinary Circumstances**

Modification of a permanent injunction is extraordinary relief, and requires a showing of extraordinary circumstances. A reviewing court reviews decisions by a district court on [Fed. R. Civ. P. 60 \(b\)\(5\)](#) motions under an abuse of discretion standard. Deferential review does not mean no review at all. The reviewing court must be satisfied that the district court's decision was guided by established principles of law.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Extraordinary Circumstances

HN4 **Grounds for Relief from Final Judgment, Order or Proceeding, Extraordinary Circumstances**

A court can modify an injunction that it has entered previously whenever the principles of equity require it to do so.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Extraordinary Circumstances

HN5 **Grounds for Relief from Final Judgment, Order or Proceeding, Extraordinary Circumstances**

When a change in the law authorizes what had previously been forbidden it is an abuse of discretion for a court to refuse to modify an injunction founded on the superseded law. Sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have arisen.

Counsel: For PROTECTOSEAL COMPANY, an Illinois corporation, Plaintiff - Appellant: Michael J. Abernathy, Scott M. Mendel, Julie M. Rubins, Victor E. Grimm, BELL, BOYD & LLOYD, Chicago, IL.

For CHARLES BARANCIK, Defendant - Appellee: Bradley P. Nelson, Steven A. Weiss, SCHOPF & WEISS, Chicago, IL.

Judges: Before CUMMINGS, BAUER and COFFEY, Circuit Judges.

Opinion by: COFFEY

Opinion

[*1185] COFFEY, *Circuit Judge*. The Protectoseal Company (Protectoseal) appeals the dissolution of a permanent injunction prohibiting Charles Barancik from serving as one of Protectoseal's directors. We affirm.

BACKGROUND

Protectoseal is a privately-held Illinois corporation engaged in the manufacture and sale of products such as safety cans, storage cabinets, drum vents, and safety faucets designed to handle and store flammable liquids. Barancik and his wife Margery are the sole owners of Justrite Manufacturing Company, one of Protectoseal's business competitors.

[*1186] In September of 1971, Barancik purchased 16.2 percent of Protectoseal's shares and used the shares to become one of Protectoseal's directors. [**2] Fearing a conflict of interest because Barancik "had put himself in a position to learn all of [Protectoseal's] operations including [Protectoseal's] manufacturing, merchandising and

pricing policies, new products and full details respecting [Protectoseal's] costs and expenses as well as similar data respecting the business of Justrite Manufacturing Company[,] other Protectoseal board members served Barancik with a written demand that Barancik resign from Protectoseal's board of directors. Barancik refused, and Protectoseal filed a complaint under § 8 of the Clayton Act, which provided (in 1971) that:

HN1[] No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$ 1,000,000, engaged in whole or in part in commerce, . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition between them would constitute a violation of any of the provisions of any of the antitrust laws[.]

15 U.S.C. § 19. After a hearing the court determined that because **[[**3]]** Justrite's capital, surplus, and undivided profits totalled more than \$ 1,000,000, the district court issued a permanent injunction barring Barancik from serving as one of Protectoseal's directors and from voting any of his shares for the election of directors. This court affirmed the entry of the injunction, noting that "the statute reflects a public interest in preventing directors from serving in positions which involve either a potential conflict of interest or a potential frustration of competition." [Protectoseal Co. v. Barancik, 484 F.2d 585, 589 \(7th Cir. 1973\)](#).

Some seventeen years later, Congress in 1990 amended § 8 of the Clayton Act by increasing the minimum threshold amount of capital, surplus, and undivided profits necessary to prohibit interlocking directorates from \$ 1,000,000 to \$ 10,000,000, computed "at the end of that corporation's last completed fiscal year." Pub.L. 101-588. Because Justrite's capital, surplus, and undivided profits did not exceed \$ 10,000,000, on April 1, 1991, Barancik returned to court and requested that the court vacate the permanent injunction. The judge conducted a hearing and set aside the injunction previously **[[**4]]** granted after determining that Justrite's capital, surplus, and undivided profits did not exceed \$ 10,000,000. Protectoseal appeals.

ISSUE

Whether the court erroneously granted Barancik's [Fed. R.Civ.P. 60\(b\)\(5\)](#) motion to lift the permanent injunction enjoining Barancik from serving as one of Protectoseal's directors.

DISCUSSION

Standard of Review

The trial court dissolved the injunction at issue pursuant to **HN2**[] [Fed.R.Civ.P. 60\(b\)\(5\)](#), which provides in part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application[.]

"Modification **HN3**[] of a permanent injunction is extraordinary relief, and requires a showing of extraordinary circumstances." [Money Store, Inc. v. Harriscorp Finance, Inc., 885 F.2d 369, 372 \(7th Cir. 1989\)](#) (citing [United States v. City of Chicago, 663 F.2d 1354, 1360 \(7th Cir. 1981\)](#) (en banc)). "We review decisions by the district court on [Rule 60\(b\)\(5\)](#) motions under an abuse of discretion **[[**5]]** standard." *Id.* "However, deferential review does not mean no review at all. We must be satisfied that the district court's decision was guided by established principles of law." *Id.* (citations omitted).

A.

Initially Protectoseal contends the district judge did not employ established principles of law when assessing Barancik's [Rule 60\(b\)\(5\)](#) motion to set aside the permanent injunction. Specifically, Protectoseal [[*1187](#)] argues that the court should not have used the "flexible standard" for considering [Rule 60\(b\)\(5\)](#) motions adopted in [Rufo v. Inmates of Suffolk County Jail](#), 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992). It argues that *Rufo*, which concerned prison reform litigation, is inapplicable in the commercial context because prison reform litigation has a great impact on the public whereas commercial litigation of the type at issue in the instant case primarily affects only the parties to the suit. It favors the standard set forth in [United States v. Swift & Co.](#), 286 U.S. 106, 119, 52 S. Ct. 460, 464, 76 L. Ed. 999 (1932), requiring "nothing less than a clear showing of grievous [**6] wrong evoked by new and unforeseen conditions" before a consent decree or injunction may be modified.

Just last year (1993) this court rejected Protectoseal's argument in [Matter of Hendrix](#), 986 F.2d 195 (7th Cir. 1993), wherein we affirmed the modification of a defendant's bankruptcy discharge after noting that the bankruptcy discharge had "the force of an injunction[.]" [Id. at 197](#). We observed that *Rufo* abandoned the "grievous wrong" standard of *Swift* and adopted a "flexible standard," one which "is no less suitable to other types of equitable cases. . . . So now [HN4](#)[] a court can modify an injunction that it has entered previously whenever the principles of equity require it to do so." [Id. at 198](#).

Blatantly disregarding the very limiting language of the statute, Protectoseal contends that principles of equity do not require the dissolution of the injunction against Barancik from serving as one of Protectoseal's directors because if Barancik is allowed to serve on Protectoseal's board of directors, he will be privy to sensitive information that he can use to Justrite's advantage, thereby [**7] harming Protectoseal. It submits that the 1990 amendment to the Clayton Act failed to alter the underlying purpose of the statute, which was to prevent directors from serving in positions which raise conflicts of interest and threaten competition.

We agree that Congress's intention in raising the threshold amount from \$ 1,000,000 to \$ 10,000,000 was not to alter the section's underlying purpose of protecting competition. Clearly Congress did not mean to prevent *all* conflicts of interest or *all* anticompetitive conduct. Had such been Congress's purpose, it would have imposed a flat ban on interlocking directorates between competing corporations. Instead, "rather than enacting a broad scheme to ban all interlocks between potential competitors, Congress approached the problem of interlocks selectively," [Bankamerica Corp. v. United States](#), 462 U.S. 122, 127, 103 S. Ct. 2266, 2270, 76 L. Ed. 2d 456 (1983), and established a minimum net worth requirement, indicating its intent to regulate only those corporations which are engaged in a significant degree of commerce.

"When [HN5](#)[] a change in the law authorizes what had previously [**8] been forbidden it is an abuse of discretion for a court to refuse to modify an injunction founded on the superseded law." [American Horse Protection Ass'n v. Watt](#), 224 U.S. App. D.C. 335, 694 F.2d 1310, 1316 (D.C. Cir. 1982). "There can be no doubt but that sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have arisen." [System Federation No. 91, Railway Employees' Department, AFL-CIO v. Wright](#), 364 U.S. 642, 647, 81 S. Ct. 368, 371, 5 L. Ed. 2d 349 (1961). In this case, the lifting of the injunction was mandated by a significant change in circumstances, i.e., Congress's decision to raise the minimum amount under § 8 to \$ 10,000,000. So long as Justrite's capital, surplus, and undivided profits do not exceed \$ 10,000,000, Barancik is entitled to the extraordinary relief granted to him under [Rule 60\(b\)\(5\)](#).

B.

Protectoseal concedes that Justrite's capital, surplus, and undivided profits did not exceed \$ 10,000,000, but contends [**9] the court erred by failing to aggregate the capital, surplus, and undivided profits of four other companies in addition to Justrite which Barancik owns or controls under the name "Barancik [[*1188](#)] Industries."¹

¹ "Barancik Industries" is "not a corporation or any other kind of legal entity; it is merely a descriptive name that refers to the companies in which Mr. Barancik has a majority ownership."

Barancik's other companies are Hamilton Industries, Inc., Chicago Etching Corporation, Associated Sprinkler Company, and Northbrook Management Corporation. Protectoseal submits that Justrite is one of Barancik's subsidiaries and that Barancik's companies should be viewed as a single economic unit for purposes of calculating whether § 8's \$ 10,000,000 threshold has been crossed.

"If the intent of Congress is clear, that is the end of the matter; for the Court . . . must give effect to the unambiguously expressed intent of Congress." [Condo v. Sysco Corp., 1 F.3d 599, 603 \(7th Cir. 1993\)](#), cert. denied, [**10] 127 L. Ed. 2d 373, 114 S. Ct. 1051 (1994) (citing [Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 \(1984\)](#)). The language of § 8 is clear in not applying the aggregation theory to overcome the \$ 10,000,000 threshold. The statute prohibits interlocking directors between competing "corporations" if "each of the corporations" has capital, surplus, and undivided profits totalling more than \$ 10,000,000. The two corporations at issue here are Protectoseal and Justrite. Although Barancik is chairman of the board of Justrite, Hamilton Industries, Inc., Chicago Etching Corporation, Associated Sprinkler Company, and Northbrook Management Corporation, we refuse to conclude that Barancik's companies are a "single enterprise" based solely on the fact that he owns or controls each corporation. Barancik's other companies are all independent of Justrite. Each is separately incorporated and has separate offices, manufacturing facilities, bank accounts, and customers. Each files separate tax returns and maintains separate records [**11] and financial statements. Protectoseal's citations to [United States v. Crocker National Corp., 656 F.2d 428 \(9th Cir. 1981\)](#), rev'd on other grounds, [Bankamerica Corp. v. United States, 462 U.S. 122, 127, 103 S. Ct. 2266, 2270, 76 L. Ed. 2d 456 \(1983\)](#), [Square D. v. Schneider S.A., 760 F. Supp. 362 \(S.D.N.Y. 1991\)](#) and [In re Borg-Warner Corp., 101 FTC 863 \(1973\)](#), modified in part, [102 FTC 1164 \(1983\)](#), rev'd on other grounds, [746 F.2d 108 \(2nd Cir. 1984\)](#) fail to support its argument because each of these cases addressed the issue of § 8's requirement that the corporations be competitors (specifically whether the competition requirement applied to parent corporations whose subsidiary competed with the interlocked corporation), and not whether the assets of the parent should be aggregated to those of the subsidiary when determining net worth. In any event, Justrite is not a parent or subsidiary of any other corporation.

Protectoseal's theory fails for another reason, as well: § [**12] 8 "prohibits only shared directors between competing corporations[]." [Bankamerica Corp., 462 U.S. at 128, 103 S. Ct. at 2270](#) (emphasis added). Protectoseal has not refuted Barancik's evidence that his other companies do not compete with Protectoseal or Justrite. Hamilton manufactures drafting equipment and specialty laboratory furniture, Associated Sprinkler produces fire sprinkler equipment and provides related services, Dynacircuits manufactures printed circuits, and Northbrook Management provided personnel to Barancik's companies. Given that each of these companies, including Justrite, is separately incorporated and operates independently, that none is the other's parent or subsidiary, and that the companies manufacture different products and provide different services, we fail to understand how aggregating their capital, surplus, and undivided profits as Protectoseal urges will advance the Act's underlying purpose of protecting competition. In sum, we conclude that trial court did not abuse its discretion by considering only Justrite's capital, surplus, and undivided profits and that under the circumstances the court correctly [**13] rejected Protectoseal's aggregation theory.

Finally, we reject Protectoseal's untimely argument that director interlocks falling outside the provisions of § 8 may yet be prohibited by the Sherman Act, [15 U.S.C. § 1](#) and [2](#) and the Federal Trade Commission Act, [15 U.S.C. § 45](#). Protectoseal did not sufficiently present this argument to the district court and has therefore waived it on [*1189] appeal. [Hayden v. La-Z-Boy Chair Co., 9 F.3d 617, 621 \(7th Cir. 1993\)](#) (citing [Evans v. Fluor Distribution Cos., Inc., 799 F.2d 364, 366 \(7th Cir. 1986\)](#)).

CONCLUSION

The district judge did not abuse his discretion in lifting the permanent injunction against Barancik pursuant to [Fed.R.Civ.P. 60\(b\)\(5\)](#) because due to the increased threshold amount under § 8 of the Clayton Act, Barancik is no longer prohibited from serving as one of Protectoseal's directors. The judgment is affirmed.

End of Document



ACQUAIRE v. BEVERAGE, INC.

United States Court of Appeals for the Second Circuit

February 11, 1994, Argued ; May 13, 1994, Decided

Docket Nos. 93-7368, 93-7444

Reporter

24 F.3d 401 *; 1994 U.S. App. LEXIS 10744 **; 1994-1 Trade Cas. (CCH) P70,592

FRANK ACQUAIRE; BILO II REV. INC.; PAUL ADAMS; ADAMS BEV. INC.; V. AIELLO; ANDRE ALVES; A & A BEVERAGE DIST., INC.; WILLIAM ANDERSON; MOJO SATCHMO INC.; DANIEL BAKER; MELD BEVERAGE CORP.; DOUGLAS BARNES; BARNES DIST. INC.; RICHARD BEGAN; R.A. RICHIE BEV. DIST. INC.; FRANK BRADLEY; FRANK J. BRADLEY, SR.; SCOTT BROWNER; SCOTTO BEV. INC.; JOHN BRUNNER; JCQM BEVERAGE INC.; GREGORY BURKE; B.G.M. BEVERAGE INC.; JAMES BYRNES; J.I.M. BEV. INC.; NICHOLAS CAMPANELLI; NIKKI BEV. DIST. INC.; RUSSELL CANDELLA; RUSSLINO BEV. INC.; FRANK CARRELLI, JR.; HYLIN BEV. INC.; CARMINE CARUSO; LINCOLN BEV. INC.; NICKOLAS CASTRONVOVA; C & N BEVERAGE CORP.; JOHN CETRULO; J.V.C. MIXERS INC.; GREGORY CLEMENTE; G.A.C. BEVERAGE CORP.; RUSSELL COMPESE; COMPESE BEV. CO. INC.; 7650 ENTERPRISES INC.; ROCCO CORTESE; ANN-ROC BEV. DIST. INC.; ALLEN COWAN; MI-CIN BEV. DIST. INC.; ROBERT CUMMINGS; CUMMINGS BEVERAGE INC.; JACK CUTRONE; CAPT'N JACK BEV. INC.; PAT DATTALO; P & T BEVERAGE CORP. III, INC.; W.J. DEBELLA; BAD BEVERAGE INC.; A.J. DEBELLO; A.J. DEBELLO JR. INC.; ANTHONY DERUVO; ANTHONY DERUVO BEV. INC.; BEN DIASPARRA; B & T BEV. INC.; MICHAEL DIORIO; 3 DIORIO'S DIST. INC.; RICHARD DICARLO; R & A BEVERAGE INC.; MICHAEL DICICCO; CITY LIGHTS BEV. INC.; JOHN DREW; DREW DIST. INC.; MATTHEW DROHAN; MANDRO BEV. INC.; DEAN ELLERTHORPE; VERNON INC. OF LANDING, INC.; ROBERT FLORIO; R.R.M. BEVERAGE CORP.; ED FRANZ; E. FRANZ & SONS INC.; HERMAN GONZALES; D & H DIST. CORP. INC.; JOHN GREGG; RON & JACK BEV. CORP.; PHIL GUALIELMETTI; RAINBOW FALLS BEVERAGE INC.; ROBERT GULINO; R.J.G. & SONS BEV. INC.; ROBERT W. GUNNING; N & R BEVERAGE INC.; GEORGE HAMMER; KAMEL DIST. INC.; PAUL HARTMAN; G.P.H. DIST INC.; ROBERT HASENBEIN; ROB-LIZ BEV. DIST. INC.; BARRY HELSTROM; G.S.& M DIST. INC.; RUSSELL HOLHMAN; RUSLIN BEV. CORP.; RUSLIN BEV. DIST. INC.; ROBERT HOLGERSON; LANSON HYATT; HYATT DIST. INC.; EUGENE KELLY; E & K BEVERAGE INC.; PHILLIP LENZY; P.P.C. LENZY DIST. INC.; ROBERT LEVINE; B & L BEVERAGE INC.; STEVE LOBODA; S. LOBODA INC.; SALVATORE LOGGIA; S.L. & SONS BEV. INC.; MICHAEL LOMBARDO; LOMBARDI BEVERAGE, INC.; ROCCO LONGO; BROCK DIST., INC.; ARTHUR LOUGHREN; HEARTY ARTIE BEV., INC.; CARL LOWER; BOTTOMS UP DIST. INC.; ALLEN LUNDBERG; A.L. BEVERAGES INC.; KEN MACRI; K-MAC II DIST. INC.; FRANK MAITILASSO; F.P.M. DIST. INC.; MARK MATTILASSO; BETTER BUY BEV. INC.; ANTHONY MARAFINO; A. MARAFINO BEV., INC.; JAMES MARINO; A.W.M. BEV. DIST. INC.; ROB MARKANTES; RAINBOW CONNECTION, INC.; AL MARTIN; A & S DIST. INC.; HENRY MARTINEAU; H.E. MARTINEAU INC.; WALTER MATHEWSON; S & C BEV. DIST. INC.; DENNIS MCCROSSEN; JAG-D DIST INC.; EMILIO MONTESDEOCA; E.M.O. DIST. INC.; ROBERT MORTENSON; ROBERT MORTENSON CORP.; JOSEPH OBENAUER; J.S. BEV. INC.; STEVEN O'DONNELL; S.M.S. BEVERAGE, INC.; G. OLSEN; GUNNAR OLSEN INC.; ELLIOT PANITCH; GREY FALCON ENT. INC.; BRUNO PARISI; BRUNO PARISI & SONS, INC.; B. PERICH; BENRICH DIST. INC.; CHARLIE PETTIGRANO; JUST BEGINNING INC.; KENNETH PULFORD; SOUTHSIDE SODA INC.; SCOTT PYPER; S.R.P. BEV. CORP.; JAMES REYNOLDS; J. REYNOLDS LTD. INC.; PETER ROSENBERGER; PETE'S BEV. INC.; CIRO SANTACROCE; CIRO SANTACROCE, INC.; PHILLIP SANTOMASSI; YORKVILLE BEV. INC.; BURGHARDT SCHREPF; SCHREPF BEV. INC.; WILLIAM SCHWARTZ; B & D BEVERAGE INC.; ALEX SIMYAVSKY; VLADLEEN BEV. INC.; HENRY SMITH; HANK BEV. INC.; KEVIN SMITH; J & S BEVERAGE INC.; ANTHONY SOAVEDRO; J.A.S. BEVERAGE CORP.; JAMES SOWLAKIS; J.C.C. BEV. DIST. INC.; PETER SPARACIO; CHELSEA DIST. INC.; GERARD SPIGA; G.K. SPIGA INC.; JOHN STAFFIERI;

STAFFIERI BEV., INC.; ROMAN STROCKYJ; STROCKYJ BEV. INC.; TIMOTHY SYNAN; SOUTH SHORE BEV. DIST., INC.; RALPH VENICE; VENICE BEVERAGE INC.; CARLOS VILAR; VILAR BEV. INC.; KEN WOOD; KEN WOOD BEV. INC., Plaintiffs, T & v. BEVERAGE, INC.; RALPH AMMIRATI; BEV. EXPRESS INC.; RUSSELL AMMIRATI; R & R BEVERAGE, INC.; BRIAN BACHMANN; OSPREY BEV. INC.; PETER CAFFERY; P.R. CAFFREY INC.; ANTHONY CONGIALOSI; FRANK DOLAN; GAIL BEV. DIST. INC.; THOMAS GIOELI; T & S BEV. INC.; RICHARD GRESIO; CARICH BEV. INC.; ANTHONY GULINO; ANTHONYS BEV. INC.; ALTON HEMBY; HEMBY BEV. DIST. INC.; WALTER HERGSTHAN; HERBY BEVERAGE, INC.; LARRY HOFT; L.M.P. DIST. INC.; ROBERT HOLGERSON; HOGIE BEV. CORP.; RONALD HUBBARD; HUBS BEV. INC.; ANTHONY INGRASSELLINO; DEANICK BEV. INC.; GARY LEVY; COUSINS BEV. DIST.; JOSEPH LOKITIS; JO-AIRE INC.; J. LOMBARDOZZI; 3 KIDS BEV., INC.; ROBERT MAGLIOLA; BOLYN BEV. INC.; THOMAS MARCIANO; T&L BEVERAGE, INC.; ROBERT MCCLEAN; T.J.K. BEVERAGE INC.; JOHN MEISTER; J. MEISTER CORP.; P. PARikh; RANI BEV. INC.; WALTER PEARCE; WE BEV. INC.; JOHN PETRAGLIA; JO-LYN BEV. CORP.; DIRK PRELLE; WEST ST. BEV. INC.; JAMES RICCIARDI; TOP SHELF BEV. INC.; ANTHONY SANTELIA; SANTELIA DIST., INC.; SAL SCRIMENTI; 5 SCRIMENTI BEV. INC.; MICHAEL SEDITA; S & D BEVERAGE CORP.; WALTER SIEGER; K & W DIST. CORP.; MIKE SOMMERMAN; 4 PLUS 1 BEV. INC.; TOM SPITZ; L.J.T. BEV. DIST., INC.; TOM UMSTATTER; TOM'S BEVERAGE CORP.; VINCENT VALENTINO; H & v. BEV. INC.; JETHRO WILLIAMS; WILL & LEE DIST. INC.; ANTHONY AIELLO; ANTHONY CIRELLI; TNT BEVERAGE; JOSEPH J. D'APUZZO; PHILIP J. GUGLIELMETTI; JOE DOL ENTERPRISES; J & R DIST; KELLY BEVERAGE INC.; JOSEPH PICARELLO; JUST THE BEGINNING BEV. CORP.; T. UMP'S FAMILY BEVERAGE INC.; JOHN DOES 3-10, Plaintiffs-Appellants-Cross-Appellees, v. CANADA DRY BOTTLING COMPANY OF NEW YORK, INC. Defendant-Appellee-Cross-Appellant, HAROLD HONICKMAN; STANLEY ISRAEL; DENNIS BERBERICH; RONALD J. SREIN; TRANSERVICE LEASE CORPORATION, INC.; EVANS CONGER BROUSSARD & MCCREA; SOFT DRINK WORKERS UNION LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AFL-CIO; COCA-COLA COMPANY; COORS BOTTLING COMPANY OF NEW YORK, INC.; KIRSCH BEVERAGES CORP., Defendants-Appellees.

Prior History: **[**1]** Appeal from a judgment entered in the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., Judge) granting in part and denying in part a motion for a preliminary injunction.

Disposition: Affirmed.

Core Terms

distributors, discount, retailers, products, soft drink, invoices, resale price, withholding, trucks, preliminary injunction, wholesale price, district court, customer, pre-printed, promotions, signatures, prices, enjoining, Sherman Act, merits, irreparable harm, magistrate judge, recommended, loaded, likelihood of success, deliver, temporary restraining order, compliance, impounding, adherence

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Briefs

HN1 Appeals, Appellate Briefs

Under *Fed. R. App. P. 28(a)(5)* the argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on.

Civil Procedure > Appeals > Appellate Briefs

[HN2](#)[] Appeals, Appellate Briefs

Ordinarily, an argument not raised on appeal is deemed abandoned.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN3](#)[] Injunctions, Preliminary & Temporary Injunctions

A party is entitled to a preliminary injunction only if it establishes irreparable harm should the injunction not be granted and either a likelihood of success on the merits, or sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

[HN4](#)[] Standards of Review, Abuse of Discretion

A court reviews a decision to grant or deny a preliminary injunction only for an abuse of discretion, which, when found, usually consists of the application of an incorrect legal standard or the reliance on clearly erroneous findings of fact.

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

[HN5](#)[] Vertical Restraints, Price Fixing

Not all vertical arrangements affecting price constitute resale price maintenance agreements that violate [15 U.S.C.S. § 1](#). The combination required under [Section 1](#) must be demonstrated by proof of: (1) an express or implied agreement, or (2) the securing of actual adherence to prices by means beyond mere refusal to deal.

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

[HN6](#)[] Price Fixing & Restraints of Trade, Vertical Restraints

A supplier may not use coercion on its retail outlets to achieve resale price maintenance. Evidence of pricing suggestions, persuasion, conversations, arguments, exposition, or pressure is not sufficient to establish the coercion necessary to transgress [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#). Rather, evidence of threats of

termination or other explicitly coercive conduct that secure adherence to fixed prices is what supports a finding of an illegal combination.

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

HN7 Price Fixing & Restraints of Trade, Vertical Restraints

Antitrust laws do not prohibit the undoubtedly persuasive conduct of a manufacturer suggesting a price for which the product should be available.

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

HN8 Price Fixing & Restraints of Trade, Vertical Restraints

Advertising of discount prices does not constitute coercion by a supplier even if such advertising causes an independent dealer's customers to expect or demand a lower price.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN9 Standards of Review, Abuse of Discretion

The abuse of discretion standard is utilized in reviewing a preliminary injunction. This limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief. Weighing these considerations is the responsibility of the district judge; only a clear abuse of his discretion will justify appellate reversal.

Counsel: KENNETH F. MCCALLION, New York, NY Barbara J. Hart, James W. Johnson, Goodkind Labaton Rudoff & Sucharow, NY, for Plaintiffs-Appellants-Cross-Appellees.

PETER E. GREENE, New York, NY Jonathan J. Lerner, Gary A. MacDonald, Alan J. Meese, Skadden, Arps, Slate, Meagher & Flom, NY for Defendant-Appellee-Cross-Appellant.

Judges: Before: PRATT AND MINER, Circuit Judges, CAMPBELL, * Senior Circuit Judge.

Opinion by: LEVIN H. CAMPBELL

Opinion

[*405] CAMPBELL, Senior Circuit Judge:

In these appeals we review the district court's order granting in part and denying in part a motion for a preliminary injunction. We affirm the order in its entirety.

* The Honorable Levin H. Campbell, United States Court of Appeals for the First Circuit, sitting by designation.

Plaintiffs-appellants are independent distributors of soft drink products bottled and/or distributed by defendant-appellee, Canada Dry Bottling Company of New York, Inc. ("Canada Dry").¹ On November 21, 1990, they sued Canada Dry and others in the [**2] United States District Court for the Eastern District of New York, alleging, *inter alia*, that Canada Dry had conspired to restrain the trade of soft drink products in violation of the Sherman Act, the Clayton Act, the Taft-Hartley Act, and the Racketeer Influenced and Corrupt Organization Act.

Two days later, on November 23, 1990, Plaintiffs moved for a temporary restraining order and a preliminary injunction to prevent Canada Dry "from engaging in certain conduct, including 'enforcing, directly or indirectly, against plaintiff-distributors any mandatory resale price [maintenance] policy or practice with respect to products distributed by Plaintiffs' and from committing any violations of the Sherman Act, [15 U.S.C. § 1](#)."² Magistrate Judge's Report and Recommendation, at 2 (Mar. 5, 1993) (quoting Plaintiffs' Memorandum of Law (Nov. 21, 1990)). Judge Sifton, who was then assigned to this case, denied Plaintiffs' [**3] application for a temporary restraining order, and, on December 7, 1990, heard argument on Plaintiffs' motion for a preliminary injunction. Judge Sifton reserved judgment on Plaintiffs' motion. Thereafter, Plaintiffs and Canada Dry, as well as the other defendants, entered into "protracted, court assisted, negotiations in an effort to settle this action." *Id.* Plaintiffs' November 23, 1990, "motion for a preliminary injunction was never decided and appears to have been abandoned." *Id.*

Over two years later, on February 4, 1993, Plaintiffs brought a fresh motion for a temporary restraining order and a preliminary injunction before Judge Weinstein, who was sitting as the "miscellaneous" judge. Plaintiffs say they filed this second application in response to new measures taken by Canada Dry to enforce its resale price maintenance policy. Plaintiffs assert in their appellate brief that these measures, which were associated with a funded promotional discount program implemented by Canada Dry, included

- (1) Canada Dry's requirement that customer signatures be obtained on company invoices with fixed prices pre-printed on them whenever promotional monies were used, and that participation [**4] in promotional programs be conditioned on the use of company mandated prices; and (2) the withholding of product and refusal to release trucks for distributors who did not acquiesce to Canada Dry's promotional policy.

According to Plaintiffs, "these two enforcement mechanisms were not in place at the time of the filing of the November, 23, 1990, Motion For Preliminary Injunction."

Judge Weinstein, who was unaware of Plaintiffs' earlier injunctive applications in 1990, granted a temporary restraining order. He enjoined defendants Canada Dry, Harold Honickman, and Dennis Berberich (as well as their agents, servants, employees, attorneys, and all persons in active concert and participation with them) from:

- 1. engaging in coercive actions in order to force plaintiff-distributors into using "suggested" resale prices dictated by Canada Dry, including but not limited to, requiring the signature of customers on pre-printed invoices bearing company mandated prices printed on [them] before processing said invoices, and refusing to release loaded trucks of distributors who do not submit invoices with customers' signatures on them, and
- 2. otherwise fixing, maintaining and stabilizing [**5] the resale prices at which the distributors must resell soft drinks.

Judge Weinstein referred Plaintiffs' application for a preliminary injunction to Magistrate Judge Carter.

After a hearing on February 8 and 9, 1993, Magistrate Judge Carter issued a report and [*406] recommendation on March 5, 1993. He found that Plaintiffs had established

a likelihood of success on the merits on their claim that defendant's conduct in attempting to enforce resale price maintenance is a per se violation of the Sherman Act, but that the only irreparable harm of an imminent nature cognizable on this motion for emergency relief would be the destruction of any distributor's business that would result from [Canada Dry] withholding or otherwise refusing to provide product to plaintiff distributors.

In specifically considering activities associated with Canada Dry's promotional program, however, the magistrate judge found nothing wrong with Canada Dry's purpose "to ensure that [its] funded promotional discounts are passed on to retailers." Nevertheless, he rejected the company's policy of withholding product from and refusing to release

¹ Canada Dry is just one of several named defendants in this lawsuit.

the trucks of distributors who failed to adhere to promotional [**6] discount procedures -- practices that he had found could lead to irreparable harm -- because such action provided Canada Dry with "a ready opportunity to enforce resale price maintenance in the guise of enforcing compliance with its promotional program." Accordingly, the magistrate judge recommended that Plaintiffs' motion for an order enjoining Canada Dry from refusing to release distributors' "loaded trucks or otherwise withholding product from plaintiff distributors as a means of enforcing [its] promotional discount policy be granted." But to the extent that Plaintiffs sought to enjoin Canada Dry "from engaging in other conduct designed to enforce compliance with [its] promotional discount policies, including [its] policy requiring customer signatures on pre-printed invoices," the magistrate judge recommended that Plaintiffs' motion for a preliminary injunction be denied.

In an order entered on April 15, 1993, the United States District Court for the Eastern District of New York adopted and affirmed Magistrate Judge Carter's report and recommendation. The district court (1) granted Plaintiffs' motion for an order enjoining Canada Dry from refusing to release the distributors' [**7] loaded trucks or otherwise withholding product from the distributors, (2) denied Plaintiffs' motion for an order enjoining Canada Dry from engaging in other conduct designed to enforce compliance with its promotional program, including its policy of requiring customer signatures on pre-printed invoices, and

[(3)] ordered that, upon a particularized showing by [Canada Dry] that it cannot adequately protect itself against the loss of promotional monies expended through the use of accounting adjustment or other means, plaintiff distributors be required to post a bond adequate to secure the repayment to [Canada Dry] of promotional discount monies provided by [Canada Dry] but not passed on to retailers by plaintiff distributors.

On April 23, 1993, Plaintiffs filed a notice of appeal in which they appealed

from the second part and the third part of [the district court's] order, which would allow [Canada Dry], under the guise of enforcing its "promotional policy," to fix the prices at which independent wholesale distributors resell Canada Dry products by offering discounts to distributors on the condition that the discounts be "passed through" to the distributors' customers as [**8] a deduction from Canada Dry's "suggested" resale prices, and by requiring distributors to obtain customer signatures on pre-printed invoices with company resale prices for all products printed on them.

Canada Dry, in turn, appealed "from so much of the District Court's order entered on April 15, 1993, as preliminarily enjoined '[it] from refusing to release Plaintiffs' loaded trucks or otherwise withholding product from plaintiff distributors.'"

I.

Canada Dry's promotional program and its corresponding enforcement mechanisms (*i.e.*, requiring customer signatures on company invoices, and withholding product and refusing to release trucks) constituted the central focus of Plaintiffs' preliminary injunction motion brought on February 4, 1993. In the following description of Canada Dry's arrangements with its distributors, we relate the details of the promotional program.

[*407] Canada Dry has the exclusive right in the greater New York City metropolitan area to bottle and deliver soft drinks under the Canada Dry label. These soft drinks are distributed to Canada Dry's retail customers by independent distributors, such as Plaintiffs, who operate in exclusive geographic territories. Canada [**9] Dry's distributors do not purchase from Canada Dry the soft drink products that they deliver to retailers. Rather, at the beginning of each day, Canada Dry's distributors check out a certain quantity of Canada Dry's soft drink products from Canada Dry's warehouse and deliver the products to retailers. Canada Dry's cash customers pay the distributors for the soft drink products at the time of delivery, while Canada Dry's credit customers pay Canada Dry directly through a credit arrangement. At the end of each day, the distributors return to Canada Dry's warehouse the soft drink products that they did not deliver to retailers and remit payment (in the form of cash or verified charge tickets that they collected from credit accounts) to Canada Dry for the quantity of soft drink products that they did deliver.

In return for their delivery services, Canada Dry pays its distributors a commission for each case of soft drink that is delivered. At the end of each day, Canada Dry calculates the difference in quantity between the soft drink product

checked out at the beginning of the day and the soft drink product returned. For each case of soft drink that was delivered, the distributor retains [**10] a fixed percentage of Canada Dry's suggested wholesale price per case² -- that is, the recommended price to the retailer -- and remits the balance of the suggested wholesale price per case to Canada Dry.³ Hence, as described by Canada Dry, "if the suggested wholesale price is \$ 10 per case and the per case commission is \$ 2, a distributor that delivered 100 cases would remit to Canada Dry (100 x (\$ 10-\$ 2)) or \$ 800 out of the \$ 1000 collected, thus retaining a commission of \$ 200."

Periodically, "Canada Dry . . . offers promotional events whereby the company provides special discounts for the benefit of retail establishments that purchase Canada Dry's products." Magistrate Judge's Report and Recommendation, at 17. Canada Dry makes these [**11] discounts available to retailers by reducing the suggested wholesale price of Canada Dry soft drink products that are being promoted by the full amount of the promotional discount. "A promotional discount does not affect the amount of commission earned by the distributor on the products sold pursuant to the promotion." *Id.* Thus, using our prior example, if the suggested wholesale price is \$ 10, the promotional discount is \$ 1, and the commission is \$ 2, a distributor that delivers 100 cases of soft drink would collect \$ 900 (100 x (\$ 10-\$ 1)), keep \$ 200 in commission, and remit \$ 700 to Canada Dry.

There is evidence in the record to indicate that Canada Dry distributors are not required to participate in Canada Dry promotions, and that those who choose not to may sell Canada Dry products at prices above, at, or below Canada Dry's suggested wholesale prices.⁴ Participating distributors, however, are expected to pass along the discount to the retailer by "selling the products subject to the promotion at a price that equals the suggested [wholesale] price less the promotional discount." *Id.*

[**12] On December 15, 1992, Canada Dry distributed a memorandum to its distributors in which it restated the policies and "proper procedures" to be followed by those distributors who wished to participate in a promotion. As a preliminary matter, the memorandum emphasized that Canada Dry's distributors, to be eligible for promotional support, must apply the stipulated promotion as a discount to Canada Dry's suggested wholesale [*408] price. The memorandum then went on to state that a distributor could not receive credit for a promotion unless the distributor submitted a *pre-printed invoice*⁵ [**13] to Canada Dry that contained, among other things, the signatures of both the distributor *and* the retailer.⁶

Because the distributors did not uniformly follow promotional program procedures, Canada Dry informed its distributors by letter dated January 27, 1993, that, effective February 1, 1993, it would not process and accept for credit any claim for promotional allowances that failed to comply fully with the procedures described in the December 15, [**14] 1992, policy announcement. Moreover, the letter stated:

² At any given time, Canada Dry has one recommended wholesale price for each of its product offerings.

³ For purposes of calculating the distributors' commissions, charge tickets obtained from approved Canada Dry credit customers are treated as though they are cash collected.

⁴ Therefore, as Canada Dry observes, "if the suggested wholesale price is \$ 10 per case, and a distributor is able to charge \$ 11 per case on 100 cases, it will realize \$ 100 of income in excess of its commission."

⁵ Since March 1990, Canada Dry has required its distributors to use pre-printed invoices that list the suggested wholesale prices of all products offered by Canada Dry. Canada Dry will accept no other invoices from its distributors. To avoid showing retailers the pre-printed invoices listing the suggested wholesale prices of all Canada Dry products, some distributors would use their own invoices with their own prices handwritten on them and then, at the end of the day, transfer the information from their invoices onto Canada Dry's pre-printed invoices, which they would then submit to Canada Dry for credit.

⁶ According to Canada Dry, this dual-signature policy "is designed to verify that the customer has received the Canada Dry promotional discount and that it was not simply pocketed by distributors, falsely claiming that it had been provided to the retailer." Plaintiffs contend, however, that, because the dual-signature policy forces them to show retail customers the pre-printed invoices, which list the suggested wholesale prices of all Canada Dry products "regardless of whether or not they [are] subject to promotional discounts that particular week, the practical impact of the policy [is] to eliminate the distributors' ability to charge their own resale prices for any products while at the same time participating in [Canada Dry's] promotional program."

In the event that any distributor submits a claim for promotional credits that does not comply with the enclosed policy, the distributor will be required to pay the Company the amount improperly claimed as a promotional allowance at the same time the distributor satisfies his settlement sheet obligations with the Company for that day's sales. *In the event such payments are not made, the Company retains its right to not load the distributor's truck.*

(emphasis added).

Canada Dry first enforced its no-load policy on February 3, 1993. According to the affidavit of Dennis Berberich, President of Canada Dry, on that date

distributors responsible for approximately 15 of Canada Dry's total of 121 distribution routes failed to comply with the Company's promotional policy but insisted on improperly claiming credit for the amount of the Canada Dry funded promotions against what they owed Canada Dry for the prior day's deliveries. . . . This resulted in those distributors owing Canada Dry money for the prior day's deliveries that they refused to pay. Accordingly, pursuant to its policy, Canada Dry refused to allow those distributors [**15] to receive any Canada Dry product until they satisfied that monetary shortfall for the Canada Dry product that they had already delivered. However, any such distributor was permitted to remove its truck as soon as Canada Dry's products were unloaded from such vehicle.⁷

The following day, Plaintiffs moved for a temporary restraining order and for the instant preliminary injunction.

II.

As we have said, Plaintiffs appeal only from the second and third part of the district court's order -- that is, the decision (1) to deny Plaintiffs' motion for an order enjoining Canada Dry from engaging in conduct designed to further its promotional program, including the dual-signature requirement on pre-printed invoices, and (2) to require Plaintiffs to post a bond. Canada Dry, in turn, appeals only from the first part of the district court's order -- that is, [**16] the district court's decision to enjoin Canada Dry from withholding product from its distributors or refusing to release its distributors' loaded trucks. Because the parties address these issues in their appellate briefs almost exclusively, we focus our review accordingly. See [HN1](#)[↑] Fed. [*409] R. App. P. 28(a)(5) ("The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on."); [United States v. Babwah](#), 972 F.2d 30, 34 (2d Cir. 1992) ("[HN2](#)[↑] Ordinarily, . . . an argument not raised on appeal is deemed abandoned."). There is thus no occasion to review the magistrate judge's somewhat conclusory findings (1) that "the credible evidence in the instant record establishes that [Canada Dry] has consistently utilized devices, including price surveillance, to force adherence to its suggested resale prices"; (2) that Plaintiffs have "established that there is likelihood of success on the merits on their claim that [Canada Dry's] conduct in attempting to enforce resale price maintenance is a *per se* violation of the Sherman Act"; but (3) that these [**17] devices do not threaten Canada Dry's distributors with imminent irreparable harm in that they (the devices) have "existed continuously from the onset of this lawsuit."

The standard for granting a preliminary injunction is well recognized. [HN3](#)[↑] A party is entitled to a preliminary injunction only if it establishes: "(1) irreparable harm [should the injunction not be granted] and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." [ICN Pharmaceuticals, Inc. v. Khan](#), 2 F.3d 484, 490 (2d Cir. 1993) (quoting [Plaza Health Lab., Inc. v. Perales](#), 878 F.2d 577, 580 (2d Cir. 1989)). [HN4](#)[↑] We review a decision to grant or deny a preliminary injunction only for an abuse of discretion, "which, when found, usually consists of the application of an incorrect legal standard or the reliance on clearly erroneous findings of fact." [Chemical Bank v. Haseotes](#), 13 F.3d 569, 573 (2d Cir. 1994); see [ICN Pharmaceuticals, Inc.](#), 2 F.3d at 490. [**18]

⁷ Plaintiffs assert that Canada Dry actually impounded the trucks of those distributors who failed to obtain the retailers' signatures on the pre-printed invoices.

Plaintiffs argue that Canada Dry's promotional program deprives the distributors of their ability to price independently both promotional and non-promotional soft drink products. The magistrate judge found, and there seems to be no dispute, that when distributors participate in the promotions they are expected to sell promotional items at a price equal to Canada Dry's suggested wholesale price less the promotional discount. Plaintiffs maintain that Canada Dry's promotional program also makes it impossible for them to sell *non-promotional* soft drink products at market prices because the distributors must necessarily reveal Canada Dry's suggested wholesale prices on those items when they obtain retailers' signatures on the pre-printed invoices. Thus, Plaintiffs contend that Canada Dry's promotional program constitutes a vertical, maximum-price-fixing scheme that violates *per se* § 1 of the Sherman Act. The district court did not agree with Plaintiffs. It concluded that the described promotional program passed muster under antitrust laws except to the extent that the withholding of product and impounding of trucks provided Canada Dry with too ready an "opportunity to enforce resale [**19] price maintenance in the guise of enforcing compliance with its promotional program." We do not think the court below applied an incorrect legal standard or relied on clearly erroneous findings of fact in reaching this conclusion.

To be sure, in [Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 \(1968\)](#), the Supreme Court held "that a vertical, maximum-price-fixing scheme was unlawful *per se* under § 1 of the Sherman Act because it threatened to inhibit vigorous competition by the dealers bound by it and because it threatened to become a minimum-price-fixing scheme." [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 335, 110 S. Ct. 1884, 1889, 109 L. Ed. 2d 333 \(1990\)](#) (assuming, "arguendo, that *Albrecht* correctly held that vertical, maximum price fixing is subject to the *per se* rule").⁸ Nevertheless, [*410] [HN5](#) not all vertical arrangements affecting price constitute resale price maintenance agreements that violate § 1 of the Sherman Act. See [AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc., 705 F.2d 1203, 1205 \(10th Cir. 1982\)](#), [**20] cert. denied, 461 U.S. 919, 103 S. Ct. 1903, 77 L. Ed. 2d 290 (1983). "The combination required under [Section 1](#) must be demonstrated by proof of:

(1) an express or implied agreement, or

(2) the securing of actual adherence [**21] to prices by means beyond mere refusal to deal."

[Belfiore v. New York Times Co., 654 F. Supp. 842, 851 \(D. Conn. 1986\)](#), aff'd, [826 F.2d 177, 181 \(2d Cir. 1987\)](#) ("[HN6](#) [A] supplier may not use coercion on its retail outlets to achieve resale price maintenance." (quoting [Simpson v. Union Oil Co., 377 U.S. 13, 17, 84 S. Ct. 1051, 1054, 12 L. Ed. 2d 98 \(1964\)](#)), cert. denied, 484 U.S. 1067, 108 S. Ct. 1030, 98 L. Ed. 2d 994 (1988); accord [Yentsch v. Texaco, Inc., 630 F.2d 46, 52 \(2d Cir. 1980\)](#) ("Coercion that achieves actual price-fixing is illegal."). Evidence of pricing suggestions, persuasion, conversations, arguments, exposition, or pressure is not sufficient to establish the coercion necessary to transgress § 1 of the Sherman Act. [Yentsch, 630 F.2d at 53; Belfiore, 654 F. Supp. at 851](#). Rather, evidence of threats of termination or other explicitly coercive conduct that secure adherence to fixed prices is what [**22] supports "a finding of an illegal combination." [Yentsch, 630 F.2d at 53; see Belfiore, 654 F. Supp. at 851](#).

There is evidence in the record to indicate that Canada Dry does not require its distributors to participate in its promotions and that non-participating distributors may sell Canada Dry promotional products at, above, or below Canada Dry's suggested wholesale prices. Nonetheless, Plaintiffs assert that, as a practical matter, Canada Dry's distributors must participate in the promotions in order to survive. There is nothing in the record, however, forcing this conclusion.

⁸ Although the viability of *Albrecht*'s principles is in some doubt following the Supreme Court's decision in [Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 \(1977\)](#), *Albrecht* has not yet been overturned. 8 Phillip E. Areeda, [Antitrust Law](#) PP 1638, 1639 (1989) (suggesting, however, that the Supreme Court may have silently overruled *Albrecht* in its *Sylvania* decision); see [Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 706-07](#) (7th Cir.), cert. denied, [469 U.S. 1018, 105 S. Ct. 432, 83 L. Ed. 2d 359 \(1984\)](#).

The district court found, moreover, that, other than with regard to the withholding of product and impounding of trucks, Plaintiffs did not "establish that there is any likelihood of success on the merits or any sufficiently serious question going to the merits relating to their claim that Canada Dry may not engage in conduct [-- including Canada Dry's policy requiring customer signatures on pre-printed invoices --] designed to ensure that Canada Dry funded promotional discounts are passed on to retailers." The court observed that a manufacturer, [\[**23\]](#) who, from its own pocket, grants a discount (as Canada Dry does here) through its distributor to its retailer, has a legitimate interest in making sure that the distributor "is not pocketing the price support instead of passing it on." [AAA Liquors, 705 F.2d at 1206](#) (quoting [Lehrman v. Gulf Oil Corp., 464 F.2d 26, 40](#) (5th Cir.), cert. denied, 409 U.S. 1077, 93 S. Ct. 687, 34 L. Ed. 2d 665 (1972)). Other courts, as well as the court below, have concluded that a manufacturer should be allowed to implement reasonable procedures to ensure that the discount is, in fact, passed along to the retailer. See [Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 708](#) (7th Cir.), cert. denied, 469 U.S. 1018, 105 S. Ct. 432, 83 L. Ed. 2d 359 (1984). Provided it is established that Canada Dry's distributors voluntarily elect to take part in promotions, we would agree with the district court that requiring them to (1) sell Canada Dry promotional products at a price equal to the [\[**24\]](#) suggested wholesale price less the discount, and (2) obtain retailers' signatures on invoices to document their receipt of the discount may be found to be reasonable and permissible ways for Canada Dry -- which is paying for the discounts -- to ensure that its distributors pass these along to the retailers.

The district court determined that Canada Dry's policy of requiring its distributors to obtain retailers' signatures on pre-printed invoices that disclose Canada Dry's suggested wholesale prices on non-promotional soft drink items does not constitute the coercion necessary to trigger a [§ 1](#) violation. The court noted that it is well established that the [HN7](#)[↑] "antitrust laws do not prohibit the undoubtedly persuasive conduct of a manufacturer suggesting a price . . . for which the product should be available." [Martindell v. News I^{*}411 Group Publications, Inc., 621 F. Supp. 672, 678 \(E.D.N.Y. 1985\)](#) (citing [Jack Walters & Sons Corp., 737 F.2d at 707](#) ("It is perfectly lawful for a manufacturer to advertise his product to the ultimate consumer, whether or not he sells directly to the consumer, and to mention in that advertising the retail [\[**25\]](#) price of the product -- the only price the consumer is interested in.")); [Belfiore, 654 F. Supp. at 852 \(HN8\)](#)[↑] "Advertising of discount prices does not constitute coercion by a supplier even if such advertising causes an independent dealer's customers to expect or demand a lower price.").

It is true that Canada Dry retailers who learn of Canada Dry's suggested wholesale prices may resent and even resist paying a higher price to the distributors. This result, however, simply "reflects the working of a free market in which [the retailers] have acquired relevant information," 8 Phillip E. Areeda, [Antitrust Law](#) P 1639d (1989), and does not amount to resale price maintenance. Hence, we cannot say, at least on the record as presently developed, that the district court abused its discretion by refusing to enjoin Canada Dry from requiring its distributors to use pre-printed invoices that list Canada Dry's suggested wholesale prices on both promotional and non-promotional items.

III.

The district court preliminarily enjoined Canada Dry from refusing to release the distributors' loaded trucks or otherwise withholding product from the distributors. Canada Dry, in [\[**26\]](#) its cross appeal, argues that the district court abused its discretion in granting this relief. We do not agree. We find sufficient justification for the lower court's concern that, if Canada Dry remained free to make the product-withholding decision unilaterally, it would use this authority for illegal resale price maintenance purposes.

Canada Dry assigns error to the district court's conclusion that Plaintiffs demonstrated a likelihood of success on the merits, or at least sufficiently serious questions going to the merits, that Canada Dry's policy of withholding product violates [§ 1](#) of the Sherman Act. The court below found that, "if defendant is permitted to withhold product as a means of enforcing compliance with its promotional discount program, that privilege could readily be exploited as a pretext for enforcing resale price maintenance." In response to this finding, Canada Dry submits that Plaintiffs have offered "no evidence to support the claim that [it] has withheld product for reasons *unrelated to promotional discounts.*" (emphasis in Canada Dry's brief).

Canada Dry also contests the district court's decision that Canada Dry's enforcement mechanism of withholding [\[**27\]](#) product from non-complying distributors threatens the viability of the distributors' businesses and

therefore constitutes irreparable harm. Canada Dry maintains that plaintiffs generally have an obligation to mitigate their damages and a failure to do so proscribes any finding of irreparable harm. Canada Dry asserts that the district court completely overlooked that the distributors could have avoided Canada Dry's enforcement mechanism either by opting out of the promotional program altogether or by following the promotional program's procedures. Therefore, Canada Dry insists, any irreparable harm to the distributors was self-inflicted in that Canada Dry withheld product only from those distributors who elected to participate in the promotional program but refused to abide by its terms. Under these circumstances, Canada Dry asserts that injunctive relief was appropriate only upon a showing by Plaintiffs, which Canada Dry argues they failed to make, that the distributors would be irreparably harmed either by foregoing the promotional program or by participating in it according to its terms.

The record, however, is not as entirely bereft of evidence as Canada Dry insists to support **[**28]** the district court's concerns that product would be withheld improperly. There is some evidence permitting the inference that Canada Dry managers may, in fact, have withheld product from distributors who failed to turn in customer-signed, pre-printed invoices even when the invoices did not include claims for promotional discounts. Moreover, there is some evidence that Canada Dry impounded the truck of at least one distributor who failed to have *all* of his invoices signed by retailers even though many **[*412]** of the invoices did not involve promotional discounts. And finally, there are the magistrate judge's findings of credible evidence that Canada Dry "has consistently utilized devices, including price surveillance, to force adherence to its suggested retail prices," and of a likelihood of success by Plaintiffs on their price-fixing claim. The foregoing provides sufficient support for the district court's conclusions (1) that the withholding of product and impounding of trucks might be used by Canada Dry to enforce resale price maintenance rather than merely to police its promotional program, and (2) that any distributor who, during the pendency of this proceeding, was cut off from the **[**29]** supply of product for refusing to sell at Canada Dry's suggested prices could be driven out of business and thereby irreparably harmed. Under the abuse of discretion standard utilized in reviewing a preliminary injunction, we cannot say the district court erred in temporarily enjoining Canada Dry *pendente lite* from withholding product from the distributors and impounding their trucks. See *United States Steel Corp. v. Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1048 (3d Cir. 1970) ([HN9](#) "This limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief. Weighing these considerations is the responsibility of the district judge; only a clear abuse of his discretion will justify appellate reversal.").)

IV.

Finally, we have considered Plaintiffs' contention that the district court abused its discretion in ordering them -- upon a particularized showing by Canada Dry that **[**30]** it cannot adequately protect itself against the loss of promotional monies expended through the use of accounting adjustment or other means -- to post a bond adequate to secure the repayment to Canada Dry of promotional discount monies provided by Canada Dry but not passed on to retailers by the distributors. We see nothing unreasonable about this order, especially in the absence of a concrete situation in which such a bond has yet been ordered.

The order of the district court entered April 15, 1993, is *affirmed*. *Each party shall bear its own costs.*

Pastore v. Bell Tel. Co.

United States Court of Appeals for the Third Circuit

May 2, 1994, Submitted Under Third Circuit LAR 34.1(a) ; May 16, 1994, Filed

No. 93-3556

Reporter

24 F.3d 508 *; 1994 U.S. App. LEXIS 10838 **; 1994-1 Trade Cas. (CCH) P70,588; 29 Fed. R. Serv. 3d (Callaghan) 344

GARY L. PASTORE, an individual; NATIONAL SECURITY SYSTEMS CORPORATION, a Pennsylvania corporation, Appellants v. THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, a Pennsylvania corporation; BELL ATLANTIC CORPORATION, a Delaware corporation; RONALD DONALDSON, ROBERT S. FADZEN, JR.; RAYMOND J. WICKLINE; GEORGE CALDWELL

Prior History: [**1] On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. Civil No. 92-00923).

Core Terms

district court, summary judgment, monopolize, relevant market, probability, monopoly, antitrust, summary judgment motion, defendants', Sherman Act, installed, non-moving, discovery, predatory

LexisNexis® Headnotes

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

Antitrust & Trade Law > Sherman Act > General Overview

HN1[Monopolies & Monopolization, Attempts to Monopolize

See [15 U.S.C.S. § 2.](#)

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

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

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN2[Standards of Review, Abuse of Discretion

The court reviews a claim that the district court has prematurely granted summary judgment for abuse of discretion.

24 F.3d 508, *508LÁ994 U.S. App. LEXIS 10838, **1

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

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

HN3 Supporting Materials, Affidavits

If a party believes that she needs additional time for discovery, [Fed. R. Civ. P. 56\(f\)](#) specifies that the party must file an affidavit setting forth why the time is needed.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

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

Civil Procedure > Pretrial Matters > Continuances

HN4 Supporting Materials, Affidavits

See [Fed. R. Civ. P. 56\(f\)](#).

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

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

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

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

HN5 Summary Judgment, Supporting Materials

The purpose of the affidavit is to ensure that the nonmoving party is invoking the protection of [Fed. R. Civ. P. 56\(f\)](#) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition. An unsworn memorandum opposing a party's motion for summary judgment is not an affidavit.

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

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

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

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

HN6 Standards of Review, De Novo Review

The court reviews the districts court's decision to enter summary judgment de novo, applying the same standard as the district court. Once the moving party has carried the initial burden of showing that no genuine issue of material fact exists, the nonmoving party cannot rely upon conclusory allegations in its pleadings or in memoranda and

briefs to establish a genuine issue of material fact. Instead, it must make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

HN7 **Regulated Practices, Private Actions**

The United States Supreme Court has recently affirmed that there is no special burden for summary judgment in antitrust cases.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN8 **Sherman Act, Claims**

To demonstrate attempted monopolization for the purposes of proving a claim under [§ 2](#) of the Sherman Act, a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

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

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

Determining whether a dangerous probability exists requires inquiry into the relevant product and geographic market and the defendant's economic power in that market. A plaintiff has the burden of defining the market.

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

HN10 **Monopolies & Monopolization, Attempts to Monopolize**

The plaintiffs must show that the defendants possessed sufficient market power to come dangerously close to success within a particular market. There is no simple formula and the factors to be reviewed include: the strength of the competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN11 [] **Monopolies & Monopolization, Attempts to Monopolize**

A showing of a dangerous probability of achieving monopolization in a relevant market was necessary to prevail on a [15 U.S.C.S. § 2](#) claim.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN12 [] **Monopolies & Monopolization, Attempts to Monopolize**

Intent to monopolize alone is not sufficient to establish the dangerous probability of success that is the object of [15 U.S.C.S. § 2](#)'s prohibition of attempts. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. Thus, courts have been careful to avoid constructions of [§ 2](#) which might chill competition, rather than foster it. For these reasons, [§ 2](#) makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. The concern that [§ 2](#) might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics.

Counsel: John R. Orie, Jr., Orie & Zivic, Pittsburgh, PA 15219, Attorney for Appellants.

Richard B. Tucker, III, Jeffrey J. Leech, Diane Heron Chavis, Tucker Arensberg, P.C., Pittsburgh, PA 15222, Attorney for Appellees Bell Telephone Co. of Pennsylvania; Bell Atlantic Corp.; Ronald Donaldson; Raymond J. Wickline; George Caldwell. Ralston S. Jackson, Odermatt & Jackson, Pittsburgh, PA 15219, Attorney for Appellee Robert S. Fadzen, Jr.

Judges: Before: SLOVITER, Chief Judge, HUTCHINSON, and SEITZ, Circuit Judges.

Opinion by: SLOVITER

Opinion

[*509] OPINION OF THE COURT

SLOVITER, *Chief Judge.*

Gary Pastore and National Security Systems Corporation (NASSCO), plaintiffs-appellants, appeal from the entry of summary judgment in favor of defendants-appellees Bell Atlantic Corporation, its subsidiary, Bell Telephone Company of Pennsylvania, and four individual employees on plaintiffs' attempted monopolization claim under [section 2](#) of the Sherman Act, [15 U.S.C. § 2 \(Supp. IV 1992\)](#).

I.

FACTS AND PROCEDURAL HISTORY

The facts in this case are, for the most part, not in dispute. **[**2]** Pastore established **[*510]** NASSCO in early 1986 to install a sophisticated custom-designed access control communications security network (CDACCSN) for Bell of Pennsylvania, which awarded it a contract for thirty of its facilities. Bell of Pennsylvania told Pastore that it planned to order the same system for all of its 800 facilities if this pilot project was successful and that it might extend to as many as 4,000 facilities in other subsidiaries of Bell Atlantic.

The pilot project was timely completed and Bell of Pennsylvania officials expressed satisfaction with NASSCO's performance. Thereafter, they repeatedly asked NASSCO to surrender the computer source codes and specific proprietary information and technical designs relating to the CDACCSN which NASSCO declined to do, but because Bell of Pennsylvania insisted on some guarantees in the event of NASSCO's bankruptcy, NASSCO agreed to deposit in escrow the requested proprietary information.

Nonetheless, Bell of Pennsylvania ceased doing business with NASSCO and told NASSCO in March 1990 that a project for a Pittsburgh facility had been placed "on hold." In December 1990, Pastore was informed that a security system had been installed by **[**3]** an entity entitled Integrated Access Systems in the Monroeville Revenue Accounting Center, although the site was within the network of facilities to be installed and serviced exclusively by NASSCO. Other already-approved projects which were part of the first planned phase involving installation of the CDACCSN statewide were not carried forward, while none of the work planned for the second or third phase was initiated.

Plaintiffs filed this action in the District Court for the Western District of Pennsylvania alleging that defendants attempted to monopolize the relevant market in violation of [section 2](#) of the Sherman Act ¹, as well as under a variety of pendent state law tort and contract theories.² Defendants moved to dismiss for failure to state a claim under the Sherman Act. The district court issued an order converting the motion to dismiss into a motion for summary judgment as to the Sherman Act claim only. After granting plaintiffs two extensions for further discovery, the court granted the summary judgment motion, holding that the plaintiffs had produced no evidence of a dangerous probability of the defendants monopolizing the relevant market, and dismissed the pendent state **[**4]** law claims without prejudice. Plaintiffs filed this timely appeal.

II.

DISCUSSION

A.

Additional Discovery

Throughout their brief, plaintiffs argue that summary judgment was inappropriate because they did not have adequate time for discovery. As this court has previously noted, [HN2](#) we **[**5]** review a claim that the district court has prematurely granted summary judgment for abuse of discretion. See [Radich v. Goode, 886 F.2d 1391,](#)

¹ [Section 2](#) provides:

[HN1](#) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony

[15 U.S.C. § 2.](#)

² The twelve count complaint included claims for defamation, promissory estoppel, anticipatory breach of contract, breach of contract, breach of duty of good faith, common law fraud and deceit, tortious interference with contractual and business relations, tortious bad faith and unfair dealing, interference with prospective economic advantage, and intentional infliction of emotional distress.

1393 (3d Cir. 1989). [HN3](#) If a party believes that s/he needs additional time for discovery, [Fed. R. Civ. P. 56\(f\)](#) specifies the procedure to be followed,³ and explicitly provides that the party must [\[*511\]](#) file an affidavit setting forth why the time is needed. Plaintiffs concede, however, that they did not submit an affidavit. This concession is usually fatal, because by not filing "a [Rule 56\(f\)](#) affidavit, [they have] not preserved [their] objection to [their] alleged inability to obtain necessary discovery." [Falcone v. Columbia Pictures Indus., Inc., 805 F.2d 115, 117 n.2 \(3d Cir. 1986\)](#).

[\[**6\]](#) Plaintiffs contend that their brief opposing the defendants' motion for summary judgment constructively meets [Rule 56\(f\)](#)'s affidavit requirement. In the past we have rejected such arguments because "[Rule 56\(f\)](#) clearly requires that an affidavit be filed. [HN5](#) 'The purpose of the affidavit is to ensure that the nonmoving party is invoking the protection of [Rule 56\(f\)](#) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition.' An unsworn memorandum opposing a party's motion for summary judgment is not an affidavit." [Radich, 886 F.2d at 1394](#) (citations omitted).⁴

[\[**7\]](#) Even if we were to regard the request in plaintiffs' brief opposing the defendants' motion for summary judgment that the court "belay [summary judgment] until a more complete factual record is developed," Plaintiff's Supplemental Memorandum of Law in Opposition to Motion for Summary Judgment, Docket No. 33 at 13, as the functional equivalent of a [Rule 56\(f\)](#) affidavit, see [St. Surin v. Virgin Island Daily News, Inc., No. 93-7553, 1994 WL 131201 at * 3 \(3d Cir. Apr. 15, 1994\)](#), the district court did not err in considering defendants' motion for summary judgment because plaintiffs did not specify "what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained." [Dowling v. City of Philadelphia, 855 F.2d 136, 140 \(3d Cir. 1988\)](#).

Plaintiffs stated in their brief in the district court that a deposition of defendant Fadzen would demonstrate specific intent to monopolize. They claimed that Fadzen "may be a source of information not only as to specific intent but as to the product and the market as well, given his involvement with vendors and knowledge of software." Docket No. 33 at [\[**8\]](#) 12 n.11. Even assuming that plaintiffs were referring to the defendants' market power, the issue relevant here, it would be insufficient under [Rule 56\(f\)](#). Such an amorphous allegation fails to explain what plaintiffs expected to discover, how it applied to their case and why they could not obtain that information elsewhere.

The district court granted summary judgment in this case because the defendants had not entered the relevant market and thus had no market power. Plaintiffs have not explained on appeal why information as to any entry by Bell of Pennsylvania was available only through Fadzen nor what other attempts plaintiffs made to discover this information. It is not readily apparent, for example, why Pastore himself was unable to submit an affidavit with such information. We therefore decline to reverse the district court's decision to consider the summary judgment motion, when plaintiffs failed to move beyond mere generalities in their attempt to delay that consideration.

B.

Standards for Summary Judgment

³ [Federal Rule of Civil Procedure 56\(f\)](#) provides:

[HN4](#) Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(emphasis added).

⁴ Plaintiffs claim that the circumstances in this case are "somewhat similar" to [Miller v. Beneficial Management Corp., 977 F.2d 834, 846 \(3d Cir. 1992\)](#), where we held that the plaintiff's reliance on a Magistrate Judge's order waiving the [Rule 56\(f\)](#) affidavit requirement permitted this court to review the district court's termination of discovery, but we see no similarity (and plaintiffs have not articulated any) other than the fact that in neither case was an affidavit properly filed.

HN6[[↑]] We review the districts court's decision to enter summary judgment *de novo*, applying the same standard as the district court. Once the moving party has carried [**9] the initial burden of showing that no genuine issue of material fact exists, see *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), the nonmoving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact. Instead, it "must make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file." *Harter v. GAF Corp.*, 967 F.2d 846, 852 (3d Cir. 1992). It is true, however, [**512] that "inferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 122 L. Ed. 2d 659, 113 S. Ct. 1262 (1993).

Although we have stated in the past that summary judgment should be used sparingly in antitrust litigation because [**10] of the fact-intensive nature of such claims, see *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1080 (3d Cir. 1978), more recently we have taken note that "many courts, including the Supreme Court, have . . . held defendants entitled to summary judgment in antitrust cases," and that despite the "factually intensive" nature of antitrust cases "the standard of *Fed. R. Civ. P. 56* remains the same." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 481 (3d Cir.) (in banc) (citations omitted), cert. denied, 121 L. Ed. 2d 139, 113 S. Ct. 196 (1992). **HN7**[[↑]] In fact, the Supreme Court has recently affirmed that there is no "special burden . . . [for] summary judgment in antitrust cases." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2083 (1992).

C.

Dangerous Probability of Achieving Monopoly Power

The Supreme Court has recently restated the necessary elements to state a claim under *section 2* of the Sherman Act. "**HN8**[[↑]] To demonstrate attempted monopolization a plaintiff must [**11] prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 122 L. Ed. 2d 247, 113 S. Ct. 884, 890-91 (1993) (citing 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* P 820 at 312 (1978)).

The district court granted summary judgment based on the failure of the plaintiffs to meet the "dangerous probability" requirement, and this is the only issue before us on appeal. **HN9**[[↑]] Determining whether a "dangerous probability" exists requires "inquiry into the relevant product and geographic market and the defendant's economic power in that market." *Spectrum Sports*, 113 S. Ct. at 892.

The plaintiffs have the burden of defining the market. See *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 726 (3d Cir. 1991), cert. denied, 120 L. Ed. 2d 903, 112 S. Ct. 3034 (1992). Plaintiffs claim that the relevant market is the very narrow one of the CDACCSN itself, see Appellants' [**12] Brief at 15 ("the NASSCO product . . . constitutes the relevant market"),⁵ and that they themselves hold a monopoly over the CDACCSN. *Id.* at 14-15 ("NASSCO possessed monopoly power as to this product market"). Indeed, plaintiffs vigorously assert that the CDACCSN was a unique system that was incomparable to all others then or since on the market. App. at 110 (Pastore Affidavit) ("As late as 1990, it was believed that the system was unprecedented and unique . . . Since

⁵ At other times plaintiffs have argued the market should be "dial up, computer driven remotely-monitored card-access security systems in the geographic region served by Bell Atlantic." Memorandum of Law in Response to Defendants' Motion to Dismiss, Docket No. 11 at 6-7 n.2; see also App. at 24 (Complaint) ("remotely monitored security devices").

1990 other suppliers have advertised similar features However, NASSCO is not aware of any installation which duplicates *all* of the unique features of the NASSCO system installed at Bell of PA.").⁶

[**13] [**513] For purposes of the matter before us, we hold plaintiffs to their own contention, see [Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.](#), 637 F.2d 105, 117 (3d Cir. 1980) (plaintiff bound by relevant market analysis proposed to district court), cert. denied, 451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981), and we assume *arguendo* that the plaintiffs have demonstrated this to be the appropriate market definition.

HN10[] Plaintiffs must thus show that the defendants possessed "sufficient market power" to come dangerously close to success within that market. *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 197 (3d Cir. 1992), cert. denied, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993); [Barr Labs., Inc. v. Abbott Labs.](#), 978 F.2d 98, 112 (3d Cir. 1992). There is no simple formula: factors to be reviewed "include the strength of the competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand." *Id. at 112*. [**14] Most significant, however, is the defendants' share of the relevant market. See *id.* (collecting cases). Indeed, a pair of the leading antitrust commentators state that "it is clear that the basic thrust of the classic rule is the presumption that attempt does not occur in the absence of a rather significant market share." Areeda & Turner, *supra*, P 831 at 336.

The defendants have submitted an affidavit which states they are not "engaged in the businesses of (i) remotely monitoring security alarms or (ii) the manufacture, sale or provision of equipment used to remotely monitor alarms or card access security systems." App. at 70. The plaintiffs offer no evidence that the defendants have entered the CDACCSN market. Indeed, they have confined their discussion to defendants' *future* entry into the market. See, e.g., App. at 24 (Complaint) (defendants are "intent upon entering"); App. at 119 (Pastore Affidavit) ("in the event that Bell Atlantic is determined to enter into the alarm monitoring market"); Memorandum of Law in Response to Defendants' Motion to Dismiss, Docket No. 11 at 2 (defendants are "poised to enter"). Thus, it is clear that the defendants presently have [**15] no share of the CDACCSN market.⁷ Without any share in the relevant market as described by plaintiffs, there can be no inference that defendants hold sufficient economic power in that market to create a dangerous probability of monopoly. See [Neumann v. Reinforced Earth Co.](#), 252 U.S. App. D.C. 11, 786 F.2d 424, 428 (D.C. Cir.), cert. denied, 479 U.S. 851, 93 L. Ed. 2d 116, 107 S. Ct. 181 (1986); see also *Fineman*, 980 F.2d at 201.

[**16] Plaintiffs argue that where there is high degree of predatory conduct coupled with a transparent intent to monopolize, the courts have required a less rigorous showing of market power. They cite [Otto Milk Co. v. United Dairy Farmers Coop. Ass'n](#), 388 F.2d 789 (3d Cir. 1967), for this proposition, but nothing in that case supports this view. In *Otto Milk* the defendants argued that they were not liable because they did not in fact have a monopoly and we simply held that an attempt claim under [Section 2](#) "does not require an actual monopoly of the territory sought." *Id. at 798*.

Three sources relied upon by the plaintiffs do support their position. A well-known 1956 law review article by Professor Turner argued that if "defendants are attempting to drive someone out of the market by foul means rather

⁶ See also Pastore Affidavit, Docket No. 21 at 6 ("At the time of the misconduct by Bell, to the best of my knowledge, NASSCO was the only supplier of such an integrated access control product."); Plaintiffs' Br. in Opposition to Motion for Summary Judgment, Docket No. 22 at 5 n.3 ("This is not an instance of a superior product among inferior competing products. It is an instance of a product without competitors."); Plaintiffs' Supplemental Memorandum of Law in Opposition to Motion for Summary Judgment, Docket No. 33 at 3 ("the NASSCO product constituted a unique product without parallel or substitute").

⁷ Plaintiffs' position as to the only specific facility that they did not install, the one at the Monroeville Revenue Accounting Center, is unclear. Even if this system was "pirated" from NASSCO, see Pastore Affidavit, Docket No. 21 at 9-10 (defendants "were simultaneously meeting with another contractor, using NASSCO's engineering design for the MRAC"); Plaintiffs' Br. in Opposition to Motion for Summary Judgment, Docket No. 22 at 12 ("an unsuccessful effort by defendants' to mimic the NASSCO product and install and implement that pirated technology at [MRAC]"), there is no evidence that the defendants attempted to market this system to others. The internal use at one site of the NASSCO product is insufficient to indicate a dangerous probability of achieving monopoly power.

than fair, there is ample warrant for not resorting to any refined analysis as to whether . . . having taken over all the production of a particular commodity, the defendants would still face effective competition from substitutes." Donald F. Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281, 305 (1956); [**17] see also Edwin [*514] S. Rockefeller, *Antitrust Questions and Answers* 27 (1974) ("If a sufficiently evil intent can be shown--to destroy or exclude a competitor, control prices, or coerce customers or suppliers--the Court might not look for any relevant market beyond the product immediately involved."). And the district court in *Rea v. Ford Motor Co.*, 355 F. Supp. 842, 876-77 (W.D. Pa. 1973), rev'd, 497 F.2d 577 (3d Cir.), cert. denied, 419 U.S. 868, 42 L. Ed. 2d 106, 95 S. Ct. 126 (1974), held that a finding of dangerous probability of monopoly was unnecessary when overwhelming evidence of specific intent to monopolize existed.

However, we reversed the district court in *Rea* and noted that [HN11](#)[¹⁸] a showing of "a dangerous probability of achieving monopolization in a relevant market" was necessary to prevail on a [section 2](#) claim. [497 F.2d at 590 n.28](#). More generally, the principle proposed by the sources on which plaintiffs rely was that adopted by the Ninth Circuit in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 [**18] (9th Cir.), cert. denied, 377 U.S. 993, 12 L. Ed. 2d 1046, 84 S. Ct. 1920 (1964), a decision this court rejected in *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 n.17 (3d Cir. 1975), and again in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117 (3d Cir. 1980), cert. denied, 451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981).

Further, the Supreme Court unanimously interred *Lessig* in *Spectrum Sports*. In reversing a Ninth Circuit opinion which relied on *Lessig*, it held that [HN12](#)[¹⁹] intent to monopolize alone "is not sufficient[] to establish the dangerous probability of success that is the object of § 2's prohibition of attempts." *Id.* at 890. It explained that the "law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. . . . Thus, this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it. . . . For these [**19] reasons, § 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics." *Id.* at 892 (citations omitted).

In any event, this is not the case in which we must consider whether predatory actions by defendants may reduce the amount of market share that is needed to show a dangerous probability of success. Having shown no market share by defendants, plaintiffs have nothing to couple with their alleged predatory behavior.

Accepting everything the plaintiffs say as true, it is ironic that they basically seek to protect their own monopoly power in the field of dial-up, computer-driven remotely-monitored card-access security systems by use of an antitrust suit. To the extent that plaintiffs may have rights to the product of their creativity and initiative, there are other legal doctrines to protect them. On this record, the district court did not err in holding that they have not shown enough to proceed further under the Sherman Act.

III.

For the foregoing [**20] reasons we will affirm the judgment and order of the district court.



DU-BRO FOODS INC. -against- ARON STREIT INC., et al.

Supreme Court of New York, Queens County

May 18, 1994, Decided

INDEX NO. 2700/93

Reporter

1994 N.Y. Misc. LEXIS 762 *

DU-BRO FOODS INC. -against- ARON STREIT INC., et al.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

products, distributors, kosher, cause of action, defendants', termination, customers, alleges, deposition, summary judgment, counterclaim, asserts, food product, competitors, antitrust, relations, summary judgment motion, alleged conspiracy, sold and delivered, unfair competition, contractual, conspiracy, distribute, damages

Judges: [*1] MILANO, J.

Opinion by: MILANO

Opinion

MEMORANDUM

In this action to recover damages for an alleged violation of section 340 of the General Business Law and for tortious interference with contractual or business relations and unfair competition, defendants seek an order dismissing the complaint based upon admissions made by plaintiff's president. Defendant Streit also seeks summary judgment on its counterclaim for goods sold and delivered in the sum of \$5,630.30 plus interest.

Plaintiff Du-Bro Foods Inc. (hereinafter "Du-Bro") is a distributor of kosher and non-kosher food products for numerous competing manufacturers. Du-Bro distributes these food products to small supermarkets, groceries and kosher butcher shops in the greater New York Metropolitan area.

Defendant Aron Streit Inc. (hereinafter "Streit") is a major manufacturer of kosher food products. Defendants Intercounty Food Distributors (hereinafter "Intercounty") and Kolpen Distributors Inc. (hereinafter "Kolpen") are distributors of kosher food products in competition with Du-Bro and other distributors. Kolpen and Intercounty distribute Streit products, as well as those of its competitors in the greater New York Metropolitan area.

In 1990 or 1991 Du-Bro purchased another distributor, I. Bernstein [*2] & Sons, Inc., which had been a distributor of Streit's products as well as other brands of kosher products. Du-Bro approached Streit and requested that it be given the right to distribute Streit's products. Streit declined to permit Du-Bro to distribute Streit's products without specifying a reason. Du-Bro, however, was permitted and able to sell Bernstein's inventory of Streit's products. In

addition, Du-Bro purchased additional Streit products from Streit's other distributors, which it sold to its customers in 1991.

In September or October 1992 Streit agreed to permit Du-Bro to distribute Streit's products. There was no written agreement between Streit and Du-Bro, and no promises were made as to the length of time the distributorship arrangement would last. In December 1992, Streit terminated the distributorship with Du-Bro and refused to sell to Du-Bro. Du-Bro, however, continued to obtain some Streit products from other distributors and sold those products and other kosher products in competition with Streit's distributors and other distributors of kosher products.

Plaintiff commenced the within action on February 2, 1993 against Streit, Kolpen and Intercounty and has asserted five [*3] causes of action for violation of the State antitrust law, tortious interference with contractual or business relations and unfair competition. The first and second causes of action allege that the defendants conspired to terminate Du-Bro as a distributor of Streit kosher products, in violation of section 340 of the General Business Law, the State antitrust law. Plaintiff alleges that it was terminated because Intercounty and Kolpen had complained to Streit that Du-Bro was selling Streit products in their territory. Plaintiff further alleges that by virtue of Kolpen and Intercounty's market power, the termination of Du-Bro has substantially lessened competition in the relevant market. The third cause of action alleges that defendants tortiously interfered with plaintiff's contractual and business relations with its customers. The fourth cause of action alleges that defendants' actions constitute unfair competition. The fifth cause of action for price discrimination alleges that Streit gave special pricing to Intercounty and Kolpen which it did not provide to Du-Bro, resulting in unfair competition in violation of section 340 of the General Business Law.

Defendants have answered and Streit has asserted a counterclaim for goods sold and delivered in the sum of [*4] \$5,630.30, plus interest. Plaintiff, in its amended reply to the counterclaim, asserts as an affirmative defense the failure to state a cause of action and breach of contract.

Defendants now seek an order granting summary judgment dismissing the complaint based upon admissions made by plaintiff's president Leslie Siegel at an examination before trial held on January 4, 1994. Defendants assert that plaintiff, by its own admissions, cannot establish its claims as matter of law. Defendant Streit also seeks an order granting summary judgment on its counterclaim for goods sold and delivered in the sum of \$5,630.30.

Plaintiff, in opposition, asserts that the complaint sufficiently states valid causes of action and that defendants' motion is improper as they have not submitted an affidavit from a person with personal knowledge of the facts. Plaintiff also asserts that defendants' motion is premature, as plaintiff did not have an opportunity to review the transcript of Mr. Siegel's deposition. Finally, plaintiff asserts that triable issues of fact may exist to justify opposition but cannot be stated as the evidence of the alleged conspiracy is solely in defendants' possession. Plaintiff thus [*5] asserts that summary judgment should not be granted as discovery has not been completed.

At the outset, the court finds that defendants' motion for summary judgment is neither improper nor premature. Defendants' motion is sufficiently supported by admissible documentary evidence consisting of Mr. Siegel's deposition transcript and other documents, as well as the attorney's affirmation. ([Olans v Farrell Lines Inc., 64 NY2d 1092; Gaeta v New York News, 62 NY2d 340](#).) Furthermore, defendants sent plaintiff's counsel a copy of the transcript of Mr. Siegel's deposition on February 9, 1994, prior to serving the within motion on February 11, 1994. Mr. Siegel did not sign the deposition and has not sought to make any changes in its form or substance. Inasmuch as Mr. Siegel has had ample time to review and sign the deposition between the time it was served and the time this motion appeared on the calendar of March 29, 1994, defendants are entitled to use the unsigned deposition as fully as though signed. ([CPLR 3116\(a\)](#).)

It is well settled that where, as here, the moving party has demonstrated that it is entitled to summary judgment, the opposing party must demonstrate by admissible evidence the existence of factual issues requiring a trial of the action or tender an acceptable [*6] excuse for the failure to do so. ([Zuckerman v City of New York, 49 NY2d 557](#).) Plaintiff's opposing affidavits merely repeat the allegations set forth in the complaint and plaintiff's reliance on mere conclusions, expressions of hope and unsubstantiated allegations are insufficient to defeat a motion for summary judgment. ([See generally, Corcoran Group Ins. v Morris, 107 AD2d 622, affd 64 NY2d 1034](#).) Contrary to plaintiff's

assertions, the issue before the court is not the sufficiency of the complaint but the sufficiency of plaintiff's evidence. In view of the sworn admissions made by Mr. Siegel at his deposition, it is clear that plaintiff cannot establish its claims as a matter of law. Moreover, further discovery is not warranted as essential elements of plaintiff's claims are based upon plaintiff's own knowledge or can be established by statistical data. Plaintiff, however, has presented no such evidence to the court in opposition to defendants' motion for summary judgment.

Plaintiff's first and second causes of action allege violations of the antitrust provisions of section 340(1) of the General Business Law, commonly known as the Donnelly Act. A party claiming a violation of this statute, which is based on the [Federal Sherman Antitrust Act \(15 USC § 1 et seq\)](#); see, [State of New York v Mobil Oil Corp., 38 NY2d 460](#)) must (1) identify the relevant product market, (2) describe the nature and effects of the alleged conspiracy, [*7] (3) describe how the economic impact of the conspiracy restrained trade in the market in question and (4) identify a conspiracy or reciprocal relationship between two or more parties. ([Home Town Muffler Inc. v Cole Muffler Inc., AD2d , 608 NYS2d 735; Creative Trading Co. v Larkin-Pluznick-Larkin Inc., 136 AD2d 461](#).)

Mr. Siegel identified the relevant market as kosher food products and the geographic market as the greater New York Metropolitan area. Mr. Siegel stated that Du-Bro and other kosher product distributors, including Intercounty and Kolpen, sell Streit's products and kosher products of Streit's competitors in competition with one another in the relevant geographic area. These distributors sell several brands of kosher products in competition with one other and their customers traditionally buy several brands of these products. Mr. Siegel admitted that there is active interbrand and intrabrand competition in the relevant market. Mr. Siegel also admitted that no one distributor or distributors control the market or has the ability to set prices that would prevent anyone from selling in competition with anyone else. While plaintiff asserts that Intercounty and Kolpen "control" approximately 90 percent of the "sales of Streit food products", Mr. Siegel stated that he had no statistical proof to substantiate [*8] this allegation. Mr. Siegel further acknowledged that Du-Bro has not attempted to acquire this information or to collect any data, and has no statistical information to show what share of the kosher products market any supplier or distributor has. Mr. Siegel testified that Streit did not place any restrictions on where Du-Bro could sell Streit's products. Mr. Siegel stated that Kolpen complained to Streit that Du-Bro was selling Streit products to its Brooklyn customers. However, when Streit advised Du-Bro of Kolpen's complaint, Streit did not threaten or coerce plaintiff to limit its sales to any particular area or customers. Mr. Siegel admitted that plaintiff did not have any evidence of any conspiracy between the defendants. Mr. Siegel, however, stated that active competition existed among kosher products distributors and suppliers, and that Streit's termination did not prevent Du-Bro from actively competing in the kosher product market.

In view of these admissions, Du-Bro cannot maintain its antitrust claims, as it cannot show that the termination has substantially lessened competition or has an anti-competitive effect. Du-Bro is also unable to establish that defendants' conduct [*9] constitutes a conspiracy in violation of the Donnelly Act. While direct evidence of a conspiracy is rarely available and must be proven by inferences from the behavior of the alleged conspirators (see, [H.L. Hayden Co. of New York v Siemens Med. Sys., 879 F2d 1005](#)), plaintiff at most can only establish that Kolpen may have complained to Streit. Terminating a distributor in response to complaints by other distributors is not sufficient to withstand a summary judgment motion. (See, [Monsanto Co. v Spray-Rite Service Corp., 465 U.S. 752](#); [Capital Imaging Associates, P.C. v Mohawk Valley Medical Associates Inc., 791 F Supp 956, 965, 769 F2d 1005](#); [Home Town Muffler Inc. v Cole Muffler Inc., supra](#).) An agreement will not be inferred from such acts and such actions do not indicate concerted behavior. Rather, there must be evidence that tends to exclude the possibility that the alleged conspirators were acting independently. (See, [Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574](#).) Antitrust laws are only concerned with acts that harm "competition and not competitors". ([Apex Oil Co. v DiMauro, 713 F Supp 587](#), quoting, [Brunswick Corp. v Pueblo-Bowl-O-Mat Inc., 429 U.S. 477](#).) Therefore, behavior which hurts or even destroys an individual competitor is not illegal under the Sherman act unless it also adversely affects competition. ([Apex Oil Co. v DiMauro, supra](#); [Capital Imaging Associates, P.C. v Mohawk Valley Medical Associates Inc., supra](#).) These principles of law are equally applicable here under the Donnelly Act. ([Bello v Cablevision Systems Corp., 185 AD2d 262](#); [Creative Trading Co. v Larkin-Pluznick-Larkin \[*101\] Inc., supra](#).)

Plaintiff's third cause of action alleges tortious interference with contractual relations. Therefore, plaintiff is required to establish (1) the existence of a contract between Du-Bro and its customers, (2) defendants' knowledge of the contract, (3) defendants' intentional inducement of the customers to breach the contract and (4) damages. (See,

Kronos Inc. Avx Corp., 81 NY2d 90.) Mr. Siegel, at his deposition admitted that there were no contracts between Du-Bro and its customers. There was also no contract between Du-Bro and Streit and, in any event, a party cannot tortiously interfere with its own contract. At the most, plaintiff may be able to show the existence of future contractual relations or a contract terminable at will. In order to recover damages for such interference plaintiff is required to show that the defendants used wrongful means. The use of persuasion alone, as in the case at bar, even if knowingly directed at interfering with a contract, does not constitute wrongful means. (Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183.) In addition, plaintiff admittedly cannot establish that it lost any customers as a result of Streit's termination.

Plaintiff's fourth cause of action for unfair competition is based on the alleged conspiracy [*11] and interference with business relations. Plaintiff has presented no evidence in support of this cause of action. The basic question in such an action is whether the acts complained of are fair or unfair. (Fisher v Star Co., 231 NY 414; Cigogne Inc. v Luxury Trading Corp., 13 AD2d 928.) Plaintiff herein has not made any showing of any act which contravenes any accepted commercial practice. In addition, plaintiff is unable to show that defendants either misappropriated something from plaintiff or attempted to palm itself off as the plaintiff. (See, Ruder & Finn Inc. v Seaboard Surety Co., 52 NY2d 663.) Mr. Siegel admitted that defendants did not engage in such conduct. While plaintiff alleges that it was induced by Streit to make add onal expenditures in connection with the distributorship, Mr. Siegel admitted that he had no records which would enable him to prove such expenditures. In addition, while plaintiff alleges in its complaint that defendants traded on its goodwill, Siegel admitted that Kolpen and Intercounty were selling Streit products before Du-Bro and that they had developed their own goodwill. Mr. Siegel further admitted that there has been no confusion, mistake or deception in the marketplace about the distributors or who they represented. Finally, Mr. Siegel admitted the Du-Bro did not lose any [*12] customers or that its reputation with its customers was damaged as a result of the termination by Streit. Plaintiff thus has sustained no damages.

Plaintiff's fifth cause of action for price discrimination in violation of the Donnelly Act is dismissed. It is well settled that the State antitrust law does not outlaw price discrimination and that no such cause of action exists under this statute. (State of New York v Mobil Oil Co., 38 NY2d 460; TDK Electronics Corp. v M & A Enterprises, 172 AD2d 603; see also, Jack's Cookie Co. Inc. v Du-Bro Foods, Inc., 145 Misc 2d 699.) In order to state a cognizable price discrimination claim, plaintiff must show that specific identified sales were lost due to the price advantage given to its competitor. (J. Truett Payne Co. Inc. v Chrysler Motors Corp., 451 U.S. 557.) Plaintiff herein cannot make any such showing. Mr. Siegel has admitted that no price advantages were given to his competitors. Rather, Mr. Siegel stated that, upon request, Streit gave plaintiff the same pricing, specials, discounts and nonrefundable policy as it gave to Kolpen and Intercounty. In addition, plaintiff is unable to establish that it lost any identifiable, specific sales as a result of special pricing given to Intercounty or Kolpen.

Streit's request for summary judgment on its counterclaim for goods sold and delivered in the sum of \$5,630.30 is granted. The documentary evidence submitted establishes [*13] that goods were sold and delivered to plaintiff by Streit on December 9, 1992 in the sum of \$5,630.30. An itemized bill was sent to Du-Bro on December 12, 1992 which had a term of "net 30 days". Mr. Siegel, at his deposition, admitted to receiving these goods and further admitted that the bill was not paid. While Du-Bro claims that Streit sought payment prior to the due date, it is undisputed that the bill is now past due and unpaid. Plaintiff's affirmative defense of breach of contract, offsetting Streit's counterclaim is based upon the termination of the distributorship. Inasmuch as plaintiff has no viable cause of action against Streit, this defense is without merit. Streit is therefore entitled to judgment in its favor in the sum of \$5,630.30, together with interest from January 12, 1993.

In view of the foregoing, defendants' motion for summary judgment dismissing the complaint is granted and defendant Streit's request for summary judgment on its counterclaim is granted.

Settle order.

/s/ Milano

J.S.C.

End of Document



Maui Trucking v. Operating Eng'rs Local Union No. 3

United States Court of Appeals for the Ninth Circuit

August 9, 1993, Argued, Submitted, San Francisco, California ; May 18, 1994, Filed

No. 92-15321

Reporter

37 F.3d 436 *; 1994 U.S. App. LEXIS 26567 **; 146 L.R.R.M. 2449; 128 Lab. Cas. (CCH) P11,102; 1994 Trade Cas. (CCH) P70,743; 94 Cal. Daily Op. Service 3554; 94 Daily Journal DAR 13394

MAUI TRUCKING, INC.; DECOITE TRUCKING, INC.; and T.J. GOMES TRUCKING CO., INC., Plaintiffs-Appellants, and GENERAL CONTRACTORS LABOR ASSOCIATION and LABOR ASSOCIATION OF THE BUILDING INDUSTRY ASSOCIATION OF HAWAII, Plaintiffs-Intervenors-Appellees, v. OPERATING ENGINEERS LOCAL UNION NO. 3 INTERNATIONAL UNION OF OPERATING ENGINEERS AFL-CIO; DOUGLAS SADO dba DOUG'S TRUCKING; DOUG'S TRUCKING EQUIPMENT & REPAIR, INC.; SADO TRUCKING, INC. dba SADO TRUCKING CO.; and CHARLES BARTON dba C & N TRUCKING, Defendants-Appellees.

Subsequent History: [**1] As Amended on Denial of Rehearing and Rehearing En Banc September 23, 1994.

Prior History: Appeal from the United States District Court for the District of Hawaii. D.C. No. CV-91-00359-SPK. Samuel P. King, Senior Judge, Presiding.

Original Opinion Previously Reported at: [1994 U.S. App. LEXIS 10870](#).

Disposition: REVERSED and REMANDED for further proceedings consistent with this opinion.

Core Terms

antitrust, truckers, preservation, employees, general contractor, subcontracting, exemption, hauling, union activity, labor law, Relations, nonunion, off-site, island, bargaining unit, restrictions, contractors, secondary, benefits, universe, boycott, lawsuit, Metal

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview

[HN1](#) Exemptions & Immunities, Labor

See § 8(e) of the National Labor Relations Act, [29 U.S.C. § 158\(e\)](#).

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

[**HN2**](#) [down] Exemptions & Immunities, Labor

Federal antitrust law excepts traditional union activity from antitrust review.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview

[**HN3**](#) [down] Exemptions & Immunities, Labor

The touchstone of § 8(e) of the National Labor Relations Act, [29 U.S.C.S. § 158\(e\)](#), is whether the agreement is addressed to the labor relations of the contracting employer vis-a-vis his own employees, or whether it is tactically calculated to satisfy union objectives elsewhere.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview

[**HN4**](#) [down] Exemptions & Immunities, Labor

Contractual clauses with a primary purpose serving the general institutional interest of the union in organizing or regulating the labor policies of employers with whom the union does not have a collective bargaining relationship are unlawful under § 8(e) of the National Labor Relations Act, [29 U.S.C.S. § 158\(e\)](#), because they are not aimed at preserving either the work or the employment standards of unit employees.

Counsel: Jeffrey S. Harris, Torkildson, Katz, Jossem, Fonseca, Jaffe, Moore & Hetherington, Honolulu, Hawaii, for the plaintiffs-appellants.

Barry W. Marr and David P. Ledger, Carlsmith, Ball, Wichman, Murray, Case, Mukai & Ichiki, Honolulu, Hawaii, for the plaintiffs-intervenors-appellees.

T. Anthony Gill, Gill & Zukerman, Honolulu, Hawaii; Marsha S. Berzon, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California; and Barbara A. Petrus, Goodsill, Anderson, Quinn & Stifel, Honolulu, Hawaii, for the defendants-appellees.

Judges: Before: Joseph T. Sneed, Cecil F. Poole, and Stephen S. Trott, Circuit Judges. Opinion by Judge Trott.

Opinion by: STEPHEN S. TROTT

Opinion

[*437] ORDER AMENDING OPINION and DENYING PETITION FOR REHEARING and REHEARING EN BANC

TROTT, Circuit Judge:

This lawsuit arises from a collective bargaining agreement [***2] ("Master Agreement") entered into in Hawaii by the Operating Engineers Local Union No. 3 ("Local No. 3") on one hand, and the General Contractors Labor

Association and the Building Industry Labor Association ("Associations" or "General Contractors") on the other. Section 24E of this Master Agreement covers the subcontracting by the General Contractors of off-site work such as the hauling of construction materials to and from the General Contractors' job sites. With the alleged purpose of protecting the work and employment opportunities of all employees covered by the agreement, including the benefits of the Master Agreement itself, Section 24E requires the General Contractors to subcontract off-site work only to subcontractors who agree (1) to pay their employees a total wage and benefits package equal in value to the wage and benefits package payable under the Master Agreement; (2) to ensure that their employees work in accordance with the schedule of hours established in the Master Agreement; (3) to submit certified payroll records to Local 3 and to the Associations; and, (4) to submit any disputes regarding their compliance with these requirements to the grievance procedures set [**3] forth in the Master Agreement.

The plaintiffs in this case are independent nonunion truckers with an established history of off-site hauling. When they learned of the impending implementation of Section [*438] 24E, they became concerned it would effectively prevent the General Contractors from continuing to do business with them. Accordingly, they threatened Local No. 3 and the Associations with a lawsuit. This development caused the Associations to refuse to sign and implement Section 24E out of concern that it might not be lawful. This refusal prompted Local No. 3 to file an action for declaratory judgment against the Associations seeking a declaration that the subcontracting restrictions in Section 24E were lawful under federal labor and **antitrust law**.

In that action, to which the independent nonunion truckers were not parties, Judge David A. Ezra ruled that Section 24E was facially valid and did not violate section 8(e) of the National Labor Relations Act¹ because Section 24E constituted a valid "union standards clause." See [Associated Builders & Contractors v. N.L.R.B., 654 F.2d 1301, 1307 \(9th Cir. 1981\)](#), aff'd in part, vacated in part, [456 U.S. 645, 72 L. Ed. 2d 398, 102 S. Ct. 2071 \(1982\)](#). [**4] Quoting and relying on [General Teamsters Local 386, 198 N.L.R.B. 1038 \(1972\)](#), Judge Ezra concluded that the disputed restrictions furthered the union's "legitimate interest in preventing the undermining of the work opportunities and standards of employees in a contractual bargaining unit by subcontractors who do not meet the prevailing wage scales and employee benefits covered by the contract." *Id.* In so holding, however, Judge Ezra noted that "where a union standards clause is intended not to protect or preserve the working standards of employees in the unit, but rather to control the employment practices of firms that seek to do business with the employer and to aid and assist union members generally, the object of that clause is secondary and unlawful." (citing [General Teamsters Local 386, 198 N.L.R.B. at 1038](#)). See [Sheet Metal Workers Local 91, 294 N.L.R.B. 766, 770 \(1989\)](#); [National Woodwork Mfrs. Ass'n v. N.L.R.B., 386 U.S. 612, 644-45, 18 L. Ed. 2d 357, 87 S. Ct. 1250 \(1967\)](#). Accordingly, Judge Ezra opined that although [**5] Section 24E was facially valid, "it may nonetheless be unlawful as applied." (citing [Building Materials and Construction Local 216, 198 N.L.R.B. 1046 \(1972\)](#), aff'd sub nom. [Building Material & Construction Local No. 216 v. N.L.R.B., 171 U.S. App. D.C. 440, 520 F.2d 172 \(D.C. Cir. 1975\)](#)).

In *Building Materials*, the union sought to apply similar restrictions to subcontractors hauling pre-stressed concrete girders. Because the general contractors had never hauled pre-stressed girders and had no plans to do so, the court upheld the NLRB's conclusions (1) that the object of [**6] the restrictions, as applied to the hauling of pre-stressed girders, was not the preservation or protection of unit work, and (2) that therefore their aim was "secondary" and thus a violation of section 8(e). [Building Materials, 520 F.2d at 179](#). Noting that "the question of whether the restrictions are invalid, as applied, depends on specific factual situations that may in time unfold," Judge Ezra deferred resolution of this issue to a later date. See [In re Bituminous Coal Wage Agreements, 756 F.2d 284, 290-291 \(3d Cir.\), cert. denied, 474 U.S. 863 \(1985\)](#).

Building on his holding that the disputed clause did not violate section 8(c) and was a legitimate subcontracting restriction, Judge Ezra also held that the clause did not violate [HN2](#) federal **antitrust law** which excepts

¹ [HN1](#) Section 8(e) makes it an unfair labor practice for any labor organization and any employer "to enter into any contract or agreement, express or implied, whereby such employer . . . agrees to . . . cease doing business with any other person." [29 U.S.C. § 158\(e\) \(1988\)](#). Any such contract shall to that extent be unenforceable and void.

traditional union activity from antitrust review. *Continental Maritime v. Pacific Coast Metal Trades*, 817 F.2d 1391, 1393 (9th Cir. 1987); *California Dump Truck Owners Ass'n v. Associated General Contractors*, 562 F.2d 607, 610 (9th Cir. 1977).

Needless [**7] to say, both Local No. 3 and the Associations were generally pleased with the outcome, but the independent nonunion truckers were not. Thus, the independent truckers filed the present lawsuit challenging the validity of Section 24E as applied to them. Because they were not parties to the earlier lawsuit, the independent truckers were permitted again to litigate the issues decided by Judge Ezra, including the "as applied" issue he did not decide. The independent [*439] truckers originally filed this lawsuit only against Local No. 3, but the district court permitted the Associations to intervene as plaintiffs seeking a declaration as to the legality and enforceability of Section 24E as applied to the facts of this case.

Eventually, motions and cross motions for summary judgment were joined, and Judge Samuel King ruled for the Associations and Local No. 3 and against the plaintiffs. On the central issue of whether Section 24E was valid as applied, Judge King held that it was because it served as a "union standards clause" designed appropriately (1) to preserve the work of the union, and (2) to preserve "union standards."

The independent truckers appeal this ruling. We have jurisdiction over [**8] this timely appeal pursuant to [28 U.S.C. § 1291](#), and we reverse and remand for further proceedings consistent with this opinion.

I

A.

The first issue we must decide is whether the appropriate universe for work preservation analysis is the entire State of Hawaii, as the Associations and Local No. 3 claim, or whether it can be limited to just the island of Maui, as the independent truckers argue. Judge King held that the relevant work universe was coextensive with the bargaining unit, and thus that the universe to which we look in testing Section 24E as applied is the entire State of Hawaii. We agree. The record demonstrates that many General Contractors, including all the largest in the state, do business on all of the Hawaiian islands. Contractors move equipment from island to island, and union members move as well to find work. It would be senseless to break the state into parts for this analysis, possibly creating different rules for each island.

B.

Next, we must decide from the record whether, as a matter of law, and looking at the State of Hawaii as a whole, Section 24E is valid "as applied." To do this we must determine whether the contract [**9] clause at issue has the "primary purpose of protecting unit work or unit standards" or, instead, the secondary purpose of promoting the broader goals of the union "by asserting control over the labor relations" of other employers. [*Associated Gen. Contractors, 280 N.L.R.B. 698 (1986)*.] . . . As the Supreme Court has stated, [HN3](#)[] the touchstone of Section 8(e) is whether the agreement is addressed to "the labor relations of the contracting employer *vis-a-vis* his own employees" or whether it is "tactically calculated to satisfy union objectives elsewhere." *National Woodwork Mfrs., 386 U.S. 612, 644-45, 18 L. Ed. 2d 357, 87 S. Ct. 1250 (1967)*.

Sheet Metal Workers Local 91, 294 N.L.R.B. at 770.

Judge King held, under this test, that if the appropriate universe for work preservation analysis was only the island of Maui, there would exist a genuine issue of material fact as to whether there was any relevant work to preserve. He added, however, that an examination of the state as a whole would reveal that Association members performed at least 2.5% to 7.5% of the total [**10] amount of off-site hauling work ordinarily performed by the plaintiffs. Judge King concluded that this amount of off-site hauling was sufficient as a matter of law to establish that Section 24E had a legitimate work preservation purpose.

Although this is a close call, we respectfully disagree with Judge King. Although Maui might not be the sole universe to which one must look to determine this issue, neither can what we learn from Maui be ignored when we examine

the situation statewide. Looking at the *whole* factual picture in the light most favorable to the non-moving party, it appears that on Maui only three of sixty-seven General Contractors ever perform the work at issue, and then only occasionally. On Oahu, there may be only three Generals who do such work whereas the other sixty-four or sixty-five do not do such work *anywhere* in the State. This scenario does not demonstrate that the [*440] disputed work has been "traditionally performed" by the General Contractors. In this respect, the present case is similar to [Sheet Metal Workers Union Local 162 \(Associated Pipe and Fittings Manufacturer, et al.\), 207 N.L.R.B. 741 \(1973\)](#), where the Board affirmed [**11] a holding by an ALJ that the clause under consideration was secondary and violated § 8(e) because it did not have the purpose of preserving work:

Of some 35 contractors who appear to engage in any commercial work in excess of 3,200 square feet, the overwhelming majority purchase from 90 to 100 percent of the round pipe and fittings each uses on his construction jobs from mass production manufacturers, and . . . this has been a continuous practice on the part of most of the contractors for periods ranging up to 20 years. . . .

. . .

. . . The conclusion is inescapable that the fabrication of these items by unit employees has not been customary or traditional at any time. . . . While it has been shown that contractors can, and in some instances do, fabricate round pipe and fittings, this comes about only in exceptional situations and to meet special needs.

Id., at 748-49. Moreover, the Associations appear to concede that their involvement in this work "has been declining over time, yet some remains." Apparently, the General Contractors do not want to "tie their assets up into owning a whole lot of metal [and sometimes] letting it sit around idle."

[**12] In summary, we conclude that the record demonstrates a genuine issue of material fact as to whether Section 24E, as applied to these facts, had a legitimate primary object of preserving relevant work. The work the Associations claim to want to preserve gives every appearance of being so scanty that Section 24E cannot be viewed as a matter of law as a legitimate means to address "the labor relations of the contracting employer vis-a-vis his own employees." [National Woodwork Mfrs., 386 U.S. at 645](#). As Judge Ezra observed, an "as applied" analysis is heavily dependent on the facts, and the record in this regard is replete with conflicting affidavits. Accord [In re Bituminous Coal, 756 F.2d at 293](#) ("Whether the clause is valid . . . must depend on individualized fact finding.").

Our holding as to Section 24E necessarily requires us to vacate the district court's grant of summary judgment in favor of the Associations and Local No. 3 on the issue of whether Section 24E violated Sections 1 and 2 of the Sherman Act and the Clayton Act. We do so based in part on [Richards v. Neilson Freight Lines, 810 F.2d 898 \(9th Cir. 1987\)](#). [**13]

In *Richards*, the plaintiff, a nonunion employer, alleged that the union pressured union employers to boycott the plaintiff because the union was attempting to organize the plaintiff's employees. The boycott was designed to force the plaintiff to change its substandard wages and working conditions. [810 F.2d at 906](#). The plaintiff argued that the union-led activity was not covered by the nonstatutory exemption from antitrust review because the activity constituted an unfair labor practice under section 8(e). We rejected that argument:

The Supreme Court's consideration . . . of the actual and potential anticompetitive effects of [such] agreements independently of the violation of [section 158\(e\)](#) suggests that the presence of a [section 158\(e\)](#) violation may not itself decide the exemption issue. . . . *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975)*,] does not suggest that every violation of [section 158\(e\)](#) gives rise to an antitrust suit. It is not paradoxical that a labor law violation may still be within the antitrust exemption, [**14] for the violation will carry its own remedies under the labor laws, although we recognize that in some cases a violation of the labor laws may involve conduct whose consequences are so far-reaching that it falls outside the exemption. Where, as here, there is no showing the alleged agreements pose actual or potential anticompetitive risks other than those related to a reduction in competitive advantages based on differential wage and working conditions, the nonstatutory [*441] labor exemption prevents antitrust scrutiny of the union activity.

810 F.2d at 906 (citation omitted).

The independent truckers argue that *Richards* is distinguishable on its facts, pointing out that the offending union activity in that case was limited in scope and market impact as compared to the alleged marketwide impact in this case. Quoting the Sixth Circuit for the proposition that "*Richards* goes to the extreme in protecting union activity . . ." *In re Detroit Auto Dealers Assn., Inc.*, 955 F.2d 457, 466 (6th Cir. 1992), the independent truckers ask us to draw a line between *Richards* and the instant case. Because a trial is in the offing, however, we decline the independent [**15] truckers' suggestion in favor of remanding this issue for resolution on a more complete record by the district court. See also *Sun-Land Nurseries v. Southern California District Council*, 793 F.2d 1110, 1117 (9th Cir. 1986) ("a valid subcontracting clause contained in a collective bargaining agreement cannot serve as the basis of an antitrust claim," unless it is an instrument of an antitrust conspiracy.). Parenthetically, we do not believe that such an approach in this case places the jurisdictional cart before the horse, as now claimed at the eleventh hour by the Associations. See *Sun-Land Nurseries*, 793 F.2d at 1118, n.1.

C.

Judge King held, however, that "even in the absence of work to preserve," Section 24E would be valid "as applied" because it also preserves "union standards." Judge King said:

While "work preservation" and "union standards" are often discussed together, they are two separate concepts and either or both may be legitimately sought by unions through subcontracting agreements. Protecting union wages and benefits for the unit employees serves the unit's interests, independent of preserving work. It [**16] prevents the erosion of union wage rates by non-union truckers, and is thus a valid, primary goal of the union.

We disagree with this analysis. As we read the cases and consider the reasons why primary purpose agreements are acceptable but secondary boycotts are not, it is clear to us that without work to perform, the preservation of union standards per se is tantamount to attempting "to satisfy union objectives elsewhere." *Sheet Metal Workers Local 91*, 294 N.L.R.B. at 770. If there is no substantial work to preserve, if there is no substantial competition for the work, it does not appear, as Judge King believed, that the agreed upon union wage or work opportunities could be eroded by others doing different work.

Indeed, the district court's reliance on *Sheet Metal Workers Local 91* for its conclusion appears misplaced given that the Board's justification for union standards clauses in that case was the protection of unit work:

It is also open to argument - again one not advanced by Respondents - that the clause simply protects union standards, that is, if the related firms paid union wages it would not be necessary for them to also sign union agreements. [**17] *Similar clauses are found to be lawful in other contexts subcontracting, for example, because they conceivably protect unit work.*

294 N.L.R.B. at 771 (emphasis added). See also *Plumbers & Steamfitters Local 342 v. N.L.R.B.*, 194 U.S. App. D.C. 297, 598 F.2d 216, 219 (D.C. Cir. 1979) ("The Supreme Court has made clear and the Board acknowledges, that not all so-called 'work preservation' agreements such as the union standards clause in the Agreement violate the National Labor Relations Act."); *Building Material & Construction Teamsters Union Local No. 216, Etc. v. N.L.R.B.*, 171 U.S. App. D.C. 440, 520 F.2d 172, 179 n.6 (D.C. Cir. 1975) (court affirmed Board's holding that "since employers who [were] parties to the AGC contract were not engaged in [a particular] type of hauling, nor [were] shown even to have anticipated its performance, the object of [the union standards clause] was not the preservation or protection of unit work"); *Truck Drivers Union Local No. 413 v. N.L.R.B.*, 118 U.S. App. D.C. 149, 334 F.2d 539, 548 n.13 [**18] (D.C. Cir.) ("Since this clause is entitled 'Subcontracting,' we assume - in the absence of any indication to the contrary - that its scope is limited to the contracting out of work which [*442] otherwise would be performed by members of the bargaining unit."), cert. denied, 329 U.S. 916 (1964); *In re Bituminous Coal*, 756 F.2d at 289 ("A union standards clause is designed to inhibit subcontracting of work that would otherwise be performed by members of the bargaining unit."); *Associated General Contractors*, 280 N.L.R.B. 698, 701-02 HN4 [↑] ("Contractual clauses with a primary purpose serving the general institutional interest of the union in organizing or regulating the labor policies of employers with whom the union does not have a collective bargaining relationship

are unlawful under Section 8(e) because . . . they are not aimed at preserving either the work or the employment standards of unit employees.") (emphasis added).

D.

Local No. 3 argues that even if off-site hauling is not found to be work "traditionally or customarily" performed by the members of the bargaining units, the work in question [**19] is still "fairly claimable," i.e., work that requires the same skills and abilities as the traditional work of the unit employees. Under this doctrine, which has not yet been adopted in this circuit, where the employees have not actually done the work in dispute but where it is of the same type as their traditional work, a clause that would cover it may be upheld as a valid work preservation agreement. See *Frito-Lay, Inc. v. Retail Clerks Local 7*, 629 F.2d 653, 660 (10th Cir. 1980). The National Labor Relations Board has recognized the validity of this doctrine as a means of validating clauses that seek to recognize work regarded as fairly claimable. *Teamsters Local Union No. 89*, 254 N.L.R.B. 783, 786 (1981), aff'd sub nom. *N.L.R.B. v. General Drivers*, 684 F.2d 359 (6th Cir. 1982).

We are unable to address this argument. The district court did not consider it, and the record is insufficient for us to tell whether it applies to this case. On remand, the parties shall have another opportunity to address this issue, assuming they wish to do so.

REVERSED and REMANDED for further proceedings consistent [**20] with this opinion.

ORDER

The opinion filed May 18, 1994, slip opinion page 5171, is amended as follows:

The second full paragraph on page 5180 of the slip opinion is ordered deleted in its entirety, and the following language (3 paragraphs) is ordered inserted in its place:

Our holding as to Section 24E necessarily requires us to vacate the district court's grant of summary judgment in favor of the Associations and Local No. 3 on the issue of whether Section 24E violated Sections 1 and 2 of the Sherman Act and the Clayton Act. We do so based in part on *Richards v. Neilson Freight Lines*, 810 F.2d 898 (9th Cir. 1987).

In *Richards*, the plaintiff, a nonunion employer, alleged that the union pressured union employers to boycott the plaintiff because the union was attempting to organize the plaintiff's employees. The boycott was designed to force the plaintiff to change its substandard wages and working conditions. *810 F.2d at 906*. The plaintiff argued that the union-led activity was not covered by the nonstatutory exemption from antitrust review because the activity constituted an unfair labor practice under section 8(e). We [**21] rejected that argument:

The Supreme Court's consideration . . . of the actual and potential anticompetitive effects of [such] agreements independently of the violation of *section 158(e)* suggests that the presence of a *section 158(e)* violation may not itself decide the exemption issue. . . . Connell [*Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975).] does not suggest that every violation of *section 158(e)* gives rise to an antitrust suit. It is not paradoxical that a labor law violation may still be within the antitrust exemption, for the violation will carry its own remedies under the labor laws, although we recognize that in some cases a violation of the labor laws may involve conduct whose consequences are so far-reaching that it falls outside the exemption. Where, as here, there is no showing the alleged agreements pose actual or potential anticompetitive risks other than those related to a reduction in competitive advantages based on differential wage and working conditions, the nonstatutory labor exemption prevents antitrust scrutiny of the union activity.

[**22] *810 F.2d at 906* (citation omitted).

The independent truckers argue that *Richards* is distinguishable on its facts, pointing out that the offending union activity in that case was limited in scope and market impact as compared to the alleged marketwide impact in this case. Quoting the Sixth Circuit for the proposition that "*Richards* goes to the extreme in protecting union activity . . .

.," *In re Detroit Auto Dealers Assn, Inc.*, 955 F.2d 457, 466 (6th Cir. 1992), the independent truckers ask us to draw a line between *Richards* and the instant case. Because a trial is in the offing, however, we decline the independent truckers' suggestion in favor of remanding this issue for resolution on a more complete record by the district court. See also *Sun-Land Nurseries v. Southern California District Council*, 793 F.2d 1110, 1117 (9th Cir. 1986) ("a valid subcontracting clause contained in a collective bargaining agreement cannot serve as the basis of an antitrust claim," unless it is an instrument of an antitrust conspiracy.). Parenthetically, we do not believe that such an approach in this case places the jurisdictional [**23] cart before the horse, as now claimed at the eleventh hour by the Associations. See *Sun-Land Nurseries*, 793 F.2d at 1118, n.1.

With these amendments, the panel has voted to deny the petition for rehearing. Judges Poole and Trott have voted to reject the suggestion for rehearing en banc, and Judge Sneed so recommends. The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested such a vote. *Fed. R. App. P.* 35.

Accordingly, the petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

End of Document



Hairston v. Pacific-10 Conference

United States District Court for the Western District of Washington

May 20, 1994, Decided ; May 20, 1994, FILED; May 23, 1994, ENTERED

NO. C93-1763R

Reporter

893 F. Supp. 1485 *; 1994 U.S. Dist. LEXIS 20495 **

RUSSELL HAIRSTON, et al., Plaintiffs, v. PACIFIC-10 CONFERENCE, an unincorporated association, Defendant.

Core Terms

players, antitrust, souvenir, damages, sellers, bowl, athletic, football, injunctive relief, competitors, consumers, injuries, antitrust violation, specific intent, ticket holder, allegations, factors, unfair, team, cause of action, Clayton Act, speculative, third-party, deprived, courts, season, cases

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1 [] Motions to Dismiss, Failure to State Claim

In considering motions to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a court construes the complaint in the light most favorable to the plaintiff and takes its allegations as true. The court, however, still examines whether the allegations in the complaint follow from the description of the facts alleged by the plaintiff.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

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

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

HN2 [] Standing, Injury in Fact

There is a three-part test for determining whether constitutional standing exists: (1) plaintiff must have suffered an injury in fact, i.e., an invasion of a legally protected, particularized, non-hypothetical interest; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, not speculative, that the injury will be remedied by a favorable decision.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

HN3 Remedies, Damages

Section 4 of the Clayton Act, 15 U.S.C.S. § 15, allows the recovery of treble damages by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN4 Clayton Act, Claims

To bring a private action under § 4 of the Clayton Act, 15 U.S.C.S. § 15, a plaintiff must establish that it has "antitrust standing." It may do so by showing that it is a proper party to bring a private antitrust action.

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

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

HN5 Private Actions, Standing

There are five factors to be considered in determining if a plaintiff is a proper party to bring an antitrust suit: (1) The nature of the plaintiff's claimed injury; (2) The directness of the injury; (3) The specific intent of the alleged conspirators; (4) The character of the damages, including the risk of duplicative recovery, the complexity of apportionment, and their speculative character; and (5) The existence of other, more appropriate plaintiffs.

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

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

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN6 Private Actions, Standing

The first factor of the five-factor antitrust standing test, which focuses on whether an "antitrust injury" has been alleged, is a threshold requirement for antitrust standing. If the plaintiff satisfies the requirement of antitrust injury,

893 F. Supp. 1485, *1485L^A994 U.S. Dist. LEXIS 20495, **20495

the court then must examine the other four factors. None of those remaining factors controls the decision and a court may find standing if the balance of factors so instructs.

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

HN7 [down] **Private Actions, Remedies**

In determining if a plaintiff has alleged an antitrust injury, the courts generally look at whether it is a participant in the same market as the alleged wrongdoer, either as a consumer or as a competitor.

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

Antitrust & Trade Law > Clayton Act > Scope

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

HN8 [down] **Collectives & Cooperatives, Clayton Act**

The Clayton Act, [15 U.S.C.S. § 1 et seq.](#), does not confine its protection to consumers, or to purchasers, or to competitors.

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

HN9 [down] **Private Actions, Remedies**

A direct antitrust injury is one close in the "chain of causation" to the violation.

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

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

HN10 [down] **Private Actions, Standing**

The existence of another possible plaintiff does not automatically mean that other parties should be denied antitrust standing.

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

893 F. Supp. 1485, *1485 (1994 U.S. Dist. LEXIS 20495, **20495

[HN11](#) [blue download icon] Clayton Act, Claims

The requirements for standing when a plaintiff seeks injunctive relief under [§ 16](#) of the Clayton Act, [15 U.S.C.S. § 26](#), are less stringent than when it requests damages under [§ 4](#). Plaintiffs still must show, however, that: (1) they have alleged an antitrust injury; (2) their injury is cognizable in equity; and (3) their injury is the proximate result of the alleged antitrust violation. The allegation of antitrust injury is a threshold requirement.

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

Civil Procedure > Remedies > Damages > Monetary Damages

[HN12](#) [blue download icon] Private Actions, Remedies

Plaintiffs asking for equitable relief for antitrust violations must demonstrate that there is a significant threat of irreparable injury. Allegations of monetary damages alone will not suffice for a showing of irreparable harm.

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

[HN13](#) [blue download icon] Private Actions, Remedies

Courts use the proximate cause test to ensure that injunctive relief, if granted, will prevent the antitrust injury from occurring.

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

[HN14](#) [blue download icon] Regulated Practices, Price Fixing & Restraints of Trade

The Washington Consumer Protection Act, [Wash. Rev. Code § 19.86.030](#), prohibits contracts or conspiracies in restraint of trade. The provision is the state equivalent of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#). The state courts look to federal precedent in applying these analogous state statutes.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

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

Antitrust & Trade Law > Federal Trade Commission Act > Scope

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

[HN15](#) [blue download icon] Trade Practices & Unfair Competition, Federal Trade Commission Act

The portion of the Washington Consumer Protection Act, [Wash. Rev. Code § 19.86.020](#), prohibiting unfair methods of competition is equivalent to § 5(a)(1) of the Federal Trade Commission Act, [15 U.S.C.S. § 45\(a\)\(1\)](#), which prohibits conduct in violation of [§§ 1](#) and [2](#) of the Sherman Act.

893 F. Supp. 1485, *1485†994 U.S. Dist. LEXIS 20495, **20495

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN16 [blue icon] Consumer Protection, Deceptive & Unfair Trade Practices

In order to prove a cause of action under the portion of the Washington Consumer Protection Act, [Wash. Rev. Code § 19.86.020](#), prohibiting unfair or deceptive acts or practices, plaintiffs must establish five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation.

Contracts Law > Third Parties > Beneficiaries > Claims & Enforcement

Contracts Law > Third Parties > Beneficiaries > General Overview

HN17 [blue icon] Beneficiaries, Claims & Enforcement

In order to create a third-party beneficiary contract, the parties must intend that the promisor assume a direct obligation to the third party, and that performance of that obligation necessarily benefits that party.

Contracts Law > Third Parties > Beneficiaries > Claims & Enforcement

Contracts Law > Third Parties > Beneficiaries > General Overview

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > General Overview

Contracts Law > ... > Beneficiaries > Types of Third Party Beneficiaries > Incidental Beneficiaries

HN18 [blue icon] Beneficiaries, Claims & Enforcement

One does not qualify as a third-party beneficiary of a contract merely because one is an incidental beneficiary of the performance of a contract or because the promisor had a general desire to advance the interests of a third party. The key is not whether the contracting parties had an altruistic motive or desire to benefit the third party, but rather, whether performance under the contract would necessarily and directly benefit that party.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN19 [blue icon] Commercial Interference, Prospective Advantage

In order to qualify as tortious interference with business expectancies, the alleged interference must be intentional, not merely an incidental, indirect result of another act.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

893 F. Supp. 1485, *1485†1994 U.S. Dist. LEXIS 20495, **20495

Constitutional Law > Substantive Due Process > Scope

HN20 [+] Fundamental Rights, Eminent Domain & Takings

In order to establish state constitutional claims for deprivation of due process, plaintiffs must establish that state action deprived them of a constitutionally protected right or property interest without due process.

Counsel: For RUSSELL HAIRSTON, FRANK GARCIA, JOVAN MCCOY, KYLE ROBERTS, individuals, SCOREBOARD INC, a Washington corporation, TEAM SPIRIT INC, a Washington corporation, GRAHAM S. ANDERSON, an individual, plaintiffs: Michael D. Hunsinger, NEUBAUER & HUNSINGER, Seattle, WA. James L. Magee, GRAHAM & DUNN, SEATTLE, WA. .

For PACIFIC 10 CONFERENCE, an unincorporated association, defendant: AlVanKampen, Richard J. Wallis, Angela M. Luera, BOGLE & GATES, SEATTLE, WA. For NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, defendant: Peter D. Byrnes, BYRNES & KELLER, SEATTLE, WA.

Judges: [**1] BARBARA J. ROTHSTEIN, CHIEF UNITED STATES DISTRICT JUDGE

Opinion by: BARBARA J. ROTHSTEIN

Opinion

[*1488] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

THIS MATTER comes before the court on a motion under *Fed. R. Civ. P. 12(b)(6)* by defendant Pacific 10 Conference to dismiss plaintiffs' complaint. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

Plaintiffs in this case are five student athletes ("the players") on the football team at the University of Washington ("UW"), two [*1489] football souvenir sellers who have licensing agreements with the UW, and a holder of a season ticket ("ticket holder") to UW football games.

Defendant Pacific 10 Conference ("Pac-10") is a private voluntary association of ten universities from the western United States, including the UW. The purpose of the association is to establish an athletic program, administer intercollegiate athletic events, and stage conference tournaments. The Pac-10 is in turn a member of the National Collegiate Athletic Association ("NCAA"), a national association of universities and colleges which supervises, [**2] promotes, and sanctions athletic competition among its members. Both the Pac-10 and the NCAA promulgate and enforce rules governing the conduct of their members' athletic programs.

In August of 1993, the Pac-10 assessed penalties against the UW for infractions of NCAA rules governing the conduct of the football program. The penalties consisted of a ban for one year on receiving revenue from television coverage of football games and other sanctions lasting two years, including a probationary period, a ban on participation in bowl games, and a reduction in the number of available scholarships and permitted recruiting visits.

Plaintiffs brought this lawsuit alleging that the true purpose of the penalties was not to punish rules infractions, but to cripple the UW's ability to compete against the rest of the universities belonging to the Pac-10. Plaintiffs accordingly seek damages and injunctive relief on a variety of claims including violation of federal antitrust laws pursuant to the Sherman Act, *15 U.S.C. §§ 1, 4* and *16*; the Washington Consumer Protection Act, *RCW 19.86.020* and -.030; breach of contract; tortious interference with a business expectancy; and deprivation of state constitutional [**3] due process guarantees.

The Pac-10 now moves to dismiss all of plaintiffs' claims on numerous grounds.

II. LEGAL ANALYSIS

A. STANDARD FOR MOTIONS TO DISMISS

The Pac-10 moves to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#). [HN1](#)[↑] In considering such motions, the court construes the complaint in the light most favorable to the plaintiff and takes its allegations as true. See [Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 \(1983\)](#); [Brian Clewer, Inc. v. Pan American World Airways, Inc., 674 F. Supp. 782, 785 \(C.D. Cal. 1986\)](#). The court, however, still examines whether the allegations in the complaint follow from the description of the facts alleged by the plaintiff. See [Clewer, 674 F. Supp. at 785](#).

B. CONSTITUTIONAL STANDING

The Pac-10 first argues that plaintiffs lack standing to bring suit under Article III of the United States Constitution. The Supreme Court recently summarized [HN2](#)[↑] the three-part test for determining whether constitutional standing exists: (1) plaintiff must have suffered an injury in fact, i.e., an invasion of a legally protected, particularized, nonhypothetical interest; (2) there must be a causal connection between [**4](#) the injury and the conduct complained of; and (3) it must be likely, not speculative, that the injury will be remedied by a favorable decision. [Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 \(1992\)](#).

The Pac-10 stresses two considerations which it feels plaintiffs fail to meet. First, it contends that plaintiffs are actually asserting the rights and interests of the UW, which was the entity penalized, in order to get relief from a perceived injury to themselves. See [Warth v. Seldin, 422 U.S. 490, 509, 45 L. Ed. 2d 343, 95 S. Ct. 2197 \(1975\)](#). Plaintiffs do not dispute that they have no standing to assert the UW's claims. See [McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1341 \(5th Cir. 1988\)](#). But they insist that they are asserting their own rights based on injuries to their own separately protected interests: the players with their right to compete in a bowl game; the ticket holder with his right to enjoy the unhampered competitiveness of the UW football team; and the souvenir sellers with their right to unfettered sales of football paraphernalia, including bowl game souvenirs. The court concludes that plaintiffs [**5](#) [\[*1490\]](#) have alleged their own rights separate and distinct from those of the UW.

Second, the Pac-10 argues that plaintiffs cannot show that their injuries are likely to be redressed by a favorable decision. The relief plaintiffs seek is injunctive relief stopping the Pac-10 from imposing the sanctions and treble damages (except for the ticket holder, who seeks no money damages). The court finds that plaintiffs have shown a sufficient relationship between the alleged injuries and the relief sought to survive this threshold requirement for establishing constitutional standing.

C. CLAYTON ACT ANTITRUST STANDING -- DAMAGES ACTION

[HN3](#)[↑] [Section 4](#) of the Clayton Act allows the recovery of treble damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." [15 U.S.C. § 15](#). [HN4](#)[↑] To bring a private action under [§ 4](#), a plaintiff must establish that it has "antitrust standing." It may do so by showing that "it is a proper party to bring a private antitrust action." [Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 535 n.31, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#) ("AGC"); see also [Blue Shield](#) [\[*61\]](#) [of Va., Inc. v. McCready, 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 \(1982\)](#). The Supreme Court has listed [HN5](#)[↑] five factors to be considered in determining if a plaintiff is a proper party to bring suit:

- (1) The nature of the plaintiff's claimed injury;
- (2) The directness of the injury;
- (3) The specific intent of the alleged conspirators;
- (4) The character of the damages, including the risk of duplicative recovery, the complexity of apportionment, and their speculative character; and
- (5) The existence of other, more appropriate plaintiffs.

See [AGC, 459 U.S. at 537-45](#); [R.C. Dick Geothermal Corp. v. Thermogenics Inc., 890 F.2d 139, 146 \(9th Cir. 1989\)](#) (en banc).

HN6 The first factor, which focuses on whether an "antitrust injury" has been alleged, is a threshold requirement for antitrust standing. See [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#); [Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158 \(9th Cir. 1991\)](#). If the plaintiff satisfies the requirement of antitrust injury, the court then must examine the other four AGC factors. None of those remaining factors controls the decision [\[**7\]](#) and "a court may find standing if the balance of factors so instructs." [Los Angeles Memorial Coliseum Comm'n v. National Football League, 791 F.2d 1356, 1363 \(9th Cir. 1986\)](#), cert. denied, 484 U.S. 826, 98 L. Ed. 2d 53, 108 S. Ct. 92 (1987). It is according to the AGC factors that the court analyzes the claims of the players and souvenir sellers in this case.¹

1. Antitrust Injury

HN7 In determining if a plaintiff has alleged an antitrust injury, the courts generally look at whether it is a participant in the same market as the alleged wrongdoer, either as a consumer or as a competitor. See [AGC, 459 U.S. at 538-39](#); [Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 540 \(9th Cir. 1987\)](#). The players and souvenir sellers concede that they are not consumers or competitors. They note, however, that **HN8** the Clayton Act "does not confine its protection [\[**8\]](#) to consumers, or to purchasers, or to competitors" [McCready, 457 U.S. at 472](#) (quoting [Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236, 92 L. Ed. 1328, 68 S. Ct. 996 \(1948\)](#)). The Supreme Court stated in *McCready* that "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](#) (quoting [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#)). In keeping [\[*1491\]](#) with *McCready*, the courts have allowed suits by plaintiffs who are not consumers or competitors, so long as they allege a direct injury. See, e.g., [Radovich v. National Football League, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390 \(1957\)](#); [Ostrofe v. H.S. Crocker, Inc., 740 F.2d 739 \(9th Cir. 1984\)](#).

In this case, the players have alleged a direct injury. The complaint alleges that the Pac-10 intended to harm both the UW as an institution and the UW football team. See Compl. at PP 46-51.² The Pac-10, however, insists that any harm was suffered only [\[**9\]](#) by the UW. This contention misses the mark. The Pac-10 did not limit the sanctions to the UW itself. It also chose to penalize the players by banning them from bowl appearances. The players have thus alleged an antitrust injury for the purposes of a [§ 4](#) action.

Unlike the players, the souvenir sellers do not allege that they were directly harmed. They instead claim that their harm resulted from the misfortunes of the team, which in turn came about because of the Pac-10's actions. The situation of the souvenir sellers thus parallels that of the travel agents in *Clewel*, who claimed injuries due to the collapse of an airline. See [674 F. Supp. 782](#). In *Clewel*, the court held that those damages were indirect and derivative. Here, the souvenir sellers' injuries are similarly remote. The souvenir sellers, therefore, have failed to meet the threshold requirement [\[**10\]](#) of an antitrust injury and may not sue for damages under [§ 4](#) of the Clayton Act.³

2. Directness of the Injury

HN9 A direct injury is one close in the "chain of causation" to the violation. [AGC, 459 U.S. at 450](#). In this case, the players allege that the Pac-10's antitrust violations directly deprived them of the right to compete in a bowl game. The Pac-10 argues that this injury is derivative of the injury to the UW and thus too remote. It analogizes the

¹The ticket holder seeks injunctive relief and not damages. Therefore, only the standing of the players and souvenir sellers to bring an antitrust damages action is discussed below.

²As plaintiffs note, the UW football team and the players cannot logically be separated from one another. Pls.' Mem. in Opp. to Mot. to Dismiss at 14.

³The court's holding makes it unnecessary to analyze the claims of the souvenir sellers under the remaining AGC factors.

players to employees of the UW and cites cases denying antitrust standing to employees of an allegedly injured employer. See, e.g., *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 528 n.5, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991); AGC, 459 U.S. at 540-41; *Eagle*, 812 F.2d at 541-42 (9th Cir. 1987); *Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc.*, 788 F.2d 574, 579 (9th Cir. 1986). [**11] Yet in each of those cases there was only harm to the employer, from which the employees' harm derived. Because the players have alleged their own direct injuries, apart from those of the UW, the "derivative harm" cases cited by the Pac-10 are distinguishable and they do not weigh against a finding of antitrust standing in this case.⁴

3. Specific Intent of the Alleged Conspirators

The Pac-10 argues that this factor weighs against standing for the players. It relies on cases which state that the specific intent to harm a competitor does not constitute a specific intent to harm the competitor's employees. Reply in Supp. of Def.'s Mot. to Dismiss at 6. As noted above, those cases are distinguishable because they each involve claims of *derivative harm*. Here, the players have claimed [**12] *direct harm*. Therefore, they have alleged a specific intent by a conspirator, the Pac-10.

4. Character of the Damages

The Pac-10 asserts that the "highly speculative" character of the players' alleged damages weighs against standing. See Mem. in Supp. of Def.'s Mot. to Dismiss at 13-14. It is true that the players' damages for the 1994 season are somewhat speculative, since the season has not yet begun. The damages for the 1993 season, however, may be calculated [*1492] with more precision. The 1993 record of the team indicates that it would have been invited to a bowl; thus, the players' claimed loss of the benefits associated with playing in a bowl game (airfare, hotel expenses and the like) "can be ascertained to the penny." *McCready*, 457 U.S. at 475.

The Pac-10 further insists that the players' damages are duplicative of the harm suffered by the UW and that calculating the amount would entail complex apportionment. Mem. in Supp. of Def.'s Mot. to Dismiss at 14. The court is not persuaded that those problems are present here. The players' damages are limited to benefits that non-players cannot claim. Moreover, separating those damages from the losses of the UW would not [**13] be difficult. In all, the damages calculation in this case will not lead to what the Supreme Court feared, which was "complicated proceedings involving massive evidence and complicated theories." *AGC*, 459 U.S. at 544.

5. Existence of Other, More Appropriate Plaintiffs

The Pac-10 contends that the UW is a more appropriate party to bring suit because it has the "most important stake" involved. Mem. in Supp. of Def.'s Mot. to Dismiss at 9. Even if this claim were true, HN10 the existence of another possible plaintiff does not automatically mean that other parties should be denied standing. In AGC, the Supreme Court was concerned about the vindication of the public interest by private antitrust enforcement. The Court emphasized that denying standing to the more remote party in that case was "not likely to leave a significant antitrust violation undetected or unremedied." *AGC*, 459 U.S. at 542; see also *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1163-64 (9th Cir. 1991) (noting that the purpose of the "more appropriate plaintiff" analysis is to ensure that antitrust violations will be identified and remedied), cert. denied, 504 U.S. 913, [**14] 112 S. Ct. 1947, 118 L. Ed. 2d 552 (1992). The plaintiffs have pointed out that the UW has strong incentives not to sue the Pac-10. See Pls.' Mem. in Opp. to Mot. to Dismiss at 16. If the players were denied standing to bring suit, any antitrust violation would go unremedied.

On balance, the AGC factors weigh in favor of antitrust standing for the players. They have alleged a direct, antitrust injury and a specific intent to harm to them. Most of their damages are readily calculable and not speculative. Finally, denying standing to the players might frustrate the detection and punishment of an antitrust violation. For these reasons, the court finds that the players have standing to sue under § 4.

⁴ The more analogous case here is *Ostrofe*, where the court held that an employee had antitrust standing because he was a direct victim of a conspiracy to restrain interstate trade and commerce. *740 F.2d at 742-43*.

D. CLAYTON ACT ANTITRUST STANDING -- INJUNCTIVE RELIEF

HN11 [↑] The requirements for standing when a plaintiff seeks injunctive relief under [§ 16](#) of the Clayton Act, [15 U.S.C. § 26](#), are less stringent than when it requests damages under [§ 4](#). [Cargill, Inc. v. Monfort of Colo., Inc.](#), [479 U.S. 104, 111 n.6, 93 L. Ed. 2d 427, 107 S. Ct. 484 \(1986\)](#). Plaintiffs still must show, however, that: (1) they have alleged an antitrust injury; (2) their injury is cognizable in equity; and [**15] (3) their injury is the proximate result of the alleged antitrust violation. See [id. at 111](#); [Lucas v. Bechtel Corp.](#), [800 F.2d 839, 847 \(9th Cir. 1986\)](#); [Justice v. National Collegiate Athletic Ass'n](#), [577 F. Supp. 356, 375 \(D. Ariz. 1983\)](#). The allegation of antitrust injury is a threshold requirement. [Cargill](#), [479 U.S. at 111](#).

1. Antitrust Injury

The same analysis for claimed antitrust injuries under [§ 4](#) applies to [§ 16](#). See [id. at 113](#) (noting that [§ 4](#) and [§ 16](#) are complementary remedies for the same injuries). Thus, even though the players are not competitors with the Pac-10 or consumers of the product, they have alleged an antitrust injury for the purposes of [§ 16](#) by claiming that they were direct victims of the violations. By contrast, the souvenir sellers have not alleged the required antitrust injury because they have not claimed to be either consumers, competitors, or direct victims. Under [Cargill](#), the souvenir sellers have failed to meet an essential element for [§ 16](#) standing.

[*1493] 2. Cognizability in Equity and Proximate Cause

HN12 [↑] Plaintiffs asking for equitable relief must demonstrate that there is a significant threat of irreparable injury. [**16] [Lucas, 800 F.2d at 847](#). Allegations of monetary damages alone will not suffice for a showing of irreparable harm. *Id.* In this case, the ticket holder alleges only monetary damages. Thus, he has failed to demonstrate a significant threat of irreparable injury and is not a proper party to sue for injunctive relief under [§ 16](#).⁵

While the losses of the players for the 1993 season may also be reduced to a monetary figure, their claims regarding the right to attend a bowl game in 1994 cannot be quantified. The latter are cognizable in equity. In addition, the players' allegations meet the proximate cause prong. **HN13** [↑] Courts use the proximate cause test to ensure that injunctive relief, if granted, will prevent the injury from occurring. [Justice](#), [577 F. Supp. at \[**17\] 377](#). The threatened injury here may be redressed by injunctive relief.

In sum, the souvenir sellers and the ticket holder lack standing to sue under [§ 16](#) because they have failed to fulfill one of the three required elements. The players, on the other hand, have met all the requirements. As a result, they have standing to sue for injunctive relief under [§ 16](#) of the Clayton Act.

E. WASHINGTON CONSUMER PROTECTION ACT CLAIMS

1. Antitrust Claims Under [RCW 19.86.020](#) and -.030

Plaintiffs bring suit under **HN14** [↑] [RCW 19.86.030](#) of the Washington Consumer Protection Act ("CPA"), which prohibits contracts or conspiracies in restraint of trade. This provision is the state equivalent of the Sherman Act [§ 1, 15 U.S.C. § 1](#). Plaintiffs also allege claims under **HN15** [↑] the portion of [RCW 19.86.020](#) prohibiting unfair methods of competition. That provision is equivalent to Section 5(a)(1) of the Federal Trade Commission Act, [15 U.S.C. § 45\(a\)\(1\)](#), which prohibits conduct in violation of Sherman Act [§§ 1](#) and [2](#). [Seven Gables Corp. v. Sterling Recreation Org. Co.](#), 1987-1 Trade Cas. P 67,637 at 60,826 n.28 (W.D. Wash. 1987).

The state courts look to federal precedent in applying these analogous [**18] state statutes. See, e.g., [Consol. Dairy Prod. Co. v. Bar-T Ranch Dairy, Inc.](#), [97 Wash. 2d 167, 179, 642 P.2d 1240 \(1982\)](#), in which the Washington Supreme Court used the then applicable federal "target area" standing analysis in considering claims brought under

⁵ This holding is dispositive of the ticket holder's claim that he has standing. See [Lucas, 800 F.2d at 847](#). It is not necessary, therefore, for the court to consider the issues of antitrust injury and proximate cause as to the ticket holder.

[RCW 19.86.020](#) and -.040. See also [RCW 19.86.020](#), which provides that it is the legislature's intent to have state courts be guided by federal decisions interpreting the federal statutes on similar matters.

Applying the federal standards set forth above for determining the existence of standing to plaintiffs' claims under [RCW 19.86.030](#) and the unfair methods of competition provision of [RCW 19.86.020](#), the court concludes that the same result must be reached. The claims brought by the souvenir sellers and ticket holder must be dismissed for lack of antitrust standing. Because the players have established antitrust standing, the Pac-10's motion to dismiss their claims under [RCW 19.86.030](#) and the unfair methods of competition provision of [RCW 19.86.020](#) must be denied.

2. Failure to Allege Elements of [RCW 19.86.020](#) Violation

In addition to alleging a cause of action under the unfair methods of competition portion of [**19] [RCW 19.86.020](#), plaintiffs also allege that the Pac-10 violated that portion of the statute prohibiting unfair or deceptive acts or practices. [HN16](#)[¹⁵] In order to prove the latter claim, plaintiffs must establish five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. [Hangman Ridge Training Inst¹⁴⁹⁴ Stables v. Safeco Title Ins. Co., 105 Wash. 2d 778, 780, 719 P.2d 531 \(1986\)](#).

Regarding the first element, plaintiffs allege that the Pac-10 failed to administer its own rules in good faith and to comply with NCAA rules. The court concludes that plaintiffs do not allege the kind of misleading or fraudulent behavior which [RCW 19.86.020](#) was intended to reach. Therefore, plaintiffs have failed to state a cause of action under that portion of the statute.

F. THIRD-PARTY BENEFICIARY CONTRACT CLAIM

The players allege breach of contract claims based on the theory that they are third-party beneficiaries of a contract between the Pac-10 and its member institutions. This allegation is based on some language in the contract stating that the purpose of the Pac-10 [**20] is to provide its student athletes with "quality competitive opportunities" and to conduct its affairs so as to enrich the athletic and academic experiences of its student athletes.

[HN17](#)[¹⁶] In order to create a third-party beneficiary contract, the parties must intend that the promisor assume a direct obligation to the third party, and that performance of that obligation necessarily benefits that party. [Postlewait Constr., Inc. v. Great American Ins., 106 Wash. 2d 96, 99-101, 720 P.2d 805 \(1986\)](#). Thus, [HN18](#)[¹⁷] one does not qualify as a third-party beneficiary of a contract merely because one is an incidental beneficiary of the performance of a contract or because the promisor had a general desire to advance the interests of a third party. *Id.* As *Postlewait* holds, "the key is not whether the contracting parties had an altruistic motive or desire to benefit the third party, but rather, 'whether performance under the contract would necessarily and directly benefit that party.'" *Id. at 99* (quoting [Lonsdale v. Chesterfield, 99 Wash. 2d 353, 361, 662 P.2d 385 \(1983\)](#)). See also [Del Guzzi Constr. v. Global Northwest, 105 Wash. 2d 878, 887, 719 P.2d 120 \(1986\)](#), in which the court held [**21] that the mere fact that a construction project required minority participation in order to receive federal funding did not manifest an intent by the county or the general contractor to assume a direct legal obligation to the minority subcontractor.

The court concludes that the players have failed to state a cause of action for breach of contract on a third-party beneficiary theory. The only evidence before the court consists of vague, hortatory pronouncements in the contract between the Pac-10 and its member schools. By themselves, these pronouncements are not sufficient to support the players' claims that the Pac-10 intended to assume a direct contractual obligation to every football player on a Pac-10 team.

G. TORTIOUS INTERFERENCE WITH SOUVENIR SELLERS' CONTRACTS

The souvenir sellers allege that the Pac-10 intentionally interfered with their business expectancies involving future sales of UW souvenirs and bowl products. The court agrees with the Pac-10 that the souvenir sellers have failed to state a claim.

893 F. Supp. 1485, *1494L 1994 U.S. Dist. LEXIS 20495, **21

HN19 [↑] In order to qualify as tortious, the alleged interference must be intentional, not merely an incidental, indirect result of another act. *Pleas v. City of Seattle*, [*22] 112 Wash. 2d 794, 804, 774 P.2d 1158 (1989); *Titus v. Tacoma Smeltermen's Union Local No. 25*, 62 Wash. 2d 461, 465, 383 P.2d 504 (1963); *Restatement (2d) of Torts*, §§ 766, 766B, 767. In this case, the souvenir sellers themselves admit that they "do not contend that the Pac-10 set out to harm the business plaintiffs, though that harm was an inevitable consequence of its acts." Pls.' Mem. in Opp. to Mot. to Dismiss at 14. In other words, the souvenir sellers acknowledge that any harm they suffered was an incidental, indirect result of the Pac-10's decision to assess penalties against the UW. These circumstances cannot support a cause of action for tortious interference with a business expectancy.

H. THE PLAYERS' STATE CONSTITUTIONAL CLAIMS

HN20 [↑] In order to establish their state constitutional claims for deprivation of due process, the players must establish that state action deprived them of a constitutionally [*1495] protected right or property interest without due process. *Kuehn v. Renton School Dist.*, 103 Wash. 2d 594, 598, 694 P.2d 1078 (1985).

On the issue of whether state action is involved, *NCAA v. Tarkanian*, 488 U.S. 179, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988), is dispositive. [*23] In that case, the Supreme Court held that the NCAA's disciplinary action against a state university did not constitute state action. The players' efforts to distinguish *Tarkanian* are unavailing. Moreover, the court finds that the players have failed to show that they were deprived of any constitutionally protected right or property interest. Their hopes and expectations of participating in a bowl game do not constitute the sort of entitlement required to support a constitutional claim. See, e.g., *Parish v. NCAA*, 506 F.2d 1028, 1034 (5th Cir. 1975); *Hawkins v. NCAA*, 652 F. Supp. 602, 610 (C.D. Ill. 1987).

III. CONCLUSION

Defendant's motion is GRANTED in part and DENIED in part. All of plaintiffs' claims are dismissed with the exception of the players' federal antitrust claims and their state claims under *RCW 19.86.020* and -.030. As to those claims, the court finds that the players have stated a cause of action as to which relief could be granted.

DATED at Seattle, Washington this 20th day of May, 1994.

BARBARA J. ROTHSTEIN

CHIEF UNITED STATES DISTRICT JUDGE

End of Document

Petrocco v. Dover Gen. Hosp. & Med. Ctr.

Superior Court of New Jersey, Appellate Division

April 20, 1994, Argued ; May 20, 1994, Decided

A-4378-92T5

Reporter

273 N.J. Super. 501 *; 642 A.2d 1016 **; 1994 N.J. Super. LEXIS 254 ***; 1994-2 Trade Cas. (CCH) P70,847

ERNEST S. PETROCCO, D.C., PLAINTIFF-APPELLANT, v. DOVER GENERAL HOSPITAL AND MEDICAL CENTER; BOARD OF TRUSTEES OF DOVER GENERAL HOSPITAL; EXECUTIVE COMMITTEE OF DOVER GENERAL HOSPITAL; WAYNE C. SCHIFFNER, PRESIDENT OF DOVER GENERAL HOSPITAL, DEFENDANTS-RESPONDENTS, v. NEW JERSEY HOSPITAL ASSOCIATION AND THE MEDICAL SOCIETY OF NEW JERSEY, DEFENDANTS-RESPONDENTS-INTERVENORS.

Subsequent History: [***1] Approved for Publication June 13, 1994.

Prior History: On appeal from the Superior Court of New Jersey, Chancery Division, Morris County.

Core Terms

chiropractors, bylaws, patients, staff, chiropractic, staff privileges, medical staff, antitrust, staff member, medical doctor, health-care, due process, conspiracy, privileges, summary judgment, qualifications, practitioners, intervenors, hospital staff, recommendation, defamation, defamatory, decisions, courts, cases, constitutional due process, general hospital, psychiatric, osteopathy, profession

LexisNexis® Headnotes

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN1 [+] Elements, Color of State Law

A private hospital lacks the indicia of "state action" necessary to impose the duty to provide procedural due process to those who are refused staff privileges.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN2 Procedural Due Process, Scope of Protection

While aggrieved physicians may have no right to constitutional due process, they are entitled to the lesser standard of "fundamental fairness," i.e., that their request for privileges be considered according to procedures that adequately notify them of the hospital's proposed action and that provide a reasonable opportunity to respond.

Healthcare Law > Business Administration & Organization > Judicial Review > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN3 Business Administration & Organization, Judicial Review

If a hospital policy decision reasonably serves an evident public-health purpose, it will be sustained, even though it may have a discriminatory effect. Because an adverse or discriminatory impact upon some individual doctors or class of doctors is inevitable when a closed staff-admissions policy is adopted by a hospital, it will be upheld if the public-health objective is rationally advanced by the hospital's staff admissions policy. However, if it cannot be shown that a restrictive staff-admissions policy reasonably furthers a legitimate health-care objective, then the policy merely constitutes an unjustified vehicle of discrimination and is invalid.

Healthcare Law > Business Administration & Organization > Judicial Review > General Overview

HN4 Business Administration & Organization, Judicial Review

The standard applied to a hospital's decision is even more deferential than the traditional "substantial competent credible evidence" test of agency decisions; rather, it is whether the decision was based on "sufficient reliable evidence, including hearsay." And a more tolerant test is used where the decision was based on broad institutional policy as opposed to adjudication in an individual case.

Healthcare Law > Business Administration & Organization > Judicial Review > General Overview

HN5 Business Administration & Organization, Judicial Review

When the decision that is subject to judicial review involves the validity of a broad, general hospital policy determination, rather than a particularized, quasi-adjudicative decision in which a general policy is applied in an individual case, even greater informality can be tolerated. A hospital determining broad policy matters should be able to pursue all reasonable means to inform itself and to draw from a wide array of sources to reach an informed decision.

Healthcare Law > ... > Actions Against Facilities > Standards of Care > General Overview

Healthcare Law > Business Administration & Organization > Judicial Review > General Overview

HN6 Actions Against Facilities, Standards of Care

In developing a broad general policy, a hospital need not provide public notice, conduct formal proceedings, allow general participation, or develop a formal record in support of a managerial determination. Thus, a hospital decision of this character will be viewed favorably if it is reached in the normal and regular course of conducting the affairs of

the hospital and is based on adequate information, regardless of form, origin, or authorship, that is generally considered reasonable and reliable by professional persons responsibly involved in the health-care field.

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

HN7 Business Administration & Organization, Facility & Personnel Licensing

No license will be granted to a hospital facility unless the commissioner of health is satisfied that it is adequately prepared to provide all services and care required by the residents of the community wherein it is located. [N.J. Stat. Ann. § 30:11-1](#).

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN8 Business Administration & Organization, Facility & Personnel Licensing

[N.J. Stat. Ann. § 30:11-1](#) is part of a licensing scheme for hospitals. It grants no remedies to individuals who have not been allowed to apply for staff privileges.

Torts > Intentional Torts > Defamation > Libel

Torts > Intentional Torts > Defamation > Procedural Matters

HN9 Defamation, Libel

The threshold inquiry in a libel action is whether defendant published a false statement of fact which was reasonably susceptible of a defamatory meaning as to plaintiff. Each of these preliminary questions must be decided by the court as a question of law.

Torts > ... > Defenses > Privileges > Qualified Privileges

Torts > ... > Defenses > Privileges > General Overview

HN10 Privileges, Qualified Privileges

New Jersey courts recognize a qualified privilege to make defamatory statements on matters lying within the publisher's interest or duty, where those statements are made to one having a corresponding interest or duty.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN11[] Practices Governed by Per Se Rule, Boycotts

See [N.J. Stat. Ann. § 56:9-3.](#)

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

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

HN12[] Per Se Rule & Rule of Reason, Sherman Act

In analyzing claims of anticompetitive conduct under [N.J. Stat. Ann. § 56:9-3](#) and the cognate provision of the federal act, [15 U.S.C.S. § 1](#), New Jersey courts apply one of two rules: (1) the "per se rule" -- requiring no proof of the market power of the offending parties, or (2) the "rule of reason" -- calling for an assessment of the economic impact on the market.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN13[] Antitrust Actions, Facilities

A hospital is incapable of conspiring with its staff under **antitrust law** in deciding whether to grant staff privileges.

Counsel: *Eugene P. Dolan* argued the cause for appellant (*Mr. Dolan*, on the brief).

Andrew F. McBride, III, argued the cause for respondents (*Kalison & McBride*, attorneys; *Brian M. Foley*, on the brief).

Todd C. Brower argued the cause for respondents-intervenors (*Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone*, attorneys; *Burton L. Eichler* and *Todd C. Brower*, of counsel; *Mr. Brower*, on the brief).

Judges: Before Judges KING, HAVEY and Arnold M. STEIN. The opinion of the court was delivered by KING, P.J.A.D.

Opinion by: KING

Opinion

[*506] [1018]** The opinion of the court was delivered by

KING, P.J.A.D.

Plaintiff, a chiropractor, appeals from a judgment of the Chancery Division denying his claim for staff privileges at Dover General Hospital and Medical Center, an acute-care private, general hospital. The hospital's bylaws did not provide for staff privileges for chiropractors and the institution declined to process plaintiff's application. The hospital board appointed an ad hoc **[*507]** committee, all non-physician board members, to consider whether to amend the bylaws. That committee decided there was no need to open the staff to chiropractors and the **[***2]** board agreed. Under our highly deferential standard of review of a hospital's decision on how to structure its staff, we affirm the judgment.

[**1019] I

Sometime in 1988 the plaintiff requested that the hospital send him an application for staff privileges. A hospital employee told him by telephone that chiropractors were not included as staff members under the bylaws of the hospital. On December 5, 1988 plaintiff wrote to the president of the hospital, asking him for a clarification of this policy. He confirmed in writing that the hospital's bylaws did not allow staff membership for chiropractors.

By letter dated February 22, 1989 plaintiff advised that he was interested in knowing the procedure for changing the bylaws. On March 21, 1989 the president replied and offered this rationale for the exclusion of chiropractors:

Dover General Hospital & Medical Center is not equipped or designed to handle patients requiring chiropractic care, nor is the Hospital in a position to effectively monitor the quality of chiropractic care which you propose to provide. Moreover, there currently is not a demonstrated need for chiropractic services to be provided in an acute care setting within our service [***3] area. Consequently, an application for membership to our staff cannot be provided.

Unsatisfied, plaintiff continued to press his position upon the hospital officials for staff admission.

Prompted in part by plaintiff's inquiries, in March 1990 the hospital administration decided to create an ad hoc committee to consider the need for amending the bylaws to add chiropractors to the types of practitioners entitled to staff privileges. A four-member, non-physician committee was appointed. As part of its investigation, the committee requested information from two chiropractic associations. One did not respond; the other provided articles and materials relevant to other hospitals' experiences with chiropractors on hospital staffs. The committee also reviewed materials provided by the hospital's counsel, consisting of an [*508] article and a legal memorandum favoring exclusion of chiropractors. The committee met twice to discuss these materials.

On September 27, 1990 the committee issued its report advising the hospital's board of trustees of its unanimous vote to recommend that the bylaws not be revised to permit chiropractors staff privileges. The committee made thirteen findings, which we [***4] summarize:

1. New Jersey statutory law did not require that hospitals admit chiropractors;
2. No acute-care hospital in New Jersey had chiropractors on its staff;
3. N.J.A.C. 13:44E-1.1 defined chiropractic as "that discipline whose methodology is the adjustment and manipulation of the articulations of the spine and related structures and whose purpose is the relief of certain abnormal clinical conditions of the human body causing discomfort resulting from the impingement upon associated nerves;"
4. If a chiropractor determined that a patient had a problem not treatable by a chiropractor, the chiropractor was required by law to refer the patient to a medical doctor;
5. Hospital bylaws required that each patient be examined by a doctor of medicine or osteopathy;
6. Under hospital bylaws the treatment of medical conditions had to be directed by a doctor of medicine or osteopathy;
7. The hospital's patients "generally suffer from an acute medical condition requiring medical and/or surgical care, including the use of pharmacological methods, none of which may be prescribed by chiropractors;"
8. The hospital had no record of any patient or staff member ever having requested chiropractic [***5] care in the hospital;
9. The hospital had no administrative apparatus in place for the evaluation and approval of admission of chiropractors;
10. "The nature of chiropractic evaluation and treatment is fundamentally different from the evaluation and treatment of patients offered by doctors of medicine and osteopathy in acute care facilities such as the Hospital;"
11. The addition of chiropractors to the staff might expose the hospital to additional liability risks;
12. Chiropractors were authorized to refer their patients to the hospital's x-ray and laboratory facilities for testing, the results of which were sent to the chiropractor;

13. Chiropractors were authorized to refer their patients to the hospital's medical staff for diagnosis and treatment.

Based upon these findings, the committee reached these conclusions:

- [*509] 1. The addition of chiropractors to the Hospital's Medical Staff is not required by law.
- 2. The addition of chiropractors to the Hospital's Medical Staff is not necessary for the Hospital to carry out its mission of providing acute care services to the community.
- 3. Any benefits obtained by admitting chiropractors to the Hospital's Medical Staff would be enjoyed [***6] by an insignificant number of patients, and would not be necessary to the provision of appropriate acute care services by the Hospital.
- 4. The admission of chiropractors to the Hospital's Medical Staff would result in substantial direct and indirect costs and an adverse effect on Hospital operations which would far outweigh any resulting benefit.
- 5. Although chiropractors might enjoy various benefits from admission to the Hospital's Medical Staff, the same would be true of many other health care professionals, such as nutritionists, physical therapists and psychiatric nurses. The Hospital's decision to expand its Medical Staff to include new categories of professionals must be based upon net benefit to the mission of the Hospital and the patients it serves.
- 6. We concur that chiropractors currently have the right and opportunity to refer their patients to Hospital facilities for x-rays and laboratory tests, and can refer patients to members of the Hospital's Medical Staff for all necessary, non-chiropractic diagnosis or treatment.

At a meeting on September 27, 1990 the hospital board of trustees voted to accept the committee's recommendation. The vote was ten "yes," zero "no," and [***7] three abstentions.

In July 1991 plaintiff's counsel requested and was supplied with the hospital's bylaws. The bylaws defined "medical staff" as follows: "[A]ll doctors of medicine, osteopathy, dentistry and podiatry licensed to practice in the State of New Jersey and who are privileged to attend patients at Dover General Hospital." Staff membership was divided into three fields: medical, dental, and podiatric. All applicants for the medical staff were required to be "legally licensed to practice medicine and surgery" in New Jersey.

The bylaws set forth detailed procedures for the processing of applications for the medical staff. In addition, the bylaws granted a right to a formal hearing to any applicant receiving an unfavorable recommendation. If an applicant failed to prevail after a hearing, the applicant had the right to appeal to the board of trustees.

[*510] On August 9, 1991 plaintiff requested a hearing under Article 13.03 of the bylaws. On September 19, 1991 the hospital denied plaintiff's request on the ground that as a chiropractor, he did not qualify as an "applicant." In response to a request for further clarification, on October 25, 1991 the hospital again explained that the [***8] bylaws afforded no procedural rights to chiropractors. In justification of its decision not to amend its bylaws to include chiropractors, the hospital explained it had "determined that it is not in the best interests of the Hospital and its patients to expand the medical staff to include chiropractors."

II

In January 1992 plaintiff filed a complaint in the Chancery Division and an order to show cause against defendant-hospital, its board of trustees, its executive committee, and its president. Plaintiff alleged that he had been damaged by the hospital's refusal to allow him to apply for staff privileges. He expressed his legal theories in five counts: (1) breach of contract under the hospital's bylaws; (2) common-law due process; (3) [**1021] constitutional due process; (4) defamation; and (5) the New Jersey Antitrust Act.

The Medical Society of New Jersey and the New Jersey Hospital Association successfully moved for permission to intervene and to participate "as if" they "had been named as original party defendants." The hospital defendants moved for summary judgment and plaintiff filed a cross-motion for summary judgment. The hospital defendants prevailed.

Plaintiff raises these points [***9] on this appeal:

1. THE JUDGE ERRED IN FINDING THAT PLAINTIFF WAS NOT ENTITLED TO HAVE HIS APPLICATION CONSIDERED UNDER THE PROCEDURAL SAFEGUARDS OF THE HOSPITAL BYLAWS OR OF CONSTITUTIONAL DUE PROCESS.
2. DISPUTED ISSUES OF FACT PREVENTED SUMMARY JUDGMENT.
3. N.J.S.A. 30:11-1 REQUIRES A HOSPITAL TO OFFER CHIROPRACTIC SERVICES. [*511]
4. THE JUDGE ERRED ON THE LAW IN DISMISSING THE DEFAMATION AND ANTITRUST CLAIMS.

III

Plaintiff's principal contention is a denial of procedural due process. As the sources of his alleged right to due process, he invokes the Fourteenth Amendment and the hospital's bylaws. Plaintiff claims that he has a federal constitutional right to have his application processed and considered on its individual merits. He also claims a right to a hearing if the hospital's initial decision is adverse.

Judge Stanton held that plaintiff had no individualized rights to procedural due process or a hearing, because there had been no adjudication of plaintiff's personal qualifications. The judge reasoned:

The decision made by the hospital here was not a decision which involved the evaluation of the credentials and qualifications of an individual practitioner who [***10] was generically eligible to apply for membership on the hospital medical staff. It was not a quasi-judicial decision which involved the evaluation of this particular physician, Dr. Petrocco. It was really a management or policy decision as to whether a broad class of people should be eligible to be on the medical treatment staff of the hospital.

And it seems to me that because it was that kind of a decision that due process concepts do not apply. The physician was not, the individual person who wanted to apply, in this case Dr. Petrocco, was not entitled to have a hearing before the hospital at which he could question witnesses, question evidence, present his own evidence, present his own arguments, make arguments against arguments on the other side. He was not entitled to that kind of a hearing because there was no effort being made by the hospital to evaluate his individual qualifications and to pass either favorably or adversely on his qualifications and on his skills.

Instead, the hospital was saying as a matter of policy it did not think that there was a need for it or a utility for it to have this whole class of practitioners.

So in my judgment, [the decision] didn't even involve [***11] due process determinations.

The most plaintiff was entitled to receive, the judge observed, was the assurance that the hospital followed its bylaws and that those bylaws reasonably served the public interest. The judge then applied the appropriate standard of review to the hospital's decision not to amend its bylaws to include chiropractors and ruled against plaintiff.

[*512] We agree that plaintiff had no individualized right to procedural due process. [HN1](#) A private hospital lacks the indicia of "state action" necessary to impose the duty to provide procedural due process to those who are refused staff privileges. In [Garrow v. Elizabeth Gen. Hosp. and Dispensary](#), 79 N.J. 549, 401 A.2d 533 (1979), a physician applied for but was denied staff privileges; he was a medical doctor and belonged to a class of practitioners eligible for admission. The Court rejected the doctor's claim that he was entitled to constitutional due process: "In the absence of a showing, allegation or admission that the Hospital's action reflected state action. . . , fundamental constitutional [**1022] due process may not be invoked." [Id. at 563, 401 A.2d 533](#). [*512] Accord [Zoneraich v. Overlook Hosp.](#), 212 N.J.Super. 83, 91, 514 A.2d 53 (App.Div.), certif. denied, 107 N.J. 32, 526 A.2d 126 (1986).

[HN2](#) While aggrieved physicians may have no right to constitutional due process, they are entitled to the lesser standard of "fundamental fairness," i.e., that their request for privileges be considered according to procedures that adequately notify them of the hospital's proposed action and that provide a reasonable opportunity to respond. [Garrow, supra, 79 N.J. at 564, 401 A.2d 533](#); [Zoneraich, supra, 212 N.J.Super. at 91, 514 A.2d 53](#). But plaintiff has cited no case authority, and we have found none, granting procedural protections, under either "due process" or

"fundamental fairness" concepts, to a member of a class seeking to have the hospital change its policy barring that class from staff membership, where the hospital has not attempted to adjudicate the merits of the member's personal qualifications. The reason for imposing procedural protections in staff privilege cases is to protect professional reputations [***13] and ensure the ability to pursue the profession. *Garrow, supra, 79 N.J. at 557, 401 A.2d 533*. Neither concern is implicated here: the decision to exclude chiropractors as a class does not impugn plaintiff's personal reputation and his ability to practice chiropractic is not substantially impaired by denial of access to hospital patients through staff privileges.

[*513] Plaintiff also urges that he is a third-party beneficiary of the hospital's bylaws which grant him a contractual right to have his application processed under the bylaws, including the provisions for a hearing. He reasons that the bylaws "form a binding contract between the hospital and its existing medical staff and prospective medical staff." He cites a federal case recognizing that an applicant for hospital-staff privileges may be a third-party beneficiary of the hospital's bylaws, if such an intent may be inferred from the language and surrounding circumstances. *Robinson v. Magovern, 521 F.Supp. 842, 925-26 (W.D.Pa.1981)*, aff'd, 688 F.2d 824 (3d Cir.), cert. denied, 459 U.S. 971, 103 S.Ct. 302, 74 L.Ed.2d 283 (1982). [***14] But plaintiff fails to recognize that the court in *Robinson* found that no such intent was inferable in that case. *Ibid.* In addition, the doctor-applicant in *Robinson* was a thoracic surgeon, who met the threshold test for staff membership. Plaintiff in this case was not eligible for staff membership under the bylaws as written. Hence we will not infer that the bylaws were intended to protect plaintiff as a third-party beneficiary.

Plaintiff also relies on a series of cases recognizing that hospital bylaws form a contract between the hospital and its staff. In those cases the aggrieved persons were either already on the staff or were practicing in a field entitled to staff membership. See, e.g., *Balkissoon v. Capitol Hill Hosp., 558 A.2d 304 (D.C.App. 1989)* (medical doctor was denied staff privileges based on alleged professional deficiencies); *Ishak v. Fallston Gen. Hosp. & Nursing Ctr., 50 Md.App. 473, 438 A.2d 1369 (1982)* (hospital refused to renew privileges of staff physician).

While plaintiff was not entitled to any procedural protections under the bylaws or the Fourteenth Amendment, [***15] he was entitled to have his claim reviewed under the special standard developed by our courts for review of administrative decisions treating exclusion of certain categories of practitioners, as distinguished from decisions on the qualifications of individual applicants. The earliest reported case is *Davis v. Morristown Memorial Hosp., 106 N.J.Super. 33, 254 A.2d 125 (Ch.Div.1969)*, in which [*514] two obstetricians applied for admission to a hospital staff. The hospital refused, invoking its written policy deferring action on new staff applications until sufficient beds became available. The court upheld the policy as supported by evidence that there was a bed shortage and found the hospital "acted from honest motives." *Id. at 53, 254 A.2d 125*. The court applied the deferential guidelines for review announced by our Supreme Court in *Greisman v. Newcomb Hosp., 40 N.J. 389, 192 A.2d 817 (1963)*, and *Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961)*. Those cases permitted judicial review [***16] of exclusionary policies, on the theory that hospitals acted as fiduciaries for the public and could not exercise their discretion [**1023] over staff composition without considering the interests of the medical profession and the public. *Falcone, supra, 34 N.J. at 596-97, 170 A.2d 791*.

Next, in *Wrable v. Community Memorial Hosp., 205 N.J.Super. 438, 501 A.2d 187 (Law Div.1985)*, aff'd, *213 N.J.Super. 347, 517 A.2d 470 (App.Div.1986)*, certif. denied, 107 N.J. 150, 526 A.2d 210 (1987), a psychiatric nurse was denied staff membership on the ground that the hospital did not have a psychiatric department and was not equipped to handle patients needing psychiatric care. Also, the hospital's bylaws provided for staff membership for doctors of medicine, dentistry, osteopathy, and podiatry only. *205 N.J.Super. at 441, 501 A.2d 187*.

The Law Division upheld the hospital's exclusion of psychiatric nurses and found a reasonable relationship between that policy and the hospital's health-care mission. *Id. at 443-45, 501 A.2d 187*. [***17] The judge explained:

A hospital has a right and a duty not only to review the qualifications of the members of its staff, but also to consider the need for and impact of new and previously unadmitted persons to the hospital staff and how their admission to the staff would affect patient care. See *Belmar v. Cipolla, 96 N.J. 199, 208 [475 A.2d 533]* (1984). Since the hospital is unable to review effectively plaintiff's credentials and supervise her activities, it would

therefore not be in the best interest of patient treatment and care to allow plaintiff, at this time, to become a member of the adjunct medical-dental staff.

[*Id. 205 N.J.Super. at 443-44, 501 A.2d 187.*]

Of particular relevance to the appeal before us, the judge added:

[*515] Merely because a professional may be able to provide medical aid or psychological comfort to a patient in a hospital does not justify a finding that the individual is entitled to adjunct medical-dental staff privileges. The testimony revealed that there are more than 200 health care professions in the State of New Jersey. *In any given case a physical therapist, nutritionist, chiropractor or other professional health care specialist* **[***18]** *may give aid and comfort to their patients while in the hospital, but this would not justify making them members of the adjunct medical-dental staff.* A hospital is entitled to reasonably restrict eligibility for such privileges in order to insure that its patients receive the best care possible on a consistent basis.

[*Id. at 444, 501 A.2d 187* (emphasis added).]

Finally, the judge noted that the exclusion had only a minimal impact on plaintiff's practice. Plaintiff was free to treat her patients outside the hospital; during her patients' infrequent hospitalizations, she could see them at visiting hours or talk on the telephone. *Ibid.*

In *Desai v. St. Barnabas Medical Ctr., 103 N.J. 79, 510 A.2d 662 (1986)*, a medical doctor was denied staff privileges under a written policy granting preference to doctors who had professional associations with existing staff members. In evaluating the validity of the preference, the Supreme Court recognized the special standards of judicial review of hospital-management decisions.

In light of the specialized and sensitive nature of institutional public health care and the paramount responsibilities **[***19]** and concerns of other branches of government in this area, courts are normally most circumspect when called upon to determine the validity or enforceability of managerial health-care decisions made by a hospital. **HN3**[↑] If a hospital policy decision reasonably serves an evident public-health purpose, it will be sustained, even though it may have a discriminatory effect. We have thus recognized that because an adverse or discriminatory impact upon some individual doctors or class of doctors is inevitable when a closed staff-admissions policy is adopted by a hospital, it will be upheld if the public-health objective is rationally advanced by the hospital's staff admissions policy. . . . However, if it cannot be shown that a restrictive staff-admissions policy reasonably furthers a legitimate health-care objective, then the policy merely constitutes an unjustified vehicle of discrimination **[**1024]** and is invalid.

[*Id. at 91, 510 A.2d 662* (citation omitted).]

The Court also acknowledged that **HN4**[↑] the standard applied to the hospital's decision is even more deferential than the traditional "substantial competent credible evidence" test of agency decisions; rather, it **[***20]** is whether the decision was based on "sufficient reliable evidence, including hearsay." *Id. at 92, 510 A.2d 662*. Accord **[*516]** *Nanavati v. Burdette Tomlin Memorial Hosp., 107 N.J. 240, 249, 526 A.2d 697 (1987)*. And a more tolerant test is used where the decision was based on broad institutional policy as opposed to adjudication in an individual case:

HN5[↑] When the decision that is subject to judicial review involves the validity of a broad, general hospital policy determination, rather than a particularized, quasi-adjudicative decision in which a general policy is applied in an individual case, even greater informality can be tolerated. A hospital determining broad policy matters should be able to pursue all reasonable means to inform itself and to draw from a wide array of sources to reach an informed decision.

[\[103 N.J. at 92, 510 A.2d 662.\]](#)

Finally, the Court reasoned, [HN6](#)[[↑]] in developing such a general policy the hospital

need not provide public notice, conduct formal proceedings, allow general participation, or develop a formal record in support of a managerial determination. [***21] Thus, a hospital decision of this character will be viewed favorably if it is reached in the normal and regular course of conducting the affairs of the hospital and is based on adequate information, regardless of form, origin, or authorship, that is generally considered reasonable and reliable by professional persons responsibly involved in the health-care field.

[\[Id. at 93, 510 A.2d 662.\]](#)

Applying these standards to the admissions preference at issue, the Court held that the record failed to support the hospital's claims of a public-health purpose or benefit; hence the policy was invidiously discriminatory. [Id. at 93-97, 510 A.2d 662.](#)

In [Berman v. Valley Hosp., 103 N.J. 100, 510 A.2d 673 \(1986\)](#), two doctors were denied admission under a policy refusing privileges "to doctors who practiced medicine in the hospital's service area for more than two years." [Id. at 101, 510 A.2d 673](#). The reason for the policy was to avoid "a problem of overcrowding and overutilization that was attributable to doctors from surrounding areas obtaining staff [***22] privileges" at defendant-hospital. [Id. at 103, 510 A.2d 673.](#)

As in *Desai*, the Court in *Berman* applied a most deferential standard of review: "in reviewing the validity of the kind of broad, quasi-legislative policy determination, such as presented in this case, the freedom of decisional action accorded a hospital is even greater and judicial review more tolerant." [Id. 103 N.J. at 107, 510 A.2d 673.](#) [*517] Such action is limited, however, by the requirements that: (1) it be reached in the normal course of hospital affairs; (2) it be based on adequate information; and (3) it reasonably advance the intended health-care objectives. [Id. at 108, 510 A.2d 673.](#) The Court struck the policy on these two grounds:

We conclude that the hospital has failed to marshall adequate information that demonstrates that its particular restrictive admissions policy is sufficiently related to a genuine and legitimate health-care objective. In its present formulation, the admissions policy ban against doctors from particular locations has not been justified and appears in most respects to be arbitrary. Further, the two-year [***23] practice limitation has not been shown on this record to be sufficiently related to its professed health-care objective of securing staff physicians who are both highly-educated and also have few patients.

[\[Id. at 113, 510 A.2d 673.\]](#)

In dicta the *Berman* Court opined that "a staff-admissions policy that focuses upon an applicant's years of licensure, length and type of experience, quality of medical education, and caliber of medical training, as well as the volume and residences of private patients, would be entitled to favorable judicial consideration." [Id. at 114, 510 A.2d 673.](#)

Judge Stanton here followed this limited review function. He examined the hospital's [**1025] response to plaintiff's request and was impressed by its diligence and fairness:

The hospital here did not simply reject this application. . . . [B]ecause the management of the hospital realized that there had not been a careful and recent look taken by the hospital at the question of whether chiropractors should be able to be on the treatment staff, it undertook to review that question, not in the sense of having formal adversarial type hearings, but [***24] in the sense of making an inquiry, collecting information, trying to evaluate the information and make a sensible recommendation to the Board.

In my view, what the Board did here, or at least what the hospital management and the non-physician members of the Board, and by default the physician members of the Board, did was to have designated trustees review the situation, study it, make a recommendation to the Board, and then the Board decided that there was no current need or utility, net utility to having chiropractic doctors admitted to the staff.

In my view, the broad methodology followed was appropriate and the result reached was broadly reasonable. That is to say, it makes sense.

[*518] The judge was not concerned with whether the hospital's decision was "right" or whether he agreed with it. Rather, he was compelled to defer to the hospital's judgment of whether chiropractors were necessary to or compatible with the hospital's medical-care mission. And he found it significant that the Legislature had intervened specifically to recognize and approve staff access to dentists, [N.J.S.A. 45:6-19.5](#), and podiatrists, [N.J.S.A. 26:2H-12.1](#), but not to chiropractors. Hence the hospital's [***25] decision contravened no statutory law or public policy. Moreover, our research discloses that no bill has ever been introduced in our legislature on the subject of admitting chiropractors to hospital staffs. At oral argument, plaintiff's counsel stressed that the chiropractic profession wanted admission to hospital staffs for economic reasons, that is, to insure their competitive position in the health-care service market. Such economic arguments are best addressed to the legislature. Also, our research discloses that state courts consistently reject claims in law suits by chiropractors for admission to hospital staffs. See [Fort Hamilton-Hughes Memorial Hosp. Ctr. v. Southard](#), 12 Ohio St.3d 263, 12 Ohio B. 342, 466 N.E.2d 903 (1984); [Boos v. Donnel](#), 421 P.2d 644 (Okla. 1966); [Cohn v. Wilkes Regional Medical Ctr.](#), 113 N.C.App. 275, 437 S.E.2d 889 (1994); [Samuel v. Curry County](#), 55 Or.App. 653, 639 P.2d 687 (1982).

We find Judge Stanton's ruling unassailable. The hospital did more than the law required. Instead of simply [***26] rejecting plaintiff's application offhandedly, it convened a special committee, which solicited evidence from both sides of the issue and reached a reasoned opinion not to change its bylaws. It acted deliberatively and in the course of the normal administration of hospital affairs, and only after receiving adequate information. [Desai, supra, 103 N.J. at 93, 510 A.2d 662](#). The hospital board's opinion was grounded in a finding that the continued exclusion of chiropractors reasonably served genuine health-care objectives. *Ibid.* For example, the ad hoc committee found that chiropractors were not necessary to the hospital's acute-care mission, that an insignificant [*519] number of patients would require chiropractic services, and that the administrative costs of adding chiropractors would outweigh any benefits. The committee reached these conclusions only after studying a substantial compilation of materials obtained from the American Chiropractic Association.

Neither Judge Stanton nor this court should second-guess the hospital's honest administrative judgment. Plaintiff has identified no countervailing public policy, nor has he demonstrated that the [***27] hospital fell short of the *Desai-Berman* standards for adopting a broad policy of exclusion. Plaintiff argues that chiropractic is a respectable health-care field which deserves treatment equal to dentists, podiatrists, osteopaths, and medical doctors. But he does not effectively refute the reasons offered by the hospital for differential treatment. As the judge recognized, those reasons "made sense" and may not be disregarded by a reviewing court. The hospital's decision was supported by the requisite [**1026] "sufficient reliable evidence." [Nanavati, supra, 107 N.J. at 249, 526 A.2d 697](#).

IV

Plaintiff next urges that the judge erred in failing to rule that [N.J.S.A. 30:11-1](#) mandates the hospital to offer chiropractic services. [N.J.S.A. 30:11-1](#) is part of the legislation governing state licensure of private hospitals. That provision announces a "public policy" of establishing and enforcing "basic standards" of hospital care. It forbids hospitals from operating without a license, issuance of which is dependent upon the Department of Health's judgment that the hospital is "adequately prepared" to provide the services it offers. In the sentence relied [***28] on by plaintiff, the Legislature imposed a further condition: "[HN7](#) [↑] No license shall be granted to a hospital facility unless the commissioner is satisfied that it is adequately prepared to provide all services and care required by the residents of the community wherein it is located." [N.J.S.A. 30:11-1](#). Plaintiff reasons that, because chiropractic services are "required" in the community where the hospital is [*520] located, the denial of staff admission to chiropractors violates [N.J.S.A. 30:11-1](#).

The judge did not expressly address the [N.J.S.A. 30:11-1](#) argument which was not precisely presented to him. He impliedly rejected it when he reasoned that the courts must defer to the hospitals' and Commissioner of Health's judgment as to what services must be provided by each hospital.

As the hospital and intervenors observe, on its face the statute does not mandate chiropractic services. Rather, it demands only those services that are "required" by the community. The decision as to what services are required lies within the discretion of the hospital. This discretionary judgment, calling for the expertise of the hospital governing body, is entitled to substantial judicial deference. Here [***29] the hospital determined, in effect, that chiropractic services were not required. That decision was supported by evidence. In his reply brief, plaintiff cites some contradictory evidence in the record but there was ample evidence supporting denial of privileges. Moreover, [HN8](#)[↑] [N.J.S.A. 30:11-1](#) is part of a licensing scheme for hospitals. It grants no remedies to individuals who have not been allowed to apply for staff privileges.

V

Plaintiff next claims that he was libelled by three characterizations of chiropractors contained in an article submitted to the ad hoc committee during its investigation. He insists that the judge erred in ruling as a matter of law that the article was not actionable defamation.

The article was written by Richard J. Webb and Brian M. Foley and appeared in a 1989 publication called *Health Span*, a Prentice Hall release. Both Webb and Foley are members of the law firm representing the hospital in this case. Webb was the editor of *Health Span*, and Foley wrote the hospital's appellate brief.

The article was a review of then-recent history of attempts by chiropractors to obtain staff privileges. It cited a 1987 federal [*521] district court case holding that [***30] each hospital had the right to make its own decision, based upon its own bylaws, applicable state law, and the needs of its patient community. See *Wilk v. American Medical Association*, 671 F.Supp. 1465 (N.D.Ill.1987), aff'd, [895 F.2d 352](#) (7th Cir.), cert. denied, 498 U.S. 982, 111 S.Ct. 513, 112 L.Ed.2d 524 (1990). It then reviewed the legal, regulatory, and judicial authorities that hospitals must consult in deciding whether to admit chiropractors.

Plaintiff alleges that the defamation consisted of the following:

In the first paragraph of the article, chiropractors are characterized as "an unscientific cult", "unscientific practitioners" and it further states that it is "unethical" for physicians to be associated with chiropractors.

Plaintiff terms these statements "false" and defamatory and alleges that they tainted the committee's findings.

Plaintiff's representations of the article are, at best, disingenuous. The offending phrases were quotations from American Medical Association comments, and the stated intent of Webb and Foley was to [***31] show [**1027] that such negative attitudes toward chiropractors had changed, such that chiropractors now enjoyed "professional recognition and acceptance." The tone of the article as a whole was not negative toward chiropractic; rather, its purport was as a neutral guide on how hospitals should respond to requests by chiropractors for admission. Far from counselling arbitrary rejection of such requests, the article urged hospitals to "proceed in a deliberate and fair manner" and to decide only "after due consideration of all reasonably available information."

[HN9](#)[↑] The threshold inquiry in a libel action is whether defendant published a false statement of fact which was reasonably susceptible of a defamatory meaning as to plaintiff. [Kotlikoff v. The Community News](#), 89 N.J. 62, 67, 444 A.2d 1086 (1982); [Salek v. Passaic Collegiate School](#), 255 N.J.Super. 355, 359, 605 A.2d 276 (App.Div.1992).

Each of these preliminary questions must be decided by the court as a question of law, usually in response to a motion to dismiss or for summary judgment. *Kotlikoff, supra*, 89 [*522] N.J. at 67, 444 A.2d 1086; [***32] [Salek, supra](#), 255 N.J.Super. at 359, 605 A.2d 276.

This article fell well short of satisfying the elements for a *prima facie* case. First, whether chiropractic is "scientific" and whether it is "unethical" for a doctor to associate with a chiropractor is arguably an opinion not provable as true or false. Second, and more clearly, the article was not susceptible of a defamatory meaning, whether of plaintiff or anyone else. Indeed, the article as a whole tended to bolster the reputation of chiropractic. Finally, even if the statements were defamatory, they were not published by the hospital. The hospital committee and board members may have read a defamatory article and considered it in reaching a decision but this does not render the hospital liable for defamation. The hospital neither re-published the article generally nor disseminated it to a person not having a legitimate interest in the subject matter.

The judge relied on the last ground, reasoning that the act of circulating documents among members of the committee could not constitute publication. Also, he impliedly held that any negative information was privileged:

[I]n terms of trying to [***33] get quality decisions made, allowing hospitals to be sued for defamation, if members of their boards considered negative statements made by professional health groups, one about the other, would be to put shackles on the intellectual processes by which sound decisions could be made.

HN10 [↑] New Jersey courts recognize a qualified privilege to make defamatory statements on matters lying within the publisher's interest or duty, where those statements are made to one having a corresponding interest or duty. See *Williams v. Bell Telephone Laboratories, Inc.*, 132 N.J. 109, 121, 623 A.2d 234 (1993).

VI

Plaintiff next complains of the dismissal of his antitrust cause of action. He insists that he "has provided a sufficient factual basis from which the elements of intent and conspiracy may be reasonably inferred." The participants in the conspiracy, he charges, [*523] were "defendant hospital along with the defendant hospital Association and the defendant Medical Society," all of whom joined "to successfully bring about a group boycott of chiropractic physicians in a hospital setting." Plaintiff deems this concerted action to be "a per se violation" [***34] of the New Jersey Antitrust Act, *N.J.S.A. 56:9-1* to -19. The pertinent prohibition is stated in **HN11** [↑] *N.J.S.A. 56:9-3*: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, in this State, shall be unlawful."

HN12 [↑] In analyzing claims of anticompetitive conduct under *N.J.S.A. 56:9-3* and the cognate provision of the federal act, *15 U.S.C.A. § 1*, our courts apply one of two rules: (1) the "per se rule" --requiring no proof of the market power of the offending parties, or (2) the "rule of reason" --calling for an assessment of the economic impact on the market. *Desai, supra, 103 N.J. at 97-98, 510 A.2d 662*; *Belmar, supra, 96 N.J. at 215-18, 475 A.2d 533*. Though in dicta our Supreme Court has expressed a preference for the "rule of reason" in staff privileges cases, it has not yet chosen between the rules. [**1028] *Desai, supra, 103 N.J. at 98-99, 510 A.2d 662*; *Belmar, supra, 96 N.J. at 215, 475 A.2d 533*. Because of an independent ground for disposing of this [***35] issue, we need not choose between these rules.

Plaintiff pleaded this theory against the hospital defendants only. Both intervenors were permitted to participate "as if" they "had been named as original party defendants." Though plaintiff never amended his complaint to include intervenors, in moving for summary judgment on the antitrust count, he did include them in his allegation of a conspiracy.

The judge disposed of this claim this way:

Finally, there's no basis for anti-trust claims, either state or Federal, against the originally named defendants in this case. They all constitute a single entity for the purposes of considering anti-trust laws in doctoring. There simply is no capacity for there to be any conspiracy among the named defendants.

Theoretically, theoretically, there could be a conspiracy involving the hospital association and medical societies, theoretically. But the reality is they only became [*524] involved in this case after Dr. Petrocco brought it to Court and they simply wanted to be heard.

There's no reason why they shouldn't be heard; no conspiracy involved there. There isn't. There's no semblance of an anti-trust claim that's made here.

The hospital argues that [***36] this court need not reach the merits of plaintiff's argument, since the hospital was exempt from the Antitrust Act. The hospital invokes *N.J.S.A. 56:9-5b(5)*, which exempts from the reach of the act: "The bona fide religious and charitable activities of any not for profit corporation, trust or organization established exclusively for religious or charitable purposes, or for both purposes. . . ." The hospital in this case without dispute "is a private, nonprofit corporation organized under the laws of the State of New Jersey."

From this record it is unclear whether the hospital's purpose is "charitable," or, if so, whether "charitable activities" encompass decisions relating to staff privileges. One Chancery Division decision held, without analysis, that most of the defendant-hospitals in that case were exempt under [N.J.S.A. 56:9-5\(b\)5](#). [Borland v. Bayonne Hosp.](#), [122 N.J.Super. 387, 405, 300 A.2d 584 \(Ch.Div. 1973\)](#), aff'd o.b., [136 N.J.Super. 60, 344 A.2d 331 \(App.Div.1975\)](#), aff'd, [72 N.J. 152, 369 A.2d 1](#), cert. denied, [434 U.S. 817, 98 S.Ct. 56, 54 L.Ed.2d 73 \(1977\)](#). [***37] More recently, our Supreme Court has expressly declined to decide whether the hospitals before it were exempt under [N.J.S.A. 56:9-5\(b\)5](#). [Desai, supra, 103 N.J. at 99 n. 9, 510 A.2d 662](#); [Belmar, supra, 96 N.J. at 219, 475 A.2d 533](#). In light of the uncertainty over the scope of this exception in this context, we proceed to the merits of the antitrust argument.

As the judge implied, [HN13](#)[] a hospital is incapable of conspiring with its staff in deciding whether to grant staff privileges. See generally Tim A. Thomas, Annotation, *Denial by Hospital of Staff Privileges or Other Health Care Practitioner as Violation of Sherman Act*, [89 A.L.R.Fed. 419 \(1988\)](#). Thus, in [Nanavati v. Burdette Tomlin Memorial Hosp.](#), [857 F.2d 96 \(3d Cir.1988\)](#), cert. denied, [489 U.S. 1078, 109 S.Ct. 1528, 103 L.Ed.2d 834 \(1989\)](#), the hospital's executive committee was authorized by the bylaws to make recommendations to the hospital's governing board on matters [*525] of staff privileges. The Third Circuit held [***38] that, under principles of federal [antitrust law](#), the hospital was not capable of conspiring with its executive committee, because the two entities had no conflicting interests. [857 F.2d at 118](#). Plaintiff concedes the foregoing rule but urges us to apply the well-established exception for cases when the conspiring employees or staff have an independent personal stake apart from the interest of the hospital.

Plaintiff attempts to bolster his theory by bringing the two intervenors into the alleged conspiracy. But, as the judge observed, there is no proof that the intervenors took any part in the hospital's decision; rather, they voluntarily joined this case in order to argue their legal position in favor of the decision that the hospital had already made. They had no input into the decision itself. Plaintiff contends that intervenors have "a stake" in upholding the ban on chiropractors, [**1029] but he does not show or even allege that they did anything in concert with the hospital. It is not enough to assert that intervenors "have the ability to conspire;" there must be at least a *prima facie* showing of conspiratorial conduct in fact. The judge properly dismissed the [***39] antitrust claim.

Finally, we reject plaintiff's contention that the matter was not ripe for summary judgment. Both parties moved for summary judgment. See [Morton International v. General Acc. Ins.](#), [266 N.J.Super. 300, 323, 629 A.2d 895 \(App.Div.1991\)](#), aff'd, [134 N.J. 1, 629 A.2d 831 \(1993\)](#).

Affirmed.

In re Brand Name Prescription Drugs Antitrust Litig.

United States District Court for the Northern District of Illinois, Eastern Division

May 26, 1994, Decided ; May 27, 1994, Docketed

94 C 897, MDL 997

Reporter

1994 U.S. Dist. LEXIS 7146 *

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION; This Document Relates to: ALL CASES

Core Terms

Manufacturer, motion to dismiss, plaintiffs', Coordinated, prices, Sherman Act, Defendants', allegations, Robinson-Patman Act, antitrust, conspiracy, Prescription, complaints, Drugs, brand name, purchasers, products, pharmacies, favored, commodities, violations, discovery, commerce, notice

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN1[Motions to Dismiss, Failure to State Claim]

Defendants must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted since, in ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. The allegations of a complaint should not be dismissed for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Nonetheless, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

[HN2](#) Antitrust & Trade Law, Sherman Act

In order to state a horizontal price-fixing claim under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must allege the existence of a contract, combination or conspiracy intended to restrain competition and which actually has an anticompetitive effect.

Antitrust & Trade Law > Sherman Act > General Overview

[HN3](#) Antitrust & Trade Law, Sherman Act

To plead an anti-trust violation, a plaintiff need only set forth either direct or inferential allegations respecting all of the material elements necessary to sustain recovery under some viable legal theory. To state a claim for antitrust violations, the plaintiff must at least outline or adumbrate such a violation.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

[HN4](#) Robinson-Patman Act, Claims

It is unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination or with customers of either of them. [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[HN5](#) Antitrust & Trade Law, Robinson-Patman Act

For a [15 U.S.C.S. § 13\(a\)](#) claim to survive dismissal, the plaintiffs must allege the following: (1) the same seller made two or more contemporaneous sales; (2) of commodities of similar grade and quality; (3) at different prices; (4) at least one of the sales was in interstate commerce; and (5) the price discrimination injured the plaintiff and (6) tended to lessen competition of the commodity line (7) substantially.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

[HN6](#) Antitrust & Trade Law, Robinson-Patman Act

It is unlawful for any person engaged in commerce to pay or contract for the payment as compensation or in consideration for any services or facilities in connection with the offering for sale of any products or commodities

unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. [15 U.S.C.S. § 13\(d\)](#).

Judges: [*1] Kocoras

Opinion by: CHARLES P. KOCORAS

Opinion

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the court on the Manufacturer Defendants' Motions to Dismiss pursuant to [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#). For the reasons that follow, Defendants' motions are denied.

BACKGROUND

This action arises out of alleged anti-trust and price discrimination violations of the brand name prescription drug industry. Presently pending before us in this coordinated proceeding are 11 actions in which over 400 retail pharmacies assert claims against 25 pharmaceutical product manufacturers ("the Manufacturer Defendants"), 8 wholesalers, and Medco Containment Services, Inc. ("Medco"), a mail order pharmacy, under the federal antitrust laws as well as under state statutory and common law. The plaintiffs of the various actions presently pending before us are retail drug stores ranging in size from individual, small pharmacies to large, multi-state chains. The actions have polarized into two somewhat distinct groups: (1) a "Consolidated Action," and (2) "Coordinated, Individual Actions".

The Consolidated Action consists of a group of plaintiffs alleging, on behalf of [*2] a purported nationwide class,¹ that the defendants unlawfully engaged in a "horizontal" conspiracy² in violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#). The Consolidated Action Plaintiffs assert that they were adversely impacted by a horizontal conspiracy entered into by virtually all the leading pharmaceutical manufacturers in the nation for the purpose of fixing, raising, maintaining and stabilizing the prices of "Prescription Brand Name Drugs".³

[*3] The Coordinated, Individual Plaintiffs, on the other hand, assert individual, non-class based claims. In addition to alleging Sherman Act violations, the plaintiffs in the Coordinated, Individual Actions allege that the Manufacturer Defendants have entered into certain price discrimination arrangements in violation of Sections 2(a), (d) and (f) of the Robinson-Patman Act, [15 U.S.C. §§ 13\(a\), \(d\)](#) and [\(f\)](#). Essentially, the Coordinated, Individual Plaintiffs claim that the Manufacturer Defendants sold prescription drugs to certain Health Maintenance Organizations ("HMOs") and mail order pharmacies at prices lower than those which the plaintiff pharmacies paid for the same products either to wholesalers or manufacturers. The Coordinated, Individual Plaintiffs also assert a claim against Defendant

¹ The Consolidated Class Plaintiffs' Motion for Class Certification is addressed in a separate opinion.

² A horizontal conspiracy is an agreement between "persons or firms in similar lines of endeavor or business, normally, therefore, between competitors." Austin T. Stickells, *Federal Control of Business: Antitrust Laws* § 6 (1972).

³ As defined in P 3(h) of the Consolidated and Amended Class Action Complaint, "Prescription Brand Name Drugs" are "drugs that are sold under the brand name of the Manufacturer rather than the drug's generic name."

Medco under section 2(f) of the Robinson-Patman Act, [15 U.S.C. § 13\(f\)](#), alleging that Medco has knowingly induced or received from the Manufacturer Defendants Prescription Brand Name Drugs at discriminatory prices.⁴

[*4] The Manufacturer Defendants have filed two motions to dismiss. First, the defendants move to dismiss the Consolidated and Amended Complaint in its entirety, as well as the Sherman Act conspiracy claim in the Coordinated, Individual Actions. Second, the Manufacturer Defendants move to dismiss the Robinson-Patman claims asserted in the Coordinated, Individual Complaints. Each motion is essentially based upon the Manufacturer Defendants' contention that the plaintiffs have failed to plead their federal antitrust claims with specificity.⁵

Before addressing the merits of the defendants' motions,⁶ we first examine the legal principles regarding the scope of our analysis on a [Rule 12\(b\)\(6\)](#) motion to dismiss.

[*5] LEGAL STANDARD

The purpose of a motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#) is to test the sufficiency of the complaint, not to decide the merits of the case. [HN1](#)[↑] Defendants must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted since, in ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. [Ed Miniat, Inc. v. Globe Life Ins. Group Inc., 805 F.2d 732, 733 \(7th Cir. 1986\)](#), cert. denied, 482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987). The allegations of a complaint should not be dismissed for failure to state a claim "unless it appears beyond a reasonable 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 \(1957\)](#). See also [Hishon v. King & Spalding, 467 U.S. 69, 81 L. Ed. 2d 59, 104 S. Ct. 2229 \(1984\)](#); [*6] [Doe on Behalf of Doe v. St. Joseph's Hospital, 788 F.2d 411 \(7th Cir. 1986\)](#). Nonetheless, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. [Gray v. County of Dane, 854 F.2d 179, 182 \(7th Cir. 1988\)](#). We turn to the motions before us with these principles in mind.

DISCUSSION

I. THE SHERMAN ACT CLAIMS

The Manufacturer Defendants move, pursuant to [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#), to dismiss each claim asserted by the plaintiffs under [Section 1](#) of the Sherman Act. [HN2](#)[↑] In order to state a horizontal price-fixing claim under [Section 1](#) of the Sherman Act, a plaintiff must allege the existence of a contract, combination or conspiracy "intended to restrain competition and which actually has an anticompetitive effect." [Greater Rockford Energy & Technology Corp. v. Shell Oil Co., 998 F.2d 391, 396 \(7th Cir. 1993\)](#), cert. denied, 127 L. Ed. 2d 375, 114 S. Ct. 1054 (1994); [15 U.S.C. § 1](#) ("Every contract, [*7] combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . is declared to be illegal"). Accord [Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195, 1200 \(7th Cir. 1981\)](#), cert. denied, 455 U.S. 1020, 72 L. Ed. 2d 138, 102 S. Ct. 1717 (1982).

⁴ Defendant Medco has filed its own motion to dismiss Plaintiffs' claims under Section 2(f) of the Robinson-Patman Act. According to Medco, to state a Section 2(f) claim the plaintiffs must first adequately plead a cause of action under Section 2(a) of the Robinson-Patman Act. Medco maintains that the plaintiffs have failed to sufficiently plead a Section 2(a) claim. In support of its motion, Medco adopts and incorporates by reference the arguments made by the Manufacturer Defendants in support of their motion to dismiss Plaintiffs' claims under Section 2(a) of the Act.

⁵ Naturally, each of the Manufacturer Defendants is moving to dismiss the complaint only in those actions in which it has been named as a defendant and in which it has been served.

⁶ Medco's motion is contingent upon the resolution of the Manufacturer Defendants' motion to dismiss the Coordinated, Independent Plaintiffs' Robinson-Patman Act claims, and therefore will not be separately addressed.

In their motion to dismiss the defendants take issue with the plaintiffs' allegations regarding the existence of "a contract, combination or conspiracy". D's Memo at 8. According to the Manufacturer Defendants, the plaintiffs' various complaints must be dismissed because they lack the specific factual allegations regarding "the manner in which the conspiracy was formed and function, the nature of the agreement reached, and the means by which common goals were effectuated." D's Memo at 9-10. The Manufacturer Defendants maintain that the plaintiffs' Sherman Act claims must fail because the plaintiffs' respective complaints lack particularized allegations regarding what the defendants actually did that was conspiratorial or how they did it.

While it is true that antitrust conspiracy claims alleged in conclusory [*8] or "bare-bones" terms will not withstand a motion to dismiss, the standard for pleading a Sherman Act conspiracy is hardly as demanding and exacting as suggested by the defendants. The Manufacturer Defendants are asking us to hold the plaintiffs to an inordinate level of factual specificity, one which the plaintiffs could not reasonably meet at this stage of the proceedings, since most of the information which the defendants claim must be pled is in the hands of the defendants themselves. See [Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 \(1962\)](#) ("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.").

Rather, [HN3](#)[ to plead an anti-trust violation, a plaintiff need only set forth "either direct or inferential allegations respecting all of the material elements necessary to sustain recovery under some viable legal theory." [Seglin v. Esau, 769 F.2d 1274, 1279 \(7th Cir. 1985\); Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 \(7th Cir. 1984\),](#) [*9] cert. denied, 470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985). To state a claim for antitrust violations, the plaintiff must at least "outline or adumbrate" such a violation. [Sutliff, Inc. v. Donovan Cos., 727 F.2d 648 \(7th Cir. 1984\)](#). As will be discussed below we find that the plaintiffs have, in their respective complaints, sufficiently set forth sufficient details which give rise to an inference that the defendants allegedly engaged in industry wide price fixing of Prescription Brand Name Drugs and which therefore place the Manufacturer Defendants on notice as to the claims alleged and the grounds upon which they rest.

A. The Consolidated Action

For instance, in the Consolidated Action the plaintiffs allege that the defendants "engaged in a nationwide contract, continuing combination and conspiracy" which "consisted of a continuing agreement[,] undertaking and concert of action. . . to fix, raise, maintain and stabilize the prices of Prescription Brand Name Drugs sold to the plaintiffs. . . at supra-competitive levels." Consolidated Amended Complaint at P 78, 79. The plaintiffs [*10] support their claim with specific factual allegations that the defendants conspired to and actually "did" the following: acted jointly to fix prices; implemented a "charge-back" or rebate system; utilized systems of parallel pricing; signed contract agreements; refrained from price competition with one another; met together on numerous occasions; and acted in concert to keep prices high by using a "charge-back" system and refusing to extend to the plaintiffs any substantial discounts on Prescription Brand Name Drugs. [Id. at P 80](#)(a)-(g). Moreover, in paragraphs 71 through 77 of their Consolidated Complaint, the plaintiffs make specific allegations regarding the climate of the market during the relevant time period; these allegations give support to the plaintiffs' assertion that absent collusion among the defendants the prices of Prescription Brand Name drugs would not have increased as dramatically as alleged. Finally, in paragraph 74 of their complaint the Consolidated Action Plaintiffs provide specific examples of the striking difference between prices the defendants allegedly charged to the plaintiffs, and the prices they charged to Institutional Pharmacies for the same Prescription [*11] Brand Name Drugs. Accordingly, we find that the allegations of the Consolidated Action Complaint, as amended, are more than just conclusory and "bare-bones," such that they withstand the Manufacturer Defendants' motion to dismiss.

B. The Coordinated, Independent Actions

We likewise find that the Coordinated, Independent Plaintiffs have sufficiently pled a cause of action for violations of [Section 1](#) of the Sherman Act. The plaintiffs in the Coordinated, Independent Action have specifically alleged that

the Defendant Manufacturers "have acted in concert in refusing to extend to Plaintiffs the discounted prices that the Manufacturer Defendants have extended to [] Favored Purchasers." Consolidated Independent Action Amended Complaint at P 81. The plaintiffs further allege that the Manufacturer Defendants "have acted in concert in precluding wholesale distributors from . . . using the rebates or credits received from sales to Favored Purchasers to lower the prices at which they sell the same drugs to Plaintiffs and other non-favored purchasers." *Id. at 82*. The plaintiffs support their assertion with allegations which give rise to the inference that the alleged conduct of the Manufacturer [*12] Defendants lacks a legitimate business purpose and is contrary to the self-interest of each defendant, if it were acting alone. See e.g. *Id. at P 59, 50, 58, 59*, & 86.

The Defendant Manufacturers argue that the Coordinated Independent Plaintiffs' claim under the Sherman Act must fail because "there is a 'plausible explanation' why certain manufacturers may have independently decided, without collusion, to charge lower prices to [certain] buyers." Notwithstanding, the possibility that the Manufacturer Defendants could present "plausible explanations" for the alleged conduct at trial, such an inquiry at this juncture is not appropriate. While we will not "don blinders to commercial reality," we will not, as implicitly suggested by the Manufacturer Defendants, require the plaintiffs to prove their allegations on a motion to dismiss.

The plaintiffs have sufficiently placed the Defendant Manufacturers on notice as to the type of claim alleged and the grounds upon which it rests. Whether the plaintiffs can present enough evidence that "tends to exclude the possibility," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), [*13] that the Defendant Manufacturers either acted independently or acted in accordance with ordinary business motives is more appropriately resolved at a later stage of these proceedings. The allegations in the Coordinated, Independent Plaintiffs complaint, when viewed as a whole, provide a sufficient basis from which each element of the plaintiffs' *Section 1* Sherman Act claim can be inferred. See *Three Crown Ltd. Partnership v. Caxton Corp.*, 817 F. Supp. 1033, 1047 (S.D.N.Y. 1993). The Manufacturer Defendants' motion to dismiss the Sherman Act claim is therefore denied.

In conclusion, since this is a motion to dismiss we emphasize that our function is, as noted above, is not to decide the merits of the plaintiffs' claims. Rather, our inquiry is limited to whether the plaintiffs have stated a cognizable cause of action. The Manufacturer Defendants are suggesting that the plaintiffs are required to plead, at a minimum, specific and detailed facts such as where and when the alleged conspiratorial meetings were held, who attended, what was said or what was allegedly agreed upon. We are aware of the U.S. Supreme Court's suggestion that district courts should [*14] "insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). See also *Sutliff*, 727 F.2d at 654 ("The heavy costs of modern federal litigation, especially antitrust litigation, . . . counsel against launching the parties into pretrial discovery if there is no reasonable prospect that the plaintiff can make out a cause of action from the events narrated in the complaint.") However, common sense dictates that a plaintiff should not be required to plead facts exclusively within the knowledge of the defendants themselves.

In fact, the U.S. Supreme Court has specifically cautioned against summary dismissal of antitrust suits since motive and intent are typically central issues. *Poller*, 368 U.S. at 473.⁷ Here, we find that the defendants' attacks on the Consolidated Plaintiffs' Complaint and the Coordinated, Independent Plaintiffs' Complaints are, [*15] for the most part, based on such "highly factual and subjective questions of intent and purpose," that the plaintiffs should be allowed to proceed on their claims. See *Car Carriers*, 745 F.2d at 1106 ("If a claim under the antitrust laws has been adequately set forth in the complaint, the highly factual and subjective questions of intent and purpose should be resolved after discovery and trial.")

⁷ The defendants question the vitality of *Poller*'s cautionary instruction against summary dismissal of antitrust litigation. However, we note that all of the cases with the Manufacturer Defendants primarily cite in support of its proposition that *Poller* has been effectively overruled deal with summary judgment issues. See e.g. *Matsushita*, 475 U.S. 574 at 578, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 477 (7th Cir. 1988), cert. denied, 488 U.S. 852, 102 L. Ed. 2d 110, 109 S. Ct. 137 (1988). Here, we are still in the preliminary stages of the suit where the plaintiffs must surpass a lesser threshold in avoiding summary dismissal of their claims.

[*16] Finally, we do not agree with the defendants' argument that the plaintiffs' complaints must be held to a heightened pleading standard simply because they set forth antitrust violations claims. As the U.S. Supreme Court recently confirmed in *Leatherman v. Tarrant County Narcotics Unit*, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993), the liberal system of notice pleading applies to all actions, unless otherwise specified in the in the Federal Rules. *Id.* at 1163. The plaintiffs' complaints clearly meet the Federal Rules' notice pleading requirements.⁸

[*17] Accordingly, we find that the plaintiffs have sufficiently pled their claims under Section 1 of the Sherman Act. We will leave "whatever additional sharpening of the issues [that] is necessary" to the discovery process and other pre-trial procedures. *Three Crown Ltd.*, 817 F. Supp. at 1048 (citations omitted). Defendants' motion to dismiss the plaintiffs' Sherman Act claims is denied.⁹

[*18] II. THE ROBINSON-PATMAN CLAIMS

The Manufacturer Defendants move to dismiss the Robinson-Patman claims asserted in the Coordinated Independent Actions,¹⁰ for failure to state a claim upon which relief may be granted. According to the defendants, the plaintiffs have failed to allege the fundamental facts necessary to support each element of a *prima facie* case of unlawful price discrimination under Sections 2(a) and 2(d)¹¹ of the Robinson-Patman Act.

[*19] HN4[]

Pursuant to Section 2(a) of the Robinson-Patman Act, it is unlawful:

for any person engaged in commerce. . . to discriminate in price between different purchasers of commodities of like grade and quality. . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination or with customers of either of them.

15 U.S.C. § 13(a). Accordingly, HN5[] for their Section 2(a) claim to survive dismissal, the plaintiffs must allege the following:

(1) the same seller made two or more contemporaneous sales[;] (2) of commodities of similar grade and quality[;] (3) at different prices; (4) at least one of the sales was in interstate commerce; and (5) the price discrimination injured the plaintiff and (6) tended to lessen competition of the commodity line (7) substantially.

⁸ The defendants cite to one of our own decisions, *Ballard v. Johlic*, No. 93 C3214, 1994 WL 11626, at *3 & n.5 (N.D.Ill. Jan. 3, 1994), in support of the proposition that we should hold the plaintiffs to a heightened pleading standard. In *Ballard* we noted that Rule 8 of the Federal Rules of Civil Procedure requires a plaintiff to state the grounds upon which his claim is based, and in stating such grounds the plaintiff is required to set forth factual allegations. Here, however, the plaintiffs have sufficiently buttressed the grounds for their antitrust claims with the minimum factual support necessitated by the Rules' notice pleading system.

⁹ Defendants Schering-Plough Corporation and Burroughs Wellcome Co. (collectively, "Schering and Burroughs") have filed a separate Reply Memorandum in support of the Manufacturer Defendants' Motion to Dismiss the Consolidated and Amended Complaint. Schering and Burroughs essentially argue that the Consolidated Action complaint must be dismissed because the plaintiffs have failed to state separate, individual claims against each Manufacturer Defendant. For reasons which are set forth below in our discussion of the defendants' motion to dismiss the Robinson-Patman claims, we are not persuaded that such specific and presumably redundant allegations would be either helpful or necessary at this juncture.

¹⁰ The Manufacturer Defendants' motion to dismiss the Robinson-Patman claims is addressed to the claims of price discrimination asserted in the following three sets of complaints: (1) *Rite Aid Corporation, et al. v. American Home Products Corp. et al.*, No. 93c1200 ("Rite Aid"); (2) the six complaints filed by Duker & Barrett and Mary Boies & Associates and the three additional, nearly-identical complaints filed by other counsel (collectively, the "Duker-Boies" complaints); and (3) *Albertson's, Inc. et al. v. Abbott Laboratories et al.*, Civ. No. C-1-94-160 (S.D.Ohio) ("Albertson's").

¹¹ The *Rite-Aid* and *Duker-Boies* complaint assert claims under Section 2(d) of the Robinson-Patman Act, a claim which is not asserted in the *Albertson* complaint.

Oreman Sales, Inc. v. Matsushita Elec. Corp., 768 F. Supp. 1174, 1184 (E.D.La. 1991). Accord American Academic Suppliers v. Beckley-Cardy, 922 F.2d 1317, 1322 (7th Cir. 1991). [*20]

According to the Manufacturer Defendants the plaintiffs cannot state a Section 2(a) Robinson-Patman violation without alleging with specificity: (1) what products were supposedly sold at discriminatory prices; (2) whether the plaintiff purchased products directly from a Manufacturer Defendant; (3) the price paid by the plaintiff for each product; and (4) who the allegedly favored purchaser was and the price it paid.

In support of their argument the defendants cite to Mountain View Pharmacy v. Abbott Laboratories, 630 F.2d 1383 (10th Cir. 1980). There, the Tenth Circuit affirmed the dismissal of a Section 2(a) Robinson-Patman claim because of the plaintiffs' failure to:

specify any products that were the subject of discriminatory treatment [and failure to] identify the favored and disfavored purchasers of a particular product.

Id. at 1388. Here, however, we believe that the plaintiffs' have sufficiently identified themselves as the disfavored purchasers, and have identified Medco, a representative mail order pharmacy, as a favored purchaser. Moreover, the plaintiffs have specifically alleged the anticompetitive effect [*21] of the defendants alleged actions.

Although the plaintiffs have not at this juncture specified the products that were subject to discriminatory treatment, we do not agree with the Tenth Circuit that this is a necessary allegation for the purpose of giving the defendants notice of the claims alleged and the grounds upon which they rest. Such facts are, as suggested by the plaintiffs, "neither desirable nor necessary" at this juncture, for pleading specific claims against each defendant on the basis of each product would "result[] only in a complaint doubled in length" with no resulting "gain in useful information." Nagler v. Admiral Corporation, 248 F.2d 319, 325 (2nd Cir. 1957).

In support of their argument that the plaintiffs must set forth separate pleadings for their separate claims against each defendant, the Manufacturer Defendants cite to Baim & Blank, Inc. v. Warren-Connelly Co., 19 F.R.D. 108 (D.N.Y. 1956), in which the court dismissed a Robinson-Patman Act complaint which failed to list and analyze each act of each defendant. The court in *Baim & Blank* criticized what they considered to be a "shotgun complaint." [*22] Id. at 100. However, a year after *Baim & Blank* was decided the Second Circuit harshly criticized the decision and analysis of the *Baim & Blank* court. Nagler v. Admiral Corp., 248 F.2d at 323. The court in *Nagler* observed that the *Baim & Blank* decision led "promptly to a new complaint, doubled in size, and some attempt at formal separation of the claims of different plaintiffs, with no appreciable gain in information. . . . no real progress has been made in the 2 1/3 years the case has pended." Id. at 323 n.3.

We are reluctant to take what we consider to be an unnecessary course of action which would result only in undue delay. We cannot at this juncture justify a summary dismissal of the plaintiffs' Robinson-Patman Act claims since each of the plaintiffs' complaints, as a whole, goes beyond merely reciting the elements of a Robinson-Patman Act violation. The plaintiffs have provided the defendants with a sufficient factual background evidencing their claim. See Leatherman, 113 S. Ct. at 1163. Of course, whether or not the plaintiffs will actually prevail [*23] on their claims and prove each exacting element of Section 2(a) of the Act cannot be determined until after the completion of discovery.

We find that the plaintiffs have sufficiently set forth "either direct or inferential allegations" respecting each of the material elements under Section 2(a) of the Robinson-Patman Act. Seglin, 769 F.2d 1274 at 1279; Car Carriers, 745 F.2d at 1106. Accordingly, the Manufacturer Defendants' motion to dismiss the Coordinated, Individual Plaintiffs' Section 2(a) Robinson-Patman Act claims is denied.

Likewise, the Manufacturer Defendants' motion to dismiss the Section 2(d) Robinson-Patman Act claims asserted in the *Rite-Aid* and *Duker-Boies* complaints is likewise denied. HN6 Pursuant to Section 2(d) of the act:

it is unlawful for any person engaged in commerce to pay or contract for the payment. . . as compensation or in consideration for any services or facilities. . . in connection with the . . . offering for sale of any products or

commodities. . . unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution [*24] of such products or commodities.

15 U.S.C. § 13(d). The Manufacturer Defendants argue that with the exception of one manufacturer and one product, the plaintiffs fail to allege which products are allegedly involved, who the "favored" competing customers are supposed to have been and the amount of the alleged payment. As with the defendants' Section 2(a) arguments for dismissal, we are likewise unpersuaded by their arguments for dismissal of the Section 2(f) claim. "If 'the defendants, before trial, desire more detailed information from [the] plaintiff[s] they can seek it by interrogatories, deposition or discovery'." Nagler, 248 F.2d at 323.

CONCLUSION

For the foregoing reasons, the Manufacturer Defendants' motions to dismiss the plaintiffs' Sherman Act claims and Robinson-Patman Act claims are denied. Moreover, since Defendant Medco's motion to dismiss incorporates by reference and is contingent upon the Manufacturer Defendants' motion to dismiss the plaintiffs' Robinson-Patman Act claims, Defendant Medco's motion to dismiss is likewise denied.

Charles P. Kocoras

United States District Judge

Dated: May 26, [*25] 1994

End of Document

Massachusetts Sch. of Law v. American Bar Ass'n

United States District Court for the Eastern District of Pennsylvania

May 31, 1994, Decided ; May 31, 1994, Filed

CIVIL ACTION No. 93-6206

Reporter

853 F. Supp. 843 *; 1994 U.S. Dist. LEXIS 7219 **; 1994-1 Trade Cas. (CCH) P70,605

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC. v. AMERICAN BAR ASSOCIATION, et al.

Prior History: [**1] Original Opinion of March 11, 1994, Reported at: [1994 U.S. Dist. LEXIS 2924](#).

Core Terms

individual defendant, conspired, accreditation, personal jurisdiction, law school, conspiracy, medical staff, reconsideration motion, co-conspirator, organizational, Exhibits, contacts

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN1 Pleadings, Complaints

[Federal Rule of Civil Procedure 8\(a\)\(2\)](#) requires a party provide a short and plain statement of the claim showing pleader is entitled to relief from the individual defendants.

Torts > ... > Concerted Action > Civil Conspiracy > Defenses

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN2 Civil Conspiracy, Defenses

Only legally distinct entities can conspire with one another.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN3 Regulated Practices, Private Actions

In antitrust cases, courts look beyond legal form to the economic substance of an arrangement, which often depends upon the economic incentives of the parties.

Civil Procedure > General Overview

Civil Procedure

The rules of civil procedure are to be construed to secure the just, speedy, and inexpensive determination of every action. [Fed. R. Civ. P. 1.](#)

Counsel: For MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC., PLAINTIFF: HAROLD E. KOHN, KOHN, SAVEETT, KLEIN & GRAF, P.C., PHILADELPHIA, PA, JOANNE ZACK, KOHN, NAST & GRAF, P.C., PHILADELPHIA, PA, LAWRENCE R. VELVEL, ANDOVER, MA, MICHAEL L. COYNE, ANDOVER, MA, CONSTANCE L. RUDNICK, ANDOVER, MA, PETER M. MALAGUTI, ANDOVER, MA, JOSEPH E. DEVLIN, ANDOVER, MA, ROBIN SHELDON, KOHN, NAST AND GRAF, P.C., PHILA, PA.

For AMERICAN BAR ASSOCIATION, DEFENDANT: L. SUZANNE FORBIS, PEPPER, HAMILTON & SCHEETZ, PHILA, PA, BARBARA W. MATHER, PEPPER, HAMILTON & SCHEETZ, PHILA, PA, CAREY A. DE WITT, ANN M. KELLY, BUTZEL AND LONG, DETROIT, MI, H. BLAIR WHITE, CHICAGO, IL, DAVID T. PRITIKIN, SIDLEY AND AUSTIN, CHICAGO, IL, WILLIAM H. BAUMGARTNER, SIDLEY AND AUSTIN, CHICAGO, IL. For LAW SCHOOL ADMISSION SERVICES, INC., LAW SCHOOL ADMISSION COUNCIL, DEFENDANTS: JOSEPH B. G. FAY, MARK P. EDWARDS, JAY H. CALVERT, JR., MORGAN, LEWIS & BOCKIUS, PHILA, PA, MICHAEL F. CLAYTON, MORGAN, LEWIS & BOCKIUS, WASHINGTON, DC, SCOTT A. STEMPLE, MORGAN, LEWIS AND BOCKIUS, WASHINGTON, DC, H. BLAIR WHITE, CHICAGO, IL, DAVID T. PRITIKIN, SIDLEY AND AUSTIN, CHICAGO, IL, WILLIAM H. BAUMGARTNER, SIDLEY AND AUSTIN, CHICAGO, IL. For THE ASSOCIATION [**2] OF AMERICAN LAW SCHOOLS, INC., CARL C. MONK, DEFENDANTS: JACQUELINE R. DEPEW, ROBERT A. BURGOYNE, DAVID M. FOSTER, SALLY P. PAXTON, FULBRIGHT & JAWORSKI L.L.P., WASHINGTON, DC.

For UNIVERSITY OF DETROIT MERCY SCHOOL OF LAW, RESPONDENT: CAREY A. DE WITT, ANN M. KELLY, BUTZEL AND LONG, DETROIT, MI.

Judges: Ditter, Jr., J.

Opinion by: J. WILLIAM DITTER, JR.

Opinion

[*844] MEMORANDUM AND ORDER

Ditter, J.

This case involves law school accreditation and alleged violations of federal antitrust law.¹ [**3] Plaintiff, the Massachusetts School of Law ("MSL"), alleges in its complaint that four organizational defendants² and 22 individual defendants³ conspired to fix the salaries of law school faculties and administrators, restrict professors'

¹ For a more detailed recitation of the facts and plaintiff's allegations, see [Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 846 F. Supp. 374, 376-77 \(E.D. Pa. 1994\)](#).

² The organizational defendants are the American Bar Association, the American Association of Law Schools, Law School Admission Services, Inc., and the Law School Admission Council.

³ The 22 individual defendants are: James P. White, Nina Appel, Jose R. Garcia-Pedrosa, Laura N. Gasaway, Frederick M. Hart, Rudolph C. Hasl, Carl C. Monk, R.W. Nahstoll, Henry Ramsey, Jr., Norman Redlich, John E. Ryan, Gordon D. Schaber, Pauline

output, raise law school tuitions, and foreclose from legal education people in lower socio-economic classes. Twenty-one of the 22 individual defendants filed a collective motion to dismiss the claims against them for lack of personal jurisdiction. The 22nd individual defendant, Carl C. Monk, filed a separate motion to dismiss.

I granted the 21 individual defendants' motion, holding there was no basis for the exercise of general or specific personal jurisdiction over the individual defendants. *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 846 F. Supp. 374, 380 (E.D. Pa. 1994). None of the individuals is a resident or citizen of Pennsylvania, had been served in Pennsylvania, or consented to the exercise of personal jurisdiction by courts in [*845] Pennsylvania. Further, because plaintiff [**4] had not alleged with particularity any contacts the individual defendants had with Pennsylvania that gave rise to plaintiff's cause of action, I held that plaintiff had not met its burden of establishing that its cause of action arose out of the individual defendants' contacts with Pennsylvania. Finally, I held that the theory of co-conspirator jurisdiction was inapplicable in this instance because plaintiff had not alleged substantial acts in Pennsylvania in furtherance of the conspiracy.

Plaintiff timely filed a motion for reconsideration, asserting that it now has evidence of co-conspirators' contacts with Pennsylvania and wants the chance to discover more. Such contacts, plaintiff argues, permit the exercise of personal jurisdiction over the individual defendants. In a subsequent filing, plaintiff made clear it was not challenging accreditation in general, but only the use of certain criteria that are reflected in various ABA accreditation standards.

⁴ [**6] To support its motion for reconsideration of the order of dismissal, MSL submits several documents that MSL says show that some accreditation-related activities took place in Philadelphia. Exhibits C and D indicate that an ABA [**5] workshop for law school deans took place in Philadelphia in 1988, although I note that the workshop does not appear to have been solely, or even mostly, focused on accreditation. ⁵ Similarly, plaintiff's reply memorandum in support of its motion for reconsideration shows that in 1988 and 1992, the LSAC's Board of Trustees, which included some of the individual defendants, met in Pennsylvania. The minutes of the meeting show that the board discussed cooperation with the AALS and ABA on certain issues. There is no reference to any consideration of the specific standards that MSL contends violate the antitrust laws.

Other documents submitted by MSL do not support its contention that activities in furtherance of the alleged conspiracy took place in Pennsylvania. For example, MSL submits numerous letters from law school deans who, in 1987, expressed concern or disagreement with the ABA accreditation criteria concerning student-faculty ratios. The letters were all addressed to a law school dean in San Francisco; some mention a scheduled deans' meeting in New Orleans.⁶

[**7] Similarly, MSL asserts that several of the individual defendants participated in meetings of the "Mayflower Group," which apparently includes representatives of the ABA, AALS, and LSAC. Plaintiff states that discovery "may show meetings in Philadelphia." By the same token, discovery may show meetings in Nome, Honolulu, or Timbuktu. However, the only *definite* locations of Mayflower Group meetings that can be gleaned from plaintiff's documents are Washington, D.C. (Exhibits I, J, K, L) and San Francisco (Exhibits P and R).

Schneider, Steven R. Smith, Claude R. Sowle, Robert A. Stein, Rennard Strickland, Roy T. Stuckey, Leigh H. Taylor, Frank K. Walwer, Sharp Whitmore, and Peter A. Winograd.

⁴ MSL challenges six criteria that encompass several of the more than 50 ABA standards: salary levels (ABA Standard 405); student-faculty ratios, limits on teaching hours and sabbatical requirement (ABA Standards 201 and 401-405); use of the Law School Admission Test or other test (ABA Standard 503); guidelines for law libraries (ABA Standards 602, 603, and 704); prohibition of for-credit bar review courses (ABA Standard 302(b)); and limits on hours that students may be employed (ABA Standard 305).

⁵ In addition to a program by the accreditation committee -- which may or may not have included discussion of the criteria and standards complained of -- topics for panels and discussions included fund raising, lawyer competency, law school administration, and budgeting.

⁶ MSL's contention that the documents "show that a large number of deans present at the *Philadelphia* workshop believed the ABA's student-faculty ratio to be unrelated to quality" (emphasis added) requires a leap of faith I am unwilling to make. While some letters, dated 1988, mention the Philadelphia deans' workshop, the majority of letters are from 1987 and refer to the New Orleans workshop.

Despite plaintiff's urging otherwise, I do not find that the documents MSL presents suggest, much less show, substantial acts in Pennsylvania in furtherance of the conspiracy claimed to have injured MSL in its bid for, and subsequent denial of, accreditation.

An even more important reason for affirming the March 11 order lies in the fact that plaintiff has failed, as required by [HN1](#)[↑] [Federal Rule of Civil Procedure 8\(a\)\(2\)](#), to provide a "short and plain statement of the claim showing pleader is entitled to relief" from the [*846] individual defendants. Plaintiff has not alleged in its complaint nor asserted in its arguments, a legal theory upon which the liability of any [**8](#) individual can rest. What the complaint does do is to name twenty-two persons and associate each of them with one of four organizational defendants. It asserts that "defendants have engaged in combinations, conspiracies, and agreements, and have organized and enforced a group boycott," and that they have "engaged in a conspiracy to monopolize [and] an attempt to monopolize."

The complaint can only be logically understood as asserting that the individual defendants conspired with the organizational defendants of which they are alleged to have been a part, or whose activities they are said to have carried out. Such an allegation is not a short, plain statement showing that plaintiff is entitled to relief from the individual defendants because, as a matter of law, the individual defendants cannot conspire with their own organizational defendant.⁷

[**9](#) [HN2](#)[↑] Only legally distinct entities can conspire with one another. [Oksanen v. Page Memorial Hosp., 945 F.2d 696, 703 \(4th Cir. 1991\)](#), cert. denied, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992); [Weiss v. York Hosp., 745 F.2d 786, 813 \(3d Cir. 1984\)](#), cert. denied, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985). Weiss, a case involving peer-review by a medical staff empowered to make decisions about granting hospital privileges to applicant doctors, is instructive as an analogy to this, an accreditation case in which individuals are empowered by the ABA to evaluate law schools and make recommendations to the ABA about accreditation.

In Weiss, an osteopath was denied staff privileges at a hospital. [745 F.2d at 791](#). He alleged Sherman Act violations by the hospital and its medical staff, composed of doctors who have privileges at the hospital. The Third Circuit said that the hospital could not, as a matter of law, conspire with the medical staff because the latter, empowered to make decisions [**10](#) on behalf of the hospital, acted as corporate officers would in relation to a corporation.⁸ [745 F.2d at 817](#). The medical staff had no economic interest in competition with the interests of the hospital and therefore could not conspire with it. *Id.*

[**11](#) As Weiss points out, [HN3](#)[↑] in antitrust cases, courts look beyond legal form to the economic substance of an arrangement, which often depends upon the economic incentives of the parties. Here the individual defendants may be separate economic units competing with each other, although that is not alleged, but if the complaint ties them to anything in this case, it is to their respective organizations. In short, the complaint can only be understood to assert that in effect they acted in the way corporate officers would act in relation to a corporation.

⁷ If it be argued that the complaint could be interpreted to allege that the individual defendants each conspired with some or all of the others, the complaint becomes vague to the point of absurdity.

⁸ This analogy of the medical staff acting as corporate officers would act in relation to the corporation does not mean that personal jurisdiction over the corporation supports personal jurisdiction over the individual corporate officers. A corporate officer's or director's actions taken in his or her corporate capacity do not, by themselves, bring the officer or director personally within the jurisdiction of the court. [Simkins Corp. v. Gourmet Resources Int'l, 601 F. Supp. 1336, 1345 \(E.D. Pa. 1985\)](#). See also [Amplifier Research Corp. v. Hart, 144 Bankr. 693, 696 \(E.D. Pa. 1992\)](#) (president of defendant corporation dismissed for lack of personal jurisdiction when plaintiff did not set forth what president did to subject himself to jurisdiction); [Donner v. Tams-Witmark Music Library, Inc., 480 F. Supp. 1229, 1233 \(E.D. Pa. 1979\)](#) (courts generally have not exercised personal jurisdiction over individuals for their acts done in a corporate capacity). It is for that reason that the documents referred to on page 3 do not establish a basis for jurisdiction over an individual defendant even though he or she may have participated in the activity in question.

The situation of the individual defendants *vis a vis* the organizational defendants is much the same as that of the medical staff in *Weiss*. Individual defendants who, on behalf of the ABA, assume accreditation responsibilities and undertake accreditation activities, such as visiting a law school under evaluation, are the ears and eyes of the ABA. It is not merely that their interests are consistent with those of the ABA -- for that particular accreditation matter, they are the ABA. [*847] James P. White, Consultant on Legal Education to the ABA, is a particularly good example. He is, according to the complaint, in charge of the accreditation [**12] process for the ABA. On accreditation matters, therefore, he is not legally distinct from the ABA and cannot, as a matter of law, conspire with it. Therefore, the ABA's contacts with Pennsylvania cannot be the basis for the exercise of co-conspirator personal jurisdiction over the individual defendants because the individual defendants cannot be co-conspirators with the ABA. Similarly, individual defendants on the board of trustees of the LSAC cannot, in their capacity as board members, conspire with the LSAC.

The Third Circuit in *Weiss*, while agreeing with the district court that the medical staff could not conspire with the hospital during the peer-review process, recognized that the individuals comprising the medical staff could conspire with each other, as they had independent economic interests in competition with one another and, presumably, with any doctor seeking privileges at the hospital. [745 F.2d at 817](#). Here, it may well be that the individual defendants, who have independent interests as law school professors, administrators, or practitioners, could have, as a matter of law, conspired with one another. Plaintiff, however, has not alleged [**13] which of them conspired with which others, and to do what.⁹ The global allegation about combinations, conspiracies, and agreements; the organization of a group boycott; and the organization of a monopolization conspiracy, rich in jargon though it may be, is not a short and plain statement showing why the individual defendants are liable to the plaintiff for anything.

By way of further illustration: Norman Redlich is one of the individual defendants named in MSL's complaint. The complaint alleges only that "Norman Redlich was Chairman of the Council of the Section of Legal Education from 1989-1990." No doubt, he acted through that council for the ABA. [**14] And that is exactly the point: he was not legally distinct from the ABA and cannot have conspired with it. Neither the complaint nor subsequent filings allege what Redlich, *independent of his ABA ties*, had to do with establishing, evaluating, or enforcing the accreditation criteria of which MSL complains, or that Redlich was involved in the decision not to accredit MSL. MSL has asserted that it is not attacking the virtues of accreditation as a whole, but only specific criteria alleged to be anticompetitive restraints. The only thing that can be gleaned from the complaint about Redlich is that he acted for and with the ABA. Since he cannot have conspired with the ABA, whatever is said about him is not a short and plain statement showing why MSL is entitled to relief from Redlich.

MSL's own allegations and exhibits illustrate precisely the significance of this point. MSL's motion for reconsideration includes exhibits indicating that Redlich was on a panel during the 1988 deans' workshop in Philadelphia (Exhibit D) and may have attended a Mayflower Group meeting in 1989 (Exhibit K). The deans' workshop in which Redlich participated was sponsored by the ABA; Redlich's panel addressed [**15] ABA council matters. Similarly, the document concerning the Mayflower Group is on LSAC letterhead and specifically indicates that Redlich's appearance was for, or on behalf of, the ABA: it lists to whom the meeting's agenda was sent and reads, "Norman Redlich (ABA)." While MSL may assert that the ABA, through Redlich, conspired with the LSAC, or that Redlich as an individual conspired with the LSAC, this document cannot suggest both allegations. Theoretically it is possible for Redlich to have conspired with the other defendants in his individual, not ABA, capacity. But until or unless MSL can allege with whom, and for what, Redlich -- or any other individual defendant -- conspired, there is no basis for the assertion of co-conspirator jurisdiction over any of them.

HN4 The rules of civil procedure are to be construed to secure the just, speedy, and inexpensive determination of every action. [*848] [Fed. R. Civ. P. 1](#). The rule should be more than an idea or fuzzy, though noble, abstraction. If the plaintiff cannot state a claim against one or more of these individual defendants, that individual should not be subjected to the expensive and time-consuming arsenal of interrogatories, document demands, [**16] and

⁹ I am aware of the Supreme Court's admonition that courts should not impose heightened pleading requirements in the absence of such requirements in the Federal Rules. [Leatherman v. Tarrant County Narcotics Unit](#), 122 L. Ed. 2d 517, 113 S. Ct. 1160, 1163 (1993). In this instance I am merely requiring the plaintiff to identify the alleged wrong and wrongdoer.

depositions that plaintiff will understandably use in the hope of establishing a basis for personal jurisdiction. If the plaintiff can allege with whom and for what an individual conspired, it may do so. If not, that should end the matter for that defendant.

Although this court can exercise personal jurisdiction over the four organizational defendants, when form yields to economic substance, plaintiff has not alleged the legally possible conspiracy(ies) that could give rise to the exercise of co-conspirator personal jurisdiction over any of the individual defendants. Therefore, although plaintiff's motion for reconsideration of the order dismissing the 21 individual defendants for lack of personal jurisdiction has been granted, the order must be affirmed.

An appropriate order follows.

ORDER

AND NOW, this 31st day of May, 1994, the plaintiff's motion for reconsideration is hereby granted, and the order of March 11, 1994, dismissing plaintiff's claims against 21 individual defendants is hereby affirmed.

BY THE COURT:

J. William Ditter, Jr.

End of Document

Roth v. Rhodes

Court of Appeal of California, Fourth Appellate District, Division Three

May 31, 1994, Decided

No. G013651.

Reporter

25 Cal. App. 4th 530 *; 30 Cal. Rptr. 2d 706 **; 1994 Cal. App. LEXIS 529 ***; 94 Cal. Daily Op. Service 4003; 94 Daily Journal DAR 7372; 1994-1 Trade Cas. (CCH) P70,612

IVAR ROTH et al., Plaintiffs and Appellants, v. FRANK A. RHODES et al., Defendants and Respondents.

Prior History: [***1] Superior Court of Orange County, No. 625223, C. Robert Jameson, Judge.

Disposition: The judgment is affirmed.

Core Terms

cause of action, restraint of trade, declaration, medical doctor, continuance, tenants, vertical, medical building, trial court, profession, civil rights, cases, conspiracy, patients, Cartwright Act, pleadings, lease, summary adjudication, podiatrists, landlord, tenancy, triable, arbitrary discrimination, personal characteristics, prohibits, policies, religion, appears, business establishment, civil rights statute

LexisNexis® Headnotes

Civil Rights Law > Protection of Rights > Public Versus Private Discrimination

HN1[Protection of Rights, Public Versus Private Discrimination

A policy or a classification, in itself permissible, may nevertheless be illegal if it is merely a device employed to accomplish prohibited discrimination.

Civil Rights Law > Protection of Rights > Public Versus Private Discrimination

HN2[Protection of Rights, Public Versus Private Discrimination

Legitimate business interests may justify limitations on consumer access to public accommodations. Operators of commercial buildings have legitimate reasons to designate the purposes for which they wish to let them by limiting their tenants to certain trades or professions or with respect to the type of merchandise sold.

Civil Rights Law > Protection of Rights > Public Versus Private Discrimination

HN3 Protection of Rights, Public Versus Private Discrimination

Discrimination in leasing office space based on profession, as long as it is not a stratagem designed to disguise discrimination based on personal characteristics protected under the Unruh Civil Rights Act (Act), *Cal. Civ. Code § 51 et seq.*, is not prohibited under the Act.

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

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

HN4 Price Fixing & Restraints of Trade, Vertical Restraints

The Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.*, prohibits a lease from containing a condition the lessee shall not deal with a competitor where the effect of such lease or such condition may be to substantially lessen competition or tend to create a monopoly.

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

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

HN5 Summary Judgment, Supporting Materials

A party cannot successfully resist summary judgment on a theory not pleaded.

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

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

HN6 Price Fixing & Restraints of Trade, Vertical Restraints

Vertical restraints are subject to a rule-of-reason analysis to determine their impact on competition which requires a threshold inquiry into the defendant's market power. As a practical matter, market power is usually equated with market share. Since market power can rarely be measured directly by the methods of litigation, it is normally inferred from possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography. To meet his initial burden in establishing that the practice is an unreasonable restraint of trade, a plaintiff must show that the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude. Ordinarily, a plaintiff to do this must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly.

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

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

HN7 Antitrust & Trade Law, Sherman Act

The Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.*, like the Sherman Act, prohibits "combinations" for the purpose of restraining trade. A combination means a concert of action by individuals or entities maintaining separate and independent interests. In the absence of any purpose to create or maintain a monopoly, traders

25 Cal. App. 4th 530, *530L⁸⁰ Cal. Rptr. 2d 706, **706L⁹⁹⁴ Cal. App. LEXIS 529, ***1

engaged in an entirely private business have the right to freely exercise their own independent discretion as to the parties with whom they will deal. Absent such a monopolistic purpose, and unless prohibited by other statutes, landlords may freely rent to whomever they please and likewise not rent to whomever they please.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN8 [down] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Cal. Bus. & Prof. Code § 16726 declares that "trusts" are unlawful, against public policy, and void. Cal. Bus. & Prof. Code § 16720 defines a "trust" as a combination of capital, skill, or acts by two or more persons for certain defined purposes. The statute defines combinations to create or carry out restrictions in trade or commerce among these illegal purposes.

Antitrust & Trade Law > Sherman Act > General Overview

HN9 [down] **Antitrust & Trade Law, Sherman Act**

An individual acting alone through his agent or a corporation acting alone through its officers is not a combination in restraint of trade proscribed by the Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Voluntary Dismissals > Court Order > Motions for Dismissal

HN10 [down] **Antitrust & Trade Law, Sherman Act**

The law does not require a plaintiff to join all coconspirators in the action. Antitrust coconspirators are jointly and severally liable for all damages caused by the conspiracy; thus a plaintiff may choose to sue any or all of them.

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

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

HN11 [down] **Summary Judgment, Supporting Materials**

Admissions made in the course of a party's deposition cannot be contradicted solely by that party's declaration in opposition to summary judgment.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN12 [💡] Intentional Interference, Elements

An essential element of the tort of intentional interference with prospective business advantage is the existence of a business relationship with which the tortfeasor interfered. Although this need not be a contractual relationship, an existing relationship is required.

Torts > Business Torts > Unfair Business Practices > General Overview

HN13 [💡] Business Torts, Unfair Business Practices

Before there may be liability for intentional interference with the right to pursue a lawful calling, such interference must be either by unlawful means or by means which are otherwise lawful but without sufficient justification or privilege.

Civil Procedure > Pretrial Matters > Continuances

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

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

HN14 [💡] Pretrial Matters, Continuances

See [Cal. Civ. Proc. Code § 437c\(h\)](#).

Civil Procedure > Pretrial Matters > Continuances

HN15 [💡] Pretrial Matters, Continuances

[Cal. Civ. Proc. Code § 437c\(h\)](#) makes it a condition that the party moving for a continuance show facts essential to justify opposition may exist.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A doctor of podiatry brought an action against medical building operators alleging that defendants illegally refused to lease offices to him on the basis of their policy of only leasing to medical doctors. The trial court granted defendants' motion for judgment on the pleadings as to plaintiff's cause of action for interference with prospective business advantage, and granted defendants' motion for summary adjudication on all other causes of action, which included violations of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and common law prohibitions on restraint of trade, unfair competition, and intentional interference with the right to practice a profession. (Superior Court of Orange County, No. 625223, C. Robert Jameson, Judge.)

The Court of Appeal affirmed. It held that discrimination in leasing office space based on profession, as long as it is not a stratagem designed to disguise discrimination based on personal characteristics protected under the Unruh

Civil Rights Act, is not prohibited under the act. The court also held that plaintiff's claim that defendants' refusal to lease constituted a vertical restraint of trade in violation of [Bus. & Prof. Code, § 16727](#) (lease may not contain condition that lessee may not deal with competitor where effect of lease or condition may be to substantially lessen competition or tend to create monopoly), was not encompassed within the causes of action pleaded, which were based on a conspiracy to restrain trade, not on an attempt to monopolize by refusing to deal. These are independent bases for recovery, and a party cannot successfully resist summary judgment on a theory not pleaded. The court further held that the trial court properly granted defendants' summary adjudication motion as to plaintiff's claim of conspiracy to restrain trade, since defendants, who were all each other's agents, could not conspire among themselves, and the evidence offered by them concerning the absence of any agreement or conspiracy with medical doctors (whom plaintiff had dismissed from the action) was uncontradicted. As to plaintiff's claim of interference with prospective business advantage, the trial court properly granted defendants' motion for judgment on the pleadings, as the allegations only directly charged that tort against the now dismissed medical doctors. Finally, the court held, the trial court did not abuse its discretion in denying plaintiff's motion for a continuance, which he made at the hearing on the motions for summary adjudication and judgment on the pleadings. (Opinion by Rylaarsdam, J., * with Sills, P. J., and Crosby, J., concurring.)

Headnotes

[CA\(1a\)](#) [] (1a) [CA\(1b\)](#) [] (1b)

Civil Rights § 5—Housing and Other Property—Lease of Office Space Based on Profession—Refusal to Lease to Other Than Medical Doctors.

--Discrimination in leasing office space based on profession, as long as it is not a stratagem designed to disguise discrimination based on personal characteristics protected under the Unruh Civil Rights Act (*Civ. Code, § 51 et seq.*), is not prohibited under the act. Hence, in an action by a doctor of podiatry alleging that defendant medical building operators illegally refused to rent to him because he was not a medical doctor, the trial court properly granted defendants' motion for summary adjudication as to plaintiff's cause of action under the act. Plaintiff made no allegation that defendants' policy of renting only to medical doctors had the ulterior purpose of excluding classes enumerated in the act or within the penumbra of categories identified in case law as being protected by the civil rights laws.

[See 8 **Witkin**, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 753, 754A; 5 **Miller & Starr**, Cal. Real Estate (2d ed. 1989) § 11:41.]

[CA\(2\)](#) [] (2)

Civil Rights § 1—Unruh Civil Rights Act—Statutory Classifications as Nonexclusive.

--The classifications of *Civ. Code, § 51*, prohibiting discrimination by business establishments based on sex, race, color, religion, ancestry, national origin, or disability, are not exclusive but illustrative only; the statute prohibits all arbitrary discrimination by business establishments. [Civ. Code, § 51.5](#), expands on *Civ. Code, § 51*, by specifying forms of discrimination, including refusal to deal. The classifications specified in [Civ. Code, § 51.5](#), which are identical to those of *Civ. Code, § 51*, are likewise not exclusive and encompass other personal characteristics identified in the case law.

[CA\(3\)](#) [] (3)

* Judge of the Orange Superior Court sitting under assignment by the Chairperson of the Judicial Council.

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Applicability of Act to Professions.

--The Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), which prohibits restraints of trade, applies to professions.

CA(4a)[] (4a) CA(4b)[] (4b)**Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Vertical Restraints of Trade—Refusal to Lease Office Space to Other Than Medical Doctors.**

--In an action by a doctor of podiatry alleging that defendant medical building operators illegally refused to rent to him because he was not a medical doctor, the trial court properly granted defendants' motion for summary adjudication as to plaintiff's cause of action for restraint of trade, notwithstanding plaintiff's claim that defendants' refusal to lease constituted a vertical restraint of trade in violation of [Bus. & Prof. Code, § 16727](#) (lease may not contain condition that lessee may not deal with competitor where effect of lease or condition may be to substantially lessen competition or tend to create monopoly). The claim was not encompassed within the causes of action pleaded, which were based on a conspiracy to restrain trade, not on an attempt to monopolize by refusing to deal. These are independent bases for recovery, and a party cannot successfully resist summary judgment on a theory not pleaded. In any event, the services offered by defendants did not place them in the same stream of commerce as the services offered by plaintiff, and on this ground alone, a "vertical restraint of trade" analysis was inappropriate. Further, defendants' share of the relevant market was too small to support a vertical restraint claim.

CA(5)[] (5)**Monopolies and Restraints of Trade § 6—Under Cartwright Act—Interpretation of Act—Applicability of Cases Interpreting Sherman Act.**

--The Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), which prohibits restraints of trade, is patterned after the Sherman Act and both statutes have their roots in the common law. Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.

CA(6)[] (6)**Monopolies and Restraints of Trade § 2—Definitions and Distinctions—Combination: Words, Phrases, and Maxims—Combination.**

--Under the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), which, like the Sherman Act, prohibits "combinations" for the purpose of restraining trade, "combination" means a concert of action by individuals or entities maintaining separate and independent interests.

CA(7)[] (7)**Monopolies and Other Restraints of Trade § 3—Particular Agreements and Combinations—Leases.**

--In the absence of any purpose to create or maintain a monopoly, traders engaged in an entirely private business have the right to freely exercise their own independent discretion as to the parties with whom they will deal. Thus, absent such a monopolistic purpose and unless prohibited by other statutes, such as the civil rights statutes, landlords may freely rent to whomever they please and likewise not rent to whomever they please.

CA(8a)[] (8a) CA(8b)[] (8b)**Monopolies and Restraints of Trade § 5—Actions—Conspiracy to Restraine Trade—Refusal to Rent Office Space to Other Than Medical Doctors—Summary Adjudication.**

--In an action by a doctor of podiatry alleging that defendant medical building operators illegally refused to rent to him because he was not a medical doctor, the trial court properly granted defendants' motion for summary adjudication as to plaintiff's cause of action for conspiracy to restrain trade, since there was no triable issue of fact as to whether defendants acted in concert with others to deprive plaintiff of the desired tenancy. Any alleged agreement among defendants could not support the claim, since defendants jointly engaged in the single enterprise of managing a medical building; as such, each was the agent for the others, and an individual acting alone through his or her agent or a corporation acting alone through its officers is not a combination in restraint of trade. Further, although all antitrust coconspirators need not be joined in the action, the evidence offered by defendants concerning the absence of any agreement or conspiracy with medical doctors (whom plaintiff had dismissed from the action) was uncontradicted.

CA(9)[] (9)**Summary Judgment § 5—Depositions—Contradiction of Deposition Admission by Declaration in Opposition to Summary Judgment.**

--Admissions made in the course of a party's deposition cannot be contradicted solely by the party's declaration in opposition to summary judgment.

CA(10)[] (10)**Interference § 7—With Prospective Economic Advantage—Actions and Remedies—Judgment on Pleadings—Refusal to Lease Office Space to Other Than Medical Doctors.**

--In an action by a doctor of podiatry alleging that defendant medical building operators illegally refused to rent to him because he was not a medical doctor, the trial court did not err in granting judgment on the pleadings for defendants as to plaintiff's cause of action for interference with prospective economic advantage. The essence of the cause of action was the allegation that medical doctors induced the medical building operator defendants not to lease space to plaintiff, but, at the time of the motion for judgment on the pleadings, the medical doctor defendants had been dismissed, and the allegation only charged those defendants. Further, an essential element of the tort of intentional interference with prospective business advantage is the existence of a business relationship with which the tortfeasor interfered, but plaintiff's case was predicated on the claim that a tenancy in plaintiff's building would have resulted in future referrals and patient contacts. From the very nature of this claim it followed that plaintiff could not have had an existing relationship with these speculative "future patients."

CA(11)[] (11)**Interference § 1—With Right to Pursue Lawful Profession—Refusal to Lease Office Space to Other Than Medical Doctors.**

--In an action by a doctor of podiatry alleging that defendant medical building operators illegally refused to rent to him because he was not a medical doctor, the trial court properly granted defendants' motion for summary adjudication as to plaintiff's cause of action for interference with plaintiff's right to practice his profession. Before there may be liability for intentional interference with the right to pursue a lawful calling, such interference must be either by unlawful means or by means that are otherwise lawful but without sufficient justification or privilege.

Defendants did not act unlawfully, and there was no triable issue of fact regarding justification; defendants' legitimate business purposes in renting only to medical doctors (quality control and increased reputation for the facility) were uncontradicted. Further, there was no claim that plaintiff was prevented from practicing his profession or was unable to obtain adequate facilities to treat his patients as a result of defendants' conduct.

CA(12) (12)

Continuance § 4—Review—Denial of Motion in Hearing on Motions for Summary Adjudication and Judgment on Pleadings.

--In an action by a doctor of podiatry alleging that defendant medical building operators illegally refused to rent to him because he was not a medical doctor, the trial court did not abuse its discretion in refusing to grant plaintiff's motion for a continuance at the hearing on defendants' motions for summary adjudication and judgment on the pleadings. The court did not hear the summary adjudication motion until six weeks after it had been filed, the court had already once continued the hearing to permit plaintiff to file late opposition, and *Code Civ. Proc., § 437c, subd. (h)* (continuance of hearing on summary judgment or summary adjudication motion), does not provide for an unlimited number of continuances. At the time of the motion, the case had been pending two and one-half years, and it was close to trial. Adequate bases for denial of the continuance existed in that plaintiff did not request it until the time of the hearing and gave no reason for the lateness of his request. Further, the declaration requesting the continuance failed to suggest what facts might exist to support the opposition to the motions, as required by subd. (h).

Counsel: James F. McGee for Plaintiffs and Appellants.

Layman, Jones & Dye, Kevin P. Bjerregaard and Robert B. Beauchamp for Defendants and Respondents.

Judges: Opinion by Rylaarsdam, J., * with Sills, P. J., and Crosby, J., concurring.)

Opinion by: RYLAARSDAM, J.

Opinion

[*535] [**707] * --May operators of medical buildings limit acceptable tenants to medical doctors or do statutory or common law prohibitions require them to lease space to other health care practitioners, in this instance, a podiatrist, or even the world at large? We conclude under the facts presented here, no legal requirement compels landlords to accept tenants who are not medical doctors.

[***2] Respondents Frank A. Rhodes, Gene Rhodes, Susan Rhodes, Rhodes Development Company, and Newport Center Medical Buildings (Rhodes or the Rhodes respondents) operate medical buildings in Newport Beach. According to the allegations of the complaint and as acknowledged by them, the Rhodes respondents only lease space to persons holding M.D. degrees. Appellants Ivar Roth and Ivar E. Roth, Podiatric Corporation (Roth) predicate all causes of action [**708] asserted in the complaint upon a refusal of Rhodes to rent space to Roth because of Rhodes' policy only to lease space to holders of M.D. degrees. Roth is not a medical doctor; he holds the degree of doctor of podiatric medicine. Roth appeals from a judgment entered following the granting of motions

* Judge of the Orange Superior Court sitting under assignment by the Chairperson of the Judicial Council.

* Judge of the Orange Superior Court sitting under assignment by the Chairperson of the Judicial Council.

for summary adjudication and judgment on the pleadings which disposed of all causes of action asserted in the complaint.¹

I. FACTS [***3] AND CONTENTIONS

In his third amended complaint, Roth attacked Rhodes' policy limiting tenants to medical doctors as violations of the Cartwright Act ([Bus. & Prof. I^{*536} Code, § 16700 et seq.](#)) and common law prohibitions on restraint of trade, unfair competition, interference with prospective business advantage, intentional interference with the right to practice a profession, and violations of the Unruh Civil Rights Act. (Civ. Code, § 51 et seq.) The trial court granted summary adjudication on all causes of action except the cause of action for interference with prospective business advantage. Roth argues his opposition to the motion presented triable issues of material fact which require resolution by a fact finder as to each of these causes of action. The trial court granted judgment on the pleadings on the cause of action for interference with prospective business advantage. Roth argues the complaint states sufficient facts to constitute a cause of action. We disagree on all counts.

At the hearing on the motions, Roth's counsel presented the court with a declaration requesting a continuance. The declaration stated Roth needed further discovery and time to obtain expert opinions. [***4] The court denied the continuance on grounds the request was untimely and the declaration was insufficient to support a continuance. Roth argues the court had a mandatory duty to continue the hearing. There was no such mandatory duty under the facts of this case, and we hold the trial court did not abuse its discretion.

Roth's factual allegations may be summarized as follows: (1) Rhodes operates medical buildings in the Fashion Island section of Newport Beach, including a building at 1401 Avocado. (2) This building, as well as the others operated by Rhodes in the area, is prestigious and offers a uniquely comprehensive range of medical services. (3) Tenancy in the Avocado building offers unique opportunities for professional referrals. (4) The Rhodes respondents conspired among themselves and with the (since dismissed) medical doctors to deny Roth's civil rights, restrain his trade, interfere with his prospective economic advantage, and prevent Roth from successfully practicing his profession by prohibiting podiatrists, including Roth, from practicing in the medical building to prevent competition with these medical doctors. (5) In furtherance of this conspiracy, Rhodes refuses to [***5] rent space to Roth in the Avocado building. (6) As a result, Roth lost potential referrals and potential direct patient contacts which would have benefited him economically.

II. ISSUES SUMMARIZED

The issue whether Rhodes can refuse to lease space to podiatrists is analytically no different from the question of whether the law requires a department store which caters to the high end of the market to purchase [^{*537}] shoes from a manufacturer who makes less expensive, lower quality shoes. Or we could ask, does the law prohibit a landlord from limiting his tenancies to lawyers, merchants, or any specific trade or profession? If managers of stores or office buildings adopt such policies, may a disappointed supplier or prospective tenant claim the right to a jury trial under the civil rights acts because such discrimination against inferior or superior merchandise or between various types of tenancies may constitute arbitrary discrimination by a business establishment? Does [^{**709}] such discrimination constitute a violation of the antitrust laws? We answer these questions in the negative.

III. DO THE CALIFORNIA CIVIL RIGHTS STATUTES PROHIBIT DISCRIMINATION BETWEEN MEDICAL DOCTORS AND DOCTORS [***6] OF PODIATRY IN THE LEASING OF OFFICE SPACE?

[CA\(1a\)](#)[] (1a) May operators of office buildings limit their tenants to tinkers, tailors, physicians, or podiatrists? Do such restrictions violate the statutory civil rights of prospective tenants who fail to meet the landlord's occupational or professional qualifications? Do such restrictions at least raise questions of fact as to whether the exclusion constitutes arbitrary discrimination? Unless the landlord uses such restrictions as a pretext to exclude persons

¹ Originally Roth also sued a number of medical doctors, tenants of Rhodes, on various conspiracy theories; he voluntarily dismissed as to them.

having the types of personal characteristics protected by the civil rights statutes (such as race, gender, or religion), they do not.

Roth claims Rhodes, who as a commercial landlord operates a business establishment, violated the Unruh Civil Rights Act (*Civ. Code, § 51 et seq.*). *Section 51* prohibits discrimination by business establishments based on "sex, color, race, religion, ancestry, national origin, or disability." **CA(2)↑ (2)** A number of cases hold that the classifications of *section 51* are not exclusive but illustrative only; they note the statute prohibits all arbitrary discrimination by business establishments. (See, e.g., *O'Connor v. Village Green Owners Assn. (1983) 33 Cal.3d 790 [191 Cal.Rptr. 320, 662 P.2d 427]* [***7] [age]; *Marina Point, Ltd. v. Wolfson (1982) 30 Cal.3d 721, 744 [180 Cal.Rptr. 496, 640 P.2d 115, 30 A.L.R.4th 1161]* [family status]; *In re Cox (1970) 3 Cal.3d 205, 218 [90 Cal.Rptr. 24, 474 P.2d 992]* [personal appearance]; *Pines v. Tomson (1984) 160 Cal.App.3d 370 [206 Cal.Rptr. 866]* [religion]; *Rolon v. Kulwitzky (1984) 153 Cal.App.3d 289 [200 Cal.Rptr. 217]* [homosexuality].) *Section 51.5* expands on *section 51* by, *inter alia*, specifying forms of discrimination, including refusal to deal. The rationale of *Cox* and *Marina Point* compels the conclusion that the classifications specified in *section 51.5*, which are identical to those of *section 51*, are likewise not exclusive and encompass other personal characteristics identified in earlier cases.

[*538] **CA(1b)↑ (1b)** How expansive is the prohibition on arbitrary discrimination under these statutes? All economic decisions involve choices and hence require decision makers to discriminate between alternatives in making [***8] these choices. If the issue whether or not discrimination is arbitrary may require a determination in a trial before a fact finder, are all discriminators to be subjected to such a trial to defend the rational basis for their discrimination? If law firms adopt policies not to hire associates who failed to do well in law school or only those who graduated from certain highly rated law schools, may they be put in the dock for a jury to determine whether the services offered by the firm could only be performed by excellent law students? If a university insists it will only hire holders of a Ph.D. as assistant professors, would a fact finder be permitted to determine the policy represents arbitrary discrimination, and therefore violates the civil rights statutes, because many persons not holding such a degree would be able to teach as well or better?

If such policies are subterfuges for invidious discrimination, the answer is yes. **HN1↑** A policy or a classification, in itself permissible, may nevertheless be illegal if it is merely a device employed to accomplish prohibited discrimination. For example, a case decided under title VII of the Civil Rights Act of 1964 (*42 U.S.C.A. § 2000e* [***91 et seq.]), involving policies similar to those in the Unruh Civil Rights Act, held an employer rule prohibiting law school attendance, which was applied to female employees but not to males, violated the act. (*Chescheir v. Liberty Mut. Ins. Co. (5th Cir. 1983) 713 F.2d 1142*.) There is no suggestion in the case that the discrimination against law students, in and of itself, violated title VII. Similarly, *Griggs v. Duke Power Co. (1971) 401 U.S. 424 [28 L.Ed.2d 158, 91 S.Ct. 849]*, another title VII case, held an employer could not use the requirement of a high school diploma as a pretext to exclude a racial group, where the possession [**710] of such a diploma was unrelated to the skills required for the performance of the work.

Roth makes no allegation that Rhodes' policy had any such ulterior purpose. He does not suggest the true reason for his exclusion was his membership in any of the classes enumerated in the statute or within the penumbra of categories identified in case law as being protected by the civil rights laws. There is no hint that the policy adopted by Rhodes was applied in light of the [***10] prospective tenant's race, sex, religion, or any other personal characteristic. Indeed, we have nothing in the record to suggest that Rhodes was a member of any minority group other than podiatrists.

Cases noted above, expanding application of the Unruh Civil Rights Act to categories of persons other than those specified in the statute, have used the general statement, ". . . the Legislature intended to prohibit all arbitrary [***539] discrimination by business establishments." (*In re Cox, supra, 3 Cal.3d 205, 216*.) In spite of this broad language, all these cases involve "discrimination based on personal characteristics similar to the statutory classifications of race, sex, religion, etc. . ." (*Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1156 [278 Cal.Rptr. 614, 805 P.2d 873]*.) The court in *Harris* dealt with economic discrimination; it held the Unruh Civil Rights Act did not prohibit a landlord from rejecting tenants who failed to meet a minimum income standard. (*Id.* at pp. 1143, 1163-1164.) In reviewing the legislative history of California's civil rights statutes, the court concluded, "In [***11] order to give significance to the Legislature's specific and repeated emphasis on these categories [i.e.

race, color, religion, etc.], we must ascertain their common element. The categories involve personal as opposed to economic characteristics--a person's geographical origin, physical attributes, and personal beliefs." (*Id.* at p. 1160.)

Furthermore, apparently referring to classifications other than those statutorily protected, Harris notes, ". . . the California appellate cases have also recognized that [HN2](#)[[↑]] legitimate business interests may justify limitations on consumer access to public accommodations." ([Harris v. Capital Growth Investors XIV, supra, 52 Cal.3d at p. 1162.](#)) Such a legitimate business interest is obvious here. Operators of commercial buildings have legitimate reasons to designate the purposes for which they wish to let them by limiting their tenants to certain trades or professions or with respect to the type of merchandise sold. If a shopping mall is intended to appeal to a particular segment of the market, it serves no social or economic purpose for the law to demand tenants not in keeping with this objective, [***12] be granted leases. If operators of an office building perceive a niche in the market for a particular type of tenant, no useful purpose is to be served by our interfering with their economic decision to so limit the tenancy. It may well be that the very prestige which Roth attributes to Rhodes' medical building, and on which Roth desires to trade, is in part the result of Rhodes' leasing policies. Unless legally prohibited discrimination results, a court should not insinuate itself into the market place to prohibit Rhodes from maintaining such policies as have resulted in the commercial success attributed to him by Roth.

The election to practice a particular profession represents a professional and, frequently, an economic choice, rather than a personal characteristic of the type enumerated in the act. We therefore conclude [HN3](#)[[↑]] discrimination in leasing office space based on profession, as long as it is not a stratagem designed to disguise discrimination based on personal characteristics protected under the Unruh Civil Rights Act, is not prohibited under the act. Hence, the trial court properly concluded Roth could not recover on the basis of the asserted cause of action for violation [***13] of his statutory civil rights.

[*540] IV. DOES THE CARTWRIGHT ACT PROHIBIT THE LANDLORD OF A MEDICAL BUILDING FROM REFUSING TO LEASE TO ANYONE BUT MEDICAL DOCTORS?

Roth bases four causes of action in his third amended complaint on restraint of trade: (1) restraint of trade under the Cartwright Act ([Bus. & Prof. Code, 16700 et seq.](#)); (2) common law restraint of trade; (3) damages for unfair competition; and (4) injunction for unfair competition. Roth stipulated at the hearing below and acknowledges in his brief the second, third, and fourth of these depend upon the viability of the Cartwright Act cause of action. Since we conclude the court properly granted the motion for summary adjudication of issues on the Cartwright Act cause of action, further discussion of the other three causes of action is unnecessary.

Does any principle of **antitrust law** give Roth the right to rent from Rhodes? Roth alleges, and we will accept as a fact, podiatrists compete with medical doctors with respect to certain procedures. [CA\(3\)](#)[[↑]] (3) The Cartwright Act, which prohibits restraint of trade, applies to professions. ([Cianci v. Superior Court \(1985\) 40 Cal.3d 903, 916 \[221 Cal.Rptr. 575, 710 P.2d 375\].](#)) [***14] Roth argues that Rhodes' refusal to lease constitutes a vertical restraint of trade (apparently relying on [Business and Professions Code section 16727](#)) and that the Rhodes respondents conspired among themselves and with some of the tenants (the dismissed medical doctors) to restrain his trade (relying on [Business and Profession Code sections 16720](#) and [16726](#)). Although he commingles arguments relating to vertical restraint and conspiracy to restrain trade, the two theories represent distinct violations of antitrust laws. However, under either theory, if the conduct charged against Rhodes constitutes an illegal restraint of trade, we should reverse the decision of the trial court granting summary adjudication in favor of Rhodes on the restraint of trade causes of action.

Roth does not contend Rhodes prevented him from practicing his profession. He does not contend Rhodes' building was the only place where he could treat his patients. He does not contend he is limited in his ability to practice his profession or patients will not come to his office because of its undesirable location or inadequate facilities. Roth's only contention is that Rhodes' building is more prestigious than others [***15] and, were he granted a tenancy, he would reap greater economic reward than in the accommodations available to him.

[*541] Do the facts asserted by Roth support a potential finding of a "vertical restraint of trade" in an attempt to monopolize?

CA(4a)[¹] (4a) Roth characterizes his claim as a "vertical restraint of trade." Although no statutory reference is provided, this claim appears to be made under [Business and Professions Code section 16727](#) which [HN4\[¹\]](#) prohibits a lease ² from containing a condition the lessee shall not deal with a competitor "where the effect of such lease . . . or such condition . . . may be to substantially lessen competition or tend to create a monopoly"

[***16] First, this claim is not encompassed within the causes of action pleaded; Roth bases these on a conspiracy to restrain trade, rather than on an attempt to monopolize by refusing to deal. As noted, these are independent bases for recovery. [HN5\[¹\]](#) A party cannot successfully resist summary judgment on a theory not pleaded. ([580 Folsom Associates v. Prometheus Development Co. \(1990\) 223 Cal.App.3d 1, 18 \[272 Cal.Rptr. 227\].](#))

In any event, we question whether a vertical restraint analysis is appropriate under the facts presented. All cases cited by Roth in support of his analysis and all cases disclosed through our research dealing with vertical restraints, involve claims against suppliers in the same stream of commerce as the person or entity claiming the restraint. [Business and Professions Code section 16727](#) expressly refers to "competitors."

Reviewing the cases cited by Roth: [G.H.I.I. v. MTS, Inc. \(1983\) 147 Cal.App.3d 256 \[195 Cal.Rptr. 211\]](#) deals with the relationship between, on the one hand, retail record stores and, on the other, producers and distributors of records and tapes; [Bert G. Gianelli Distributing Co. v. Beck & Co. \(1985\) 172 Cal.App.3d 1020 \[219 Cal.Rptr. 1**7121 203\]](#); [***17] the relationship between a brewer and, independent local beer distributors; [Columbia Broadcasting Sys. v. Am. Soc. of Composers \(2d Cir. 1980\) 620 F.2d 930](#); television networks and the holders of copyrights to music performed on the networks; [Redwood Theatres, Inc. v. Festival Enterprises, Inc. \(1988\) 200 Cal.App.3d 687 \[248 Cal.Rptr. 189\]](#); film distributors and theater chains. The one case cited by Roth for the proposition the parties need not be in the same product line, [Lowell v. Mother's Cake & Cookie Co. \(1978\) 79 Cal.App.3d 13 \[144 Cal.Rptr. 664\]](#), did not concern the issue of vertical restraints at all and held, albeit on unrelated grounds, the Cartwright Act did not apply. Here the services offered by Rhodes (commercial leasing) do not place him in [*542] the same stream of commerce as the services offered by Roth (podiatry). On this ground alone, a "vertical restraint of trade" analysis appears to be inappropriate.

However, even if concepts of vertical restraint of trade were to be applied, we nevertheless conclude no triable issues of fact exist on [***18] this theory. **CA(5)[¹]** (5) The complaint is framed under California's Cartwright Act; however "[a] long line of California cases has concluded that the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law. Consequently, federal cases interpreting 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 \[130 Cal.Rptr. 1, 549 P.2d 833\]; Redwood Theatres, Inc. v. Festival Enterprises, Inc., supra, 200 Cal.App.3d at p. 694.](#)) Redwood Theatres, in accordance with this principle, reviews a number of federal cases applying the federal antitrust laws to marketing practices in the motion picture industry. Although the court notes, "[t]he unusual competitive conditions of the theatre business, marked by the presence of a unique product in short supply, put an entirely different complexion on the issue of market power" (*id.* at p. 707), the case nevertheless provides us with certain basic principles which aid in our analysis here.

Redwood Theatres characterizes [***19] the refusal of a supplier to deal with a potential customer as a "vertical restraint" and holds, "[u]nder *Continental T.V., Inc. v. GTE Sylvania Inc.* [(1977)] [433 U.S. 36 \[53 L.Ed.2d 568, 97 S.Ct. 2549\]](#), such [HN6\[¹\]](#) vertical restraints are subject to a rule-of-reason analysis to determine their impact on competition." ([Redwood Theatres, Inc. v. Festival Enterprises, Inc., supra, 200 Cal.App.3d at p. 703](#), fn. omitted.) "Since the *Sylvania* decision, several other federal courts applying the rule of reason to vertical restraints have required [a] threshold inquiry into the defendant's market power. [Citations.] As a practical matter, market power is

² On its face, the statute appears to be limited to chattel leases; no similar California statute relating to leases of real property exists. However, we do not suggest that, on appropriate facts, restrictions in real property leases may not violate antitrust laws. (See, e.g., [People v. Mobile Magic Sales, Inc. \(1979\) 96 Cal.App.3d 1 \[157 Cal.Rptr. 749\].](#))

usually equated with market share. 'Since market power can rarely be measured directly by the methods of litigation, it is normally inferred from possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography.' [Citations.]" (*Id.* at p. 704.) "To meet his initial burden in establishing that the practice is an unreasonable restraint of trade, plaintiff must show that the activity [***20] is the type that restrains trade and that the restraint is likely to be of significant magnitude. [Citation.] Ordinarily, a plaintiff to do this must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly." (*Bhan v. NME Hospitals, Inc. (9th Cir. 1991) 929 F.2d 1404, 1413.*)

CA(4b)[¹] (4b) Rhodes supported his motion with the declaration of a qualified economist. This declaration demonstrated neither the building in which Roth [*543] sought a tenancy, nor the other buildings operated by Rhodes, constituted separate relevant geographic markets. Roth's admission that the area from which he draws his patients includes southern Orange County and Newport Beach, Irvine, Costa Mesa, and Huntington Beach also supports his conclusion. According to the economist, that market consists at least of the Newport Beach, Irvine, Costa Mesa, and Huntington Beach area. Within this area alone, there are some 59 medical buildings, 5 of which Rhodes operates. None of this was contradicted by Roth.

Applying the market share test to the facts, we find, on the basis of the number of [**713] buildings in the relevant market [***21] area, Rhodes controls less than 10 percent of the market. Were we to include all of southern Orange County, which is included in the area from which Roth acknowledges drawing his patients, the percentage would be even lower. Although we were not presented with square footage, which might give us a more refined measure of market share, as noted in *Redwood Theatres*, a market share of 16 percent fails "conspicuously to pass the threshold test establishing the defendant's market power." (*200 Cal.App.3d at p. 704.*) It is obvious there is no violation of the antitrust statutes, under the market share test, the basis for the rule of reason. Therefore, even if a vertical restraint analysis was appropriate, we must conclude summary adjudication in favor of Rhodes was proper, unless there is a triable issue of fact as to whether Rhodes engaged in a conspiracy to restrain trade.

Is there a triable issue of fact whether Rhodes engaged in a conspiracy to restrain trade?

CA(6)[¹] (6) **HN7[¹]** The Cartwright Act, like the Sherman Act, prohibits "combinations" for the purpose of restraining trade. "[A] combination means a concert of action by individuals or entities [***22] maintaining separate and independent interests." (*Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal.App.2d 672, 678 [73 Cal.Rptr. 494].* See also *State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal.3d 1147 [252 Cal.Rptr. 221, 762 P.2d 385].*) **CA(7)[¹]** (7) Early in the history of federal **antitrust law**, the United States Supreme Court recognized in *United States v. Colgate & Co. (1919) 250 U.S. 300, 307 [63 L.Ed. 992, 997, 39 S.Ct. 465, 7 A.L.R.443],* "[i]n the absence of any purpose to create or maintain a monopoly, . . . [traders] engaged in an entirely private business [have the right to] freely . . . exercise [their] own independent discretion as to the parties with whom [they] will deal . . ." Absent such a monopolistic purpose, and unless prohibited by other statutes, such as the civil rights statutes, discussed above, landlords may freely rent to whomever they please and likewise not rent to whomever they please.

However, a concerted refusal to deal may run afoul of the antitrust statutes. **HN8[¹]** ***Business and Professions* [***23] *Code section 16726*** declares, with exceptions not relevant here, "trusts" are "unlawful, against public policy and [*544] void." ***Business and Professions Code section 16720*** defines a "trust" as "a combination of capital, skill or acts by two or more persons" for certain defined purposes. The statute defines combinations "[t]o create or carry out restrictions in trade or commerce" among these illegal purposes. **CA(8a)[¹]** (8a) Therefore, if there is a triable issue of fact as to whether Rhodes may have acted in concert with others for the purpose of depriving Roth of the desired tenancy, the court should not have granted the motion for summary adjudication. We next examine whether a triable issue exists.

Roth argues the Rhodes respondents "agreed amongst each other and with the dismissed doctors to restrict the competition of Podiatrists, and in particular Dr. Roth, with medical doctors located in the Buildings." The alleged agreement or combination among the Rhodes respondents, the owners and operators of the building, cannot support the claim under the Cartwright Act. The Rhodes respondents jointly engage in the single enterprise of

managing the medical building; as such each is the agent for [***24] the others. [HN9](#)[[↑]] "[A]n individual acting alone through his agent or a corporation acting alone through its officers is not a combination in restraint of trade proscribed by the statute." ([Bondi v. Jewels by Edwar, Ltd., supra, 267 Cal.App.2d at p. 678.](#))

Therefore, we need to determine whether facts exist from which a fact finder could conclude the Rhodes respondents conspired with others to restrain Roth's trade. The complaint alleges: "From the opening of the Medical Building and up until the present time, the Defendants, and each of them, have combined, conspired, and agreed together and continue to combine, conspire, and agree to restrain trade by prohibiting Podiatrists, and Plaintiffs in particular, from opening a practice in the medical buildings. . ." Other than Rhodes, Roth only mentions as defendants certain medical doctors, tenants in the building. Although these [**714] defendants were originally served, Roth voluntarily dismissed them some time prior to the hearing on the motions. Their absence from the case, in and of itself, is not fatal to Roth's claim. [HN10](#)[[↑]] The law does not require a plaintiff to join all coconspirators in the action. [***25] "[A]ntitrust coconspirators are jointly and severally liable for all damages caused by the conspiracy" (*William Inglis, Etc. v. ITT Continental Baking Co.* (9th Cir. 1981) 668 F.2d 1014, 1052-1053); thus a plaintiff may choose to sue any or all of them. ([Walker Distributing Co. v. Lucky Lager Brewing Co.](#) (9th Cir. 1963) 323 F.2d 1, 8.)

In support of their motion, the Rhodes respondents relied on declarations by three of their principals and deposition testimony of Roth. The declarations show the "M.D. only" policy was adopted unilaterally and had been in effect since the development of the buildings in 1967. The declarations also [*545] demonstrate the economic justification for the policy: quality control and enhancing the reputation of the building in the eyes of the medical profession and the general public. The declarations explicitly deny Rhodes ever entered into any agreements with anyone to deprive Roth of space in the building. In his deposition Roth testified he had no knowledge of any agreement between Rhodes and the medical doctors.

In opposition to the motion, Roth submitted only his own declaration. The [***26] only "evidence" submitted by Roth to contradict Rhodes' denial of the existence of an agreement or conspiracy, was his statement: "By the systematic way in which I was continually rejected as a tenant to the Defendants' buildings and given the sometimes contradictory statements on each occasion given by the Defendants in refusing me as a tenant, it appears that there exists an understanding, agreement, and combination of each of the Defendants to refuse me as a tenant." Since Roth had already dismissed the medical doctors when his declaration was filed, this statement appears to refer only to an agreement among the Rhodes respondents. Even if the statement is read to include the medical doctors, it amounts to mere speculation and Rhodes properly objected on this ground. [CA\(9\)](#)[[↑]] (9) Furthermore, [HN11](#)[[↑]] admissions made in the course of a party's deposition cannot be contradicted solely by that party's declaration in opposition to summary judgment. ([Thompson v. Williams](#) (1989) 211 Cal.App.3d 566, 573 [259 Cal. Rptr. 518].) The trial court presumably disregarded this portion of Roth's declaration or should have done so.

[CA\(8b\)](#)[[↑]] (8b) The evidence offered by the Rhodes respondents [***27] concerning the absence of any agreement or conspiracy was uncontradicted. Absent such contradictory evidence, the trial court correctly concluded there was no triable issue of fact with respect to any agreement or conspiracy. In the absence of proof of an agreement or conspiracy, there cannot be a violation of [Business and Professions Code sections 16720](#) and [16726](#). The court properly granted the motion for summary adjudication on the causes of action based on the Cartwright Act.

V. DOES THE COMPLAINT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE?

[CA\(10\)](#)[[↑]] (10) The trial court granted judgment on the pleadings on Roth's cause of action for interference with prospective economic advantage. A motion for judgment on the pleadings performs the same function as a general [*546] demurrer and " ' admits all material and issuable facts pleaded. " ' " ([Baillargeon v. Department of Water & Power](#) (1977) 69 Cal.App.3d 670, 676 [138 Cal.Rptr. 338].) The essence of this cause of action is the allegation "the Orthopod Defendants induced the Rhodes Defendants not to lease space in the Medical Building [***28] to plaintiffs so that plaintiffs would not compete with the Orthopod Defendants for patients." At the time of the motion the Rhodes defendants were the only defendants remaining in the case. The allegation only charges the dismissed

medical doctors. Since the complaint does not allege Rhodes interfered with the relationship between Roth and future patients, it was appropriate for the trial court [**715] to determine no cause of action was stated against Rhodes.

In addition, [HN12](#)[[↑]] an essential element of the tort of intentional interference with prospective business advantage is the existence of a business relationship with which the tortfeasor interfered. ([Asia Investment Co. v. Borowski \(1982\) 133 Cal.App.3d 832, 840-841 \[184 Cal.Rptr. 317, 30 A.L.R.4th 561\]](#).) Although this need not be a contractual relationship, an existing relationship is required. ([Buckaloo v. Johnson \(1975\) 14 Cal.3d 815, 829 \[122 Cal.Rptr. 745, 537 P.2d 865\]](#)) None is alleged. Roth's case is predicated on the claim a tenancy in Rhodes' building would result in future referrals and patient contacts. Therefore, [***29] from the very nature of this claim it follows Roth cannot have an existing relationship with these speculative "future patients."

The trial court correctly concluded "[t]he pleadings do not allege any other specific economic relationship with which Rhodes interfered." The motion for judgment on the pleadings was properly granted.

VI. DO THE FACTS SUPPORT A POTENTIAL RIGHT OF ROTH TO RECOVER FOR INTERFERENCE WITH HIS RIGHT TO PRACTICE HIS PROFESSION?

[CA\(11\)](#)[[↑]] (11) Citing [Lewin v. St. Joseph Hospital of Orange \(1978\) 82 Cal.App.3d 368 \[146 Cal.Rptr. 892\]](#), Roth acknowledges that, [HN13](#)[[↑]] before there may be liability for intentional interference with the right to pursue a lawful calling, such interference must be either by unlawful means or by means which are otherwise lawful but without sufficient justification or privilege. (*Id.* at p. 392; [Blank v. Palo Alto-Stanford Hospital Center \(1965\) 234 Cal.App.2d 377, 384 \[44 Cal.Rptr. 572\]](#).) For all of the reasons discussed in the preceding parts of this opinion, we conclude Rhodes did not act unlawfully. Nor was there a triable issue of fact regarding justification; Rhodes' [***30] legitimate business purposes (quality control and increased reputation for the facility) were uncontradicted. Finally, there was no basis for claiming an [*547] interference at all in light of the absence of any contention by Roth that he was prevented from practicing his profession or was unable to obtain adequate facilities to treat his patients as a result of Rhodes' conduct. The motion for summary adjudication on this cause of action was properly granted.

VII. DID THE TRIAL COURT ABUSE ITS DISCRETION IN REFUSING TO GRANT A CONTINUANCE OF THE HEARING ON THE MOTIONS?

[CA\(12\)](#)[[↑]] (12) At the time of the hearing on the motions, Roth presented the court with a declaration requesting a continuance. Roth claimed he needed time to conduct further discovery and interview his expert witnesses. The court denied the request, finding the declaration was untimely and insufficient to support a continuance. We conclude the court did not abuse its discretion in refusing to accede to the late request for continuance.

[Code of Civil Procedure section 437c, subdivision \(h\)](#), provides, [HN14](#)[[↑]] "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that [***31] facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." Roth claims this imposed a mandatory duty on the court to grant the continuance. We disagree for a number of reasons.

We first note the court did not hear the motion until six weeks after it had been filed. Next, the court had already once continued the hearing at Roth's request to permit him to file late opposition. The statute does not provide for an unlimited number of continuances. At the time of the motion, the case had been pending two and one-half years, well beyond the goals of the Trial Court Delay Reduction Act of 1990. ([Gov. Code, 68600 et seq.](#)) The case was close to trial. Although the trial was subsequently continued, at the time the motion was noticed, it was scheduled to be heard near the last day [**716] permitted by [Code of Civil Procedure section 437\(c\), subdivision \(a\)](#), which requires the motion to be heard no later than 30 days before the date of trial. Roth did not request the continuance until the time of the hearing. [***32] This, in and of itself, is an adequate basis for denial of the continuance. Being mindful of the preparation time required of the trial judge for a motion of this type, we recognize where such a request is made after the court reviewed the matter in preparation for the hearing, substantial inefficiencies [*548]

result if continuance is granted. No reason was given for the lateness of the request.³ This too, was a sufficient basis for the denial of the continuance.

Finally, the declaration failed to satisfy the requirements of Code of Civil Procedure section 437c, subdivision (h). It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. **HN15**↑ The statute makes it a condition that the party moving for a continuance show "facts essential to justify opposition may exist." The [***33] declaration indicates two depositions remained to be completed and Roth had not yet received his expert opinions. However, there is no statement which suggests what facts might exist to support the opposition to the motions. The trial court was fully justified in finding the declaration insufficient to support a continuance.

The judgment is affirmed.

Sills, P. J., and Crosby, J., concurred.

End of Document

³ In passing, we note the lack of courtesy to court and opposing counsel implied in such a last minute request for continuance, absent any excuse being tendered for the lateness of the request.



K.M.B. Warehouse Distrib. v. Walker Mfg. Co.

United States District Court for the Southern District of New York

June 1, 1994, Decided ; June 1, 1994, Filed

92 Civ. 1167 (LBS)

Reporter

1994 U.S. Dist. LEXIS 7253 *; 1994-1 Trade Cas. (CCH) P70,609

K.M.B. WAREHOUSE DISTRIBUTORS, INC. and KMB/ CT, INC., Plaintiffs, v. WALKER MANUFACTURING COMPANY; PRIME AUTOMOTIVE PARTS, CO., INC.; WOODBURY AUTOMOTIVE WAREHOUSE ENTERPRISES, INC.; and MOTOR AGE, INC., Defendants

Core Terms

intrabrand, distributor, Tri-State, market share, antitrust, summary judgment, defendants', interbrand, exhaust, muffler, rule of reason, products, market power, automotive, customers, effects

LexisNexis® Headnotes

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

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

HN1 [] Entitlement as Matter of Law, Genuine Disputes

Summary judgment is appropriate where the moving papers and affidavits submitted by the parties show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\).](#)

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

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

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

HN2 Summary Judgment, Opposing Materials

The moving party in a summary judgment motions has the burden of showing the absence of a genuine issue as to any material fact, and the court must view the evidence in the light most favorable to the non-moving party. The court's role in such a context is not to resolve disputed factual issues, but rather to determine whether the record, taken as a whole, supports any issues that require a trial. The very language of the summary judgment standard provides that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Materiality is determined by reference to the substantive law applicable to the case at hand, and factual disputes irrelevant to its outcome will not be counted.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

The Sherman Act, [15 U.S.C.S. § 1](#), provides that any contract, combination, or conspiracy, in restraint of trade or commerce among the several states, is illegal. Although the Sherman Act speaks of restraint of trade in absolute terms, it has long been established that [§ 1](#) proscribes only unreasonable restraints. Since the early years of this century a judicial gloss on this statutory language has established the rule of reason as the prevailing standard of analysis. Under this standard of analysis, the finder of fact weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Certain business relationships are deemed unreasonable per se, however, because of their pernicious effect on competition and lack of any redeeming virtue. These business practices and agreements are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Examples of per se unreasonable arrangements are horizontal territorial restrictions, horizontal price-fixing schemes, and vertical price-fixing schemes.

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

HN4 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The market impact of vertical non-price restrictions is complex because of their potential for a simultaneous reduction of intra-brand competition and stimulation of inter-brand competition. In such cases, a rule of reason analysis is inherently better suited than applying the per se rule, because the former takes into account the complexities and subtleties of such restraints.

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

Under the rule of reason approach, plaintiff bears the initial burden of demonstrating that the challenged action has had a substantially harmful effect on competition as a whole in the relevant market. It is not sufficient for a plaintiff to prove it has been harmed as an individual competitor. Once the plaintiff has met its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive redeeming virtues of the restraint. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to show that any legitimate objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole. Ultimately, the finder of fact must weigh the harms and benefits of the challenged behavior and decide if it purports to promote or destroy competition.

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

[**HN6**](#) Price Fixing & Restraints of Trade, Vertical Restraints

Intra-brand competition alone can be a significant concern of **antitrust law**. However, a vertical restraint on trade involves some reduction in intra-brand competition. Therefore, courts balance the harms and benefits through a systematic comparison of the negative effects of the restraint on intra-brand competition and inter-brand competition, if any, with any alleged positive effects on inter-brand competition stemming from the restraint. Ultimately, the effects of a restraint on intra-brand competition on consumer welfare cannot be viewed in isolation from the inter-brand market structure. A plaintiff must establish that the inter-brand market structure was such that intra-brand competition was a critical source of competitive pressure on price, and hence of consumer welfare. Moreover, a plaintiff must demonstrate that the nature and effects of the restraint were such as to be substantially adverse to market competition.

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

[**HN7**](#) Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

A manufacturer generally has the right to select those with whom it will deal and the corresponding right to refuse to deal with others.

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

[**HN8**](#) Price Fixing & Restraints of Trade, Vertical Restraints

In evaluating a plaintiff's contention that a defendant's conduct had a substantially harmful effect on competition, the court views evidence of defendant's market power as a highly relevant factor because it bears a particularly strong relationship to a party's ability to injure competition. Market power is the ability to raise price significantly above the competitive level without losing all of one's business.

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

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

HNG[] Market Definition, Relevant Market

In order to establish a defendant's market power, plaintiff must first offer proof of a well-defined relevant market upon which the challenged anticompetitive actions would have had a substantial impact.

Counsel: [*1] LAW OFFICE OF FREDERICK R. DETTMER, Attorney for Plaintiffs, 711 Third Avenue, Suite 1505, New York, New York 10017, FREDERICK R. DETTMER, ESQ., HOWARD OCKMAN, ESQ., KAREN STEISFELD, ESQ., Of Counsel.

DONOVAN LEISURE NEWTON & IRVINE, Attorney for Defendant Walker Manufacturing Company, 30 Rockefeller Plaza, New York, NY 10112, KENNETH E. NEWMAN, ESQ., Of Counsel.

MISROK & ROSENBAUM, Attorney for Defendant Prime Automotive Parts Co., Inc., 30 South Central Avenue, Valley Stream, NY 11580, ELLIOT M. ROSENBAUM, ESQ., Of Counsel.

BLEECKER & ASEN, Attorney for Defendant Woodbury Automotive Warehouse Enterprises, Inc., 501 Fifth Avenue, Suite 1901, New York, NY 10017, LLOYD M. BLEECKER, ESQ., Of Counsel.

HOFFINGER FRIEDLAND DOBRISH, Attorney for Defendant Motor Age, Inc., 110 East 59th Street, New York, NY 10022, DAVID B. BERNFELD, ESQ., Of Counsel.

Judges: Sand

Opinion by: LEONARD B. SAND

Opinion

OPINION

SAND, J.

Plaintiffs, KMB Warehouse Distributors, Inc. and KMB/CT, Inc. (collectively "KMB"), bring this action pursuant to federal antitrust laws, particularly the Sherman Antitrust Act, [15 U.S.C. § 1, et seq.](#), and the Clayton Act, [15 U.S.C. § 15](#). [*2] Subject matter jurisdiction is founded on the presence of a federal question ([28 U.S.C. § 1337](#)) and supplemental jurisdiction ([28 U.S.C. § 1337](#)). Plaintiffs bring this suit against a manufacturer of automobile exhaust equipment, defendant Walker Manufacturing Company ("Walker"), and against three distributors of exhaust equipment, defendants Prime Automotive Parts Co., Inc. ("Prime"), Woodbury Automotive Warehouse Enterprises, Inc. ("Woodbury"), and Motor Age, Inc. ("Motor Age").

KMB alleges that certain conduct engaged in by defendants constitutes an unreasonable restraint of trade in violation of [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#). In addition, KMB charges breach of contract for the sale of goods, promissory estoppel, and tortious interference with contractual relations. Defendants each move for summary judgment. For the reasons stated below, we grant defendants' motions for summary judgment.

BACKGROUND

KMB sells automotive parts -- including mufflers, catalytic converters, exhaust piping and related accessories (collectively referred to as "exhaust equipment") [*3] -- to jobbers, which are automotive parts stores, in New York, New Jersey and Connecticut (the "Tri-State Area"). Defendant Walker is a manufacturer of exhaust equipment. Defendants Prime, Woodbury, and Motor Age are distributors of Walker products, in contrast to KMB which is a

distributor of AP Parts Company ("AP"). KMB and defendants Prime, Woodbury, and Motor Age compete in the distribution of automotive parts or equipment to jobbers.

In a complaint filed February 18, 1992, plaintiffs allege Walker entered into an agreement in or, about September 1991 whereby KMB would, among other things, become a Walker muffler equipment distributor and sell Walker muffler equipment in the Tri-State Area to existing and new customers. Complaint at P 15. Plaintiffs contend that under the alleged agreement, Walker would supply KMB's long-term requirements for muffler equipment, sponsor a joint promotional program, and "change over" KMB's inventory and the inventory of about fifty of KMB's customers. *Id.* In support of the existence of such an agreement, plaintiffs claim that two of Walker's representatives prepared a "Changeover Proposal" which was included as part of a larger "Changeover Package", [*4] an instrument allegedly binding Walker to the distributorship arrangement with KMB. Plaintiffs' Mem. in Opp. at 6. Moreover, plaintiffs allege that one of Walker's representatives told a KMB representative, "We have a deal," and shook hands. *Id.* at 8; Pls.' 3(g) Statement, Specific Comments on Defendants' Offering of "Undisputed Facts" at No. 18. Defendant Walker argues the Changeover Package was not binding because it contained only four of seven signatures allegedly necessary to approve a new Walker account. Defendants' Joint Reply at 26; Def. Walker's 3(g) Statement at PP 17-18.

KMB avers that Prime, Woodbury, and Motor Age complained to Walker that they would be unable to compete with KMB because they feared KMB would excessively discount Walker exhaust equipment and offer additional services to customers (such as extra delivery service). Complaint at P 22. Plaintiffs further contend the defendant distributors influenced, coerced, pressured and caused Walker to repudiate its distributorship agreement with KMB by threatening to reduce or terminate their purchases of Walker equipment. *Id.*¹ Furthermore, plaintiffs claim that Prime, Woodbury, and Motor Age visited many of [*5] KMB's customers advising them that they could only buy Walker products from the defendant distributors, not from KMB. Complaint at P 26. Walker eventually put the decision to contract with KMB as a distributor "on hold" in September 1991, and this lawsuit was filed in February 1992.

Plaintiffs argue that the events described above prove that defendants engaged in a "combination and conspiracy to boycott Plaintiffs and/ or to cause Walker to refuse to deal with Plaintiffs in order to deprive Plaintiffs of the opportunity or ability to purchase and sell Walker muffler equipment in the Tri-State Area and thereby to compete with Prime, Woodbury and Motor Age." Complaint at P 33. This conduct, [*6] plaintiffs contend, "has and, if unrestrained, will continue to injure competition in the market by, among other things, depriving consumers, including customers of Prime, Woodbury and Motor Age, of the benefits of competitive and superior pricing and service." *Id.* at P 34. Defendants move for summary judgment claiming, among other things, that there has been no injury to competition in the muffler equipment aftermarket in the Tri-State Area.

DISCUSSION

Standard of Review

HN1[] Summary judgment is appropriate where the moving papers and affidavits submitted by the parties "show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. **HN2**[] The moving party has the burden of showing the absence of a genuine issue as to any material fact, and the court must view the evidence in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*.

¹ For instance, as evidence of these threats, plaintiffs point to a statement by Prime's President, Robert Scheer, who testified that he had told Walker representatives, "If you are going to sell K.M.B., it might affect our relationship. We'd have to see what happens to our business and act accordingly." Pls.' Mem. in Opp. at 10.

The court's role in such a context is not to resolve disputed factual issues, but rather to determine whether the record, [*7] taken as a whole, supports any issues that require a trial. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Nevertheless, the very language of the summary judgment standard provides that "the mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (emphasis in original). This characteristic of the summary judgment standard is especially relevant in the instant case, because the facts in dispute do not create a genuine issue of material fact. Materiality is determined by reference to the substantive law applicable to the case at hand, and factual disputes irrelevant to its outcome "will not be counted." *Id. at 248*.

The Antitrust Claim

HN3 [↑] Section 1 of the Sherman Act provides that any contract, [*8] combination, or conspiracy, in restraint of trade or commerce among the several states, is illegal. 15 U.S.C. § 1 (1988). Although the Sherman Act speaks of restraint of trade in absolute terms, it has long been established that section 1 proscribes only unreasonable restraints. *Standard Oil Co. v. United States*, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911). "Since the early years of this century a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977) (hereinafter *Sylvania* (citing *Standard Oil*)). Under this standard of analysis, the finder of fact weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. *Id.*² [*10] Certain business relationships are deemed unreasonable *per se*, however, "because of their pernicious effect on competition and lack of any [*9] redeeming virtue." *Northern P. R. Co. v. United States*, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). These business practices and agreements "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." *Id.* Examples of *per se* unreasonable arrangements are horizontal territorial restrictions, horizontal price-fixing schemes, and vertical price-fixing schemes.³

² Offering little guidance on how the rule of reason standard can actually be applied, the *Sylvania* Court instead recited the classic articulation of the rule by Justice Brandeis in *Board of Trade v. United States*, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918):

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

As is discussed below, many courts have "narrowed the broad-ranging inquiry called for by the rule of reason by insisting, at the threshold, that a plaintiff attacking vertical restrictions establish the market power of the defendant." *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1568 (11th Cir. 1983). Accord *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 546 (2d Cir. 1993) ("The Supreme Court has never explicitly endorsed such a preclusive threshold approach Still, we recognize that . . . market power remains a highly relevant factor in rule of reason analysis").

³ Horizontal restraints are agreements between competitors at the same level of market structure. Vertical restraints are combinations of persons at different levels of the market structure, such as manufacturers and distributors. *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978). Horizontal restraints have been characterized as "naked restraints of trade with no purpose except stifling competition." *White Motor Co. v. United States*, 372 U.S. 253, 263, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963).

In the case before us, plaintiffs concede that the rule of reason standard is the correct framework for evaluating the alleged conspiracy motivating Walker's refusal to deal with KMB, because such conduct constitutes a vertical nonprice restraint. Pls.' Mem. in Opp. at 41. We agree that rule of reason analysis is appropriate here. The Supreme Court has noted, [HN4](#) "The market impact of vertical [nonprice] restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and [*11] stimulation of interbrand competition." [Sylvania, 433 U.S. at 51-52](#).⁴ In such cases, a rule of reason analysis is inherently better suited than applying the *per se* rule, because the former takes into account the complexities and subtleties of such restraints.

[HN5](#) Under the rule of reason approach, KMB bears the initial burden of demonstrating that the challenged action has had a substantially harmful effect on competition as a whole in the relevant market. [Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 543 \(2d Cir. 1993\)](#). [*12] In other words, plaintiffs must show that the restraint had an anticompetitive purpose or effect with respect to the exhaust equipment aftermarket industry as a whole, not simply with respect to that portion handling the Walker brand. [Borger v. Yamaha International Corp., 625 F.2d 390, 397 \(2d Cir. 1980\)](#); [Morse v. Swank, Inc., 493 F. Supp. 110, 115 \(S.D.N.Y. 1980\)](#).⁵ It is not sufficient for a plaintiff to prove it has been harmed as an individual competitor. "Insisting on proof of harm to the whole market fulfills the broad purpose of the **antitrust law** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors." [Capital Imaging, 996 F.2d at 543](#) (citing [Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 343-44, 109 L. Ed. 2d 333, 110 S. Ct. 1884 \(1990\)](#)).

[*13] Once the plaintiff has met its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive "redeeming virtues" of the restraint. *Id.*⁶ Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to show that any legitimate objectives proffered by defendant "could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole." *Id.* Ultimately, the finder of fact must weigh the harms and benefits of the challenged behavior and decide if it purports to promote or destroy competition. See [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"). As discussed below, we find plaintiff has not met its initial burden of demonstrating the challenged action has had a substantially harmful effect on competition as a whole in the relevant [*14] market.

Plaintiffs argue that by excluding KMB from becoming a distributor of Walker products, Walker, in conjunction with the other defendants, suppressed intrabrand competition. See, e.g., Pls.' Mem. in Opp. at 47. By contrast,

⁴ "Interbrand competition is the competition among the manufacturers of the same generic product [e.g., among manufacturers of exhaust equipment] . . . and is the primary concern of **antitrust law** In contrast, intrabrand competition is the competition between the distributors -- wholesale or retail -- of a product of a particular manufacturer [e.g., among distributors of Walker exhaust equipment]." [Id. at 52, n.19](#).

⁵ Both of these cases reiterated the requirement set out in [Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133 \(2d Cir. 1978\)](#). "The Court [in Oreck] clearly intended that the anti-competitive purpose or effect of the vertical restriction in that case had to be judged with respect to the vacuum cleaner industry as a whole, not simply that portion which handled the Whirlpool brand." [Yamaha, 625 F.2d at 397](#).

As in the case before us, *Yamaha* and *Swank* each involve a manufacturer's unilateral refusal to deal with a distributor seeking to handle, for the first time, the manufacturer's products. *Oreck*, by contrast, involves a manufacturer's decision not to renew an existing distributorship arrangement.

⁶ "Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason." [Sylvania, 433 U.S. at 54](#). Moreover, interbrand competition, when it exists, "provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." [Id. at 52, n.19](#).

defendant Walker contends that 1) intrabrand competition should not be the focus of the Court's analysis, and 2) by refusing to deal with KMB, [*15] Walker's conduct maintained the status quo, or, alternatively stimulated interbrand competition. Def. Walker's Mem. of Law at 8-15. These contentions are addressed in turn.

The Second Circuit has found that [HN6](#) intrabrand competition alone can be a significant concern of **antitrust law**, [*Eiberger v. Sony Corp. of America*, 622 F.2d 1068 \(2d Cir. 1980\)](#), notwithstanding the *Sylvania* Court's observation that interbrand competition is "the primary concern of **antitrust law**." [*Sylvania*, 433 U.S. at 52, n.19](#); see also [*Graphic Products*, 717 F.2d at 1572, n.20](#). However, courts have also recognized that "a vertical restraint on trade, almost by definition, involves some reduction in intrabrand competition." [*Graphic Products*, 717 F.2d at 1571](#). Therefore, courts have tried to balance the harms and benefits through "a systematic comparison of the negative effects of the restraint on intrabrand competition and interbrand competition, if any, with any alleged positive effects on interbrand competition stemming from the restraint." *Id.* Ultimately, [*16] "the effects of a restraint on intrabrand competition on consumer welfare cannot be viewed in isolation from the interbrand market structure." *Id.* A plaintiff must "establish that the interbrand market structure was such that intrabrand competition was a critical source of competitive pressure on price, and hence of consumer welfare." [*Id. at 1573*](#). Moreover, KMB must demonstrate that "the nature and effects of the restraint were such as to be 'substantially adverse' to market competition." *Id.* (citation omitted).

As an initial matter, we are not convinced that Walker's refusal to deal with KMB suppressed intrabrand competition. Rather, the status quo ante was that KMB was an AP distributor,⁷ and this status quo was not affected by Walker's refusal to deal. [HN7](#) A manufacturer generally has the right to select those with whom it will deal and the corresponding right to refuse to deal with others. [*United States v. Colgate & Co.*, 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#).

[*17] But even assuming arguendo that our starting point is that a contract was formed binding Walker and KMB in a distributorship arrangement,⁸ [*18] plaintiffs have not shown that the impact on intrabrand competition was anything but de minimis. [*H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 246 \(5th Cir. 1978\)](#).⁹ Beyond the affidavits reflecting the opinion of a few jobbers that they would prefer to purchase Walker products from KMB because of KMB's better services, plaintiffs do not offer evidence tending to show that competition for Walker products (intrabrand competition) overall has been suppressed. This case is unlike *Graphic Products* in which intrabrand competition was totally foreclosed. In that case, the court said, "To the extent that intrabrand competition continues after imposition of intrabrand restraints, the effects of the intrabrand restraints on competition may be de minimis." [*717 F.2d at 1574, n.25*](#).¹⁰ In the instant case, intrabrand competition continued even after Walker refused to deal with KMB.

⁷ There is no dispute that the practice among distributors is to only carry one line of exhaust equipment at a time, due to space requirements. Transcript at 3 & 19, Dec. 16, 1993.

⁸ We express no opinion on the validity of this point, which of course plaintiffs are free to pursue in state court.

⁹ In this case, the court said:

Even adopting the view that International Harvester reduced intrabrand competition by putting H & B out of business, H & B has not proven the effect to be any other than de minimis. Rivalry from International Harvester's other dealers makes this situation far different from the exclusive territorial arrangements which introduced the intrabrand competition concept into **antitrust law**.

Id.

¹⁰ In *Graphic Products*, the court added, "Situations in which intrabrand competition continues to be vigorous differ dramatically from those where the effect of the intrabrand restraint is to shut off all intrabrand competition." *Id.* (citing *Muenster Butane*, 651 F.2d at 298 (defendant's efforts to restrict intrabrand competition largely ineffectual, intrabrand competition continued unabated) & [*H & B Equipment Co.*, 577 F.2d at 246](#)).

KMB has also failed to demonstrate the restraint had an anticompetitive effect on the industry as a whole. [HN8↑](#)
In evaluating KMB's contention that defendants' conduct [*19] had a substantially harmful effect on competition, the Court views evidence of defendants' market power as "a highly relevant factor" because it "bears a particularly strong relationship to a party's ability to injure competition." [Capital Imaging, 996 F.2d at 546](#).¹¹ "Market power is the ability to raise price significantly above the competitive level without losing all of one's business." [Graphic Products, 717 F.2d 1560, 1570 \(11th Cir. 1983\)](#). The Second Circuit has recognized that:

firms lacking substantial market power act against their own self-interest when they raise prices, reduce output, or otherwise restrain trade. The marketplace itself will discipline such misguided efforts as buyers switch to substitutes or new sources of supply enter the market. When market power is lacking, antitrust litigation is not needed to police restraints and maintain competition

[Capital Imaging, 996 F.2d at 546](#) (citation omitted).

[*20] [HN9↑](#) In order to establish the defendants' market power, plaintiffs must first offer proof of "a well-defined relevant market upon which the challenged anticompetitive actions would have had a substantial impact." [Graphic Products, 717 F.2d at 1569](#). In the case before us, KMB defines the "relevant market" as "the aftermarket for muffler equipment sold to warehouse distributors for resale to jobbers in the tri-state area." Pls.' Mem. of Law at 39.

¹² [*22] While plaintiffs sought and were denied discovery of *national* market share information, defendant Walker was compelled to produce market share information for the Tri-State Area, as well as any data underlying Walker's national market share analyses which relate to the Tri-State Area. Order per Mag. Judge Grubin, filed 2/17/93. Plaintiffs have not produced any direct evidence of Walker's Tri-State market share.¹³ Instead, KMB offers national market share estimates¹⁴ as circumstantial evidence, contending "Walker's market share in the Tri-State Area,

¹¹ The Second Circuit has stated a plaintiff may satisfy the initial burden:

without detailed market analysis by offering proof of actual detrimental effects, such as a reduction of output. . . . Yet, where the plaintiff is unable to demonstrate such actual effects, it must at least establish that defendants possess the requisite market power so that their arrangement has the potential for genuine adverse effects on competition. Market power in that way serves as a surrogate for detrimental effects.

[Capital Imaging, 996 F.2d at 546](#) (internal citations and quotes omitted).

¹² Defendants' contest this definition, arguing that it excludes "such major suppliers of exhaust equipment as Midas and Meineke, who sell a fully competitive product line and who plaintiffs admit are active participants in the competitive process." Defs.' Joint Reply Mem. at 8. In a deposition, KMB's President, William Bastardi responded affirmatively when asked whether Midas and Meineke "appear to be taking business that otherwise might go to the customers of your customers." Bastardi II Tr. at 154-55 (attached as Ex. G to Def. Walker's Rule 3(g) Statement).

However, Midas and Meineke are not participants in the exhaust equipment *aftermarket*. An aftermarket can be defined as a separate market. C.f., [Eastman Kodak Co. v. Image Technical Servs., 119 L. Ed. 2d 265, 60 U.S.L.W. 4465, 112 S. Ct. 2072](#) (U.S. June 8, 1992) (No. 90-1029).

Even under the more narrow definition of the relevant market offered by plaintiffs, we find plaintiffs have not produced adequate evidence demonstrating the defendants' conduct had a substantially harmful effect on competition when viewed in the context of the market structure.

¹³ "Market share is frequently used in litigation as a surrogate for market power [It] directly relates to the effectiveness of interbrand competition in minimizing the anticompetitive effects of a restraint on intrabrand competition." [Graphic Products, 717 F.2d at 1570](#).

¹⁴ According to the affidavit of Gregory A. Worny, Vice President, Marketing for AP, one of Walker's chief competitors, Walker controls at least 55-60 percent of the *national* aftermarket for exhaust equipment ultimately distributed to jobbers. Worny Aff. at P 5 (Ex. 2). Moreover, when asked if it would surprise him that Walker's *national* market share is at least 70 percent, Jim Lown, Walker's Market Information Manager, replied "no." Lown Dep. at 83-84 (Ex. 8). Mr. Lown also indicated that he doubted that AP, which is probably Walker's closest competitor, has more than 10 percent market share. [Id. at 69-71](#). It was not clear whether this is a national or regional figure.

which is the geographical market in this case, is about the same as its national market share." Pls' Mem. in Opp. at 45. As support for this contention, [*21] plaintiffs cite to the deposition of Frank Grosser, Vice President of Marketing and Sales for North America. Counsel for KMB asked Mr. Grosser, "Do you have reason to believe that the percentage of the total sales for which Walker is responsible in New York, New Jersey, and Connecticut varies materially from the percentage of the total sales for which Walker is responsible nationally?" Mr. Grosser responded, "No, I'd say it's pretty much in line." Grosser Dep. at 49 (Ex. 5). At another point, however, when asked, "Do you have any reason to believe that the percentage of the total sales for which Walker is responsible varies significantly in different areas of the country?", Mr. Grosser responded, "There are differences in Walker's market shares . . . in different areas." *Id. at 47*. This is hardly the stuff upon which an antitrust action can be based.

The Court finds plaintiffs' evidence too attenuated. Even if no data on Walker's Tri-State market share [*23] existed, plaintiffs could have commissioned an expert to conduct such a market study. However, in the absence of any significant data on Walker's Tri-State market share or other evidence demonstrating the defendants' conduct was substantially adverse to market competition, the Court concludes plaintiffs have not met their initial burden to sustain this antitrust action.¹⁵

Having [*24] dismissed the antitrust claim, we have no basis for retaining jurisdiction over the common law claims. *Toys "R" Us, Inc. v. R.H. Macy & Co., 728 F. Supp. 230, 236 (S.D.N.Y. 1990); 28 U.S.C.A. § 1367(a)(3)*.

The defendants' motions for summary judgment are granted. The complaint is dismissed, and the case is closed.

SO ORDERED.

Dated: June 1, 1994

New York, New York

Leonard B. Sand

U.S.D.J.

End of Document

¹⁵ See *Borger v. Yamaha, 625 F.2d 390, 397 (2d Cir. 1980)* (finding it was reversible error to instruct a jury to find liability based on suppression of intrabrand competition when there was no evidence of either a purpose or effect related to interbrand competition); *Morse v. Swank, 493 F. Supp. 110, 115 (S.D.N.Y. 1980)* (granting defendants' summary judgment motion, finding plaintiff would not be excluded from cigarette lighter business; rather, he would only be prevented from marketing a particular brand (i.e., Pierre Cardin) of lighters, which in and of itself is not a market).



Nghiem v. NEC Elec.

United States Court of Appeals for the Ninth Circuit

November 4, 1993, Argued and Submitted as to Defendants-Appellees; Submitted as to Plaintiff-Appellant,
November 4, 1993, San Francisco, California ; June 3, 1994, Filed

No. 92-16155

Reporter

25 F.3d 1437 *; 1994 U.S. App. LEXIS 13086 **; 64 Fair Empl. Prac. Cas. (BNA) 1669; 64 Empl. Prac. Dec. (CCH) P43,075; 1994-1 Trade Cas. (CCH) P70,604; 94 Cal. Daily Op. Service 4033; 94 Daily Journal DAR 7547

PETER P. NGHIEM, Plaintiff-Appellant, v. NEC ELECTRONIC, INC., a California corporation; NEC CORPORATION; JAPAN (NIPPON ELECTRIC COMPANY), a Japanese corporation; HIRO HASHIMOTO; H. YOSHIZAWA, Dr.; GRANT HULSE, Defendants-Appellees.

Subsequent History: [\[**1\]](#) Certiorari Denied December 5, 1994, Reported at: [1994 U.S. LEXIS 8673](#).

Prior History: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-92-20135-RMW. Ronald M. Whyte, District Judge, Presiding.

Core Terms

arbitration, antitrust, antitrust claim, binding arbitration, district court, subject to arbitration, arbitration award, parties

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Execution & Delivery

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

[HN1](#) [down arrow] Federal Arbitration Act, Arbitration Agreements

The Federal Arbitration Act (FAA), [9 U.S.C.S. §§ 1-14](#), requires that an agreement to arbitrate be in writing. [9 U.S.C.S. § 2](#). While the FAA requires a writing, it does not require that the writing be signed by the parties.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

HN2 [down] Alternative Dispute Resolution, Validity of ADR Methods

An agreement to arbitrate an issue need not be express; it may be implied from the conduct of the parties.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Labor & Employment Law > ... > Labor Arbitration > Arbitrators > Authority

HN3 [down] Alternative Dispute Resolution, Judicial Review

A party may not submit a claim to arbitration and then challenge the authority of the arbitrator to act after receiving an unfavorable result.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Waiver & Preservation of Defenses

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

HN4 [down] Arbitration, Arbitrability

As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Labor & Employment Law > ... > Title VII Discrimination > Remedies > Alternative Dispute Resolution

Governments > Legislation > Interpretation

Labor & Employment Law > ... > Labor Arbitration > Arbitrators > Authority

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

HN5 [down] Alternative Dispute Resolution, Arbitration

The test of whether a statutory claim may be subject to arbitration is congressional intent.

Labor & Employment Law > ... > Title VII Discrimination > Remedies > Alternative Dispute Resolution

Labor & Employment Law > ... > Labor Arbitration > Arbitrators > Authority

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN6 [down] Remedies, Alternative Dispute Resolution

Title VII of the Civil Rights Act of 1964 claims are subject to arbitration.

Governments > Courts > Judicial Precedent

HN7 [down] Courts, Judicial Precedent

The court is bound by decisions of prior panels unless an en banc decision, United States Supreme Court decision or subsequent legislation undermines those decisions.

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Governments > Legislation > Statutory Remedies & Rights

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN8 [down] Arbitration, Federal Arbitration Act

The federal policy favoring arbitration established by the Federal Arbitration Act, [9 U.S.C.S. §§ 1-14](#), is not diminished when a party bound by an agreement raises a claim founded on statutory rights.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Labor & Employment Law > ... > Labor Arbitration > Arbitrators > Authority

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

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN9 [down] Estoppel, Collateral Estoppel

Arbitrators are not precluded from entertaining antitrust claims.

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

HN10 [blue icon] **Reviewability of Lower Court Decisions, Preservation for Review**

An appellate court will dismiss arguments not raised at the district court unless there are exceptional circumstances.

Counsel: David H. Tollner, San Jose, California, for the plaintiff-appellant.

David J. Murphy and Keith R. Black, Littler, Mendelson, Fastiff & Tichy, San Jose, California, for the defendants-appellees.

Judges: Before: Alex Kozinski and Diarmuid F. O'Scannlain, Circuit Judges; Paul G. Hatfield, * District Judge. Opinion by Judge O'Scannlain.

Opinion by: O'SCANNLAIN

Opinion

[*1439] OPINION

O'SCANNLAIN, Circuit Judge:

In this challenge to an arbitrator's award, we are asked to decide, among other issues, whether the so-called "*American Safety* doctrine" continues to prevent submission of antitrust claims to arbitration.

I

Peter Nghiem, an American citizen of Vietnamese heritage, was employed by NEC Electronics, Inc. in California from August 31, 1989 until he was fired in June 1990. Nghiem brought suit against NEC Electronics, Inc., NEC Corporation (Tokyo) Japan, and co-employees (collectively "NEC") alleging, *inter alia*, wrongful termination, race discrimination, [*2] and an antitrust violation. Nghiem claims that NEC had represented that it would provide a long-term management position to Nghiem if he accepted its employment offer.

On August 31, 1989, Nghiem signed an employment contract which did not contain an arbitration clause. Paragraph 11 of the contract states, in part: "No terms or provisions of this Agreement shall be varied or modified by any prior or subsequent act of either me or the Company except that the Company and I may subsequently amend this agreement by written instruments that specifically refer to this agreement and that are executed in the same manner as this agreement." Nghiem claims that he did not sign a modified version of NEC's employment contract because it contained a clause for binding arbitration.

On September 5, 1989 and May 7, 1990, Nghiem signed acknowledgments for receipt of NEC's company handbook. The handbook explained that NEC had a four-step "Problem Resolution Process" for employee complaints. Nghiem claims that he felt compelled to use this process because the language of the handbook said that this was the only process for resolving employee complaints. Step Four of the process is "final and binding arbitration." [*3] Nghiem followed the four-step process, including initiating arbitration pursuant to Step Four.

Through the spring of 1991, Nghiem presented evidence and argument in the arbitration hearings, including a fifty-page closing brief. On November 18, 1991, the arbitrator rendered a decision in favor of NEC. On November 27,

* The Honorable Paul G. Hatfield, Chief Judge for the District of Montana, sitting by designation.

1991, Nghiem wrote the American Arbitration Association ("AAA") to request a trial de novo and to confirm that the arbitration was not binding on him.

Meanwhile, on June 10, 1991, Nghiem had filed suit in state court on substantially the same issues. NEC removed to federal district court on March 6, 1992. On June 9, 1992, the district court granted NEC's motion for confirmation of the arbitration award and dismissed Nghiem's suit in its entirety, including the statutory claims of employment discrimination and an antitrust violation.

II

Nghiem contends that he is not bound by the arbitrator's decision because the Federal Arbitration Act ("FAA" or "the Act"), [9 U.S.C. §§ 1-14, HN1](#)¹ requires that an agreement to arbitrate be in writing. [9 U.S.C. § 2](#). Nghiem points out that the contract he signed does not have an [\[**4\]](#) arbitration clause and that he did not sign a proposed subsequent contract which did. Although Nghiem claims that NEC told him he had to pursue arbitration, that is inconsistent with his claim that he consciously avoided signing any agreement which would require him to pursue arbitration. The district court found that Nghiem voluntarily initiated binding arbitration and this finding is not clearly erroneous.

Nghiem further claims that he intended the arbitration to be nonbinding against him, but binding against NEC; his position is not persuasive. While the FAA "requires a writing, it does not require that the writing be signed by the parties." [Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 \(2d Cir. 1987\)](#). In addition to the employee handbook, which provides for binding arbitration and which Nghiem acknowledges [\[*1440\]](#) receiving, on September 21, 1990, Nghiem wrote a letter to NEC's Human Resource Director, Denny Mitchell, requesting to proceed with Step Four of NEC's problem resolution process - final and binding arbitration. This constitutes a writing memorializing an agreement to arbitrate.

Furthermore, even if these writings are insufficient, [HN2](#)² "an [\[**5\]](#) agreement to arbitrate an issue need not be express; . . . it may be implied from the conduct of the parties." [Fortune, Alsweet & Eldridge, Inc. v. Daniel, 724 F.2d 1355, 1356 \(9th Cir. 1983\)](#); see also [Teamsters Local Union No. 764 v. J.H. Merritt and Co., 770 F.2d 40, 42 \(3d Cir. 1985\)](#) (citing *Daniel*). In *Daniel*, this court reasoned that Daniel's conduct manifested an intent to arbitrate his dispute with his union because he sent a representative to the arbitration who listened to the union's evidence, presented limited evidence himself, and requested a second continuance. Two weeks later, Daniel's representative sent a letter to the arbitration board, claiming Daniel had no obligation to arbitrate and refusing to attend future hearings. The arbitrator issued a decision adverse to Daniel who appealed, arguing that the arbitrator had no such authority.

This court confirmed the arbitration award, holding that "we have long recognized a rule that [HN3](#)³ a party may not submit a claim to arbitration and then challenge the authority of the arbitrator to act after receiving an unfavorable result." [Daniel, 724 F.2d at 1357](#). [\[**6\]](#) The court held that even though Daniel attempted to deny the arbitrator's authority before a decision was issued, "it would be unreasonable and unjust to allow Daniel to challenge the legitimacy of the arbitration process, in which he had voluntarily participated over a period of several months, shortly before the arbitrator announced her decision." *Id.*

Similarly in this case, Nghiem initiated the arbitration, attended the hearings with representation, presented evidence, and submitted a closing brief of fifty pages. Although he filed suit in state court before the arbitrator announced his final decision, that decision is still binding on Nghiem under *Daniel*. Once a claimant submits to the authority of the arbitrator and pursues arbitration, he cannot suddenly change his mind and assert lack of authority. Nghiem is bound by the arbitrator's decision.

Furthermore, Nghiem's voluntary initiation of arbitration can be interpreted as waiver of any objection he may have had over the authority of the arbitrator. The Fifth Circuit has reasoned that "on whatever basis it rests, waiver, estoppel or new contract, the result is that the grievance submitted to the arbiter defines his authority [\[**7\]](#) without regard to whether the parties had a prior legal obligation to submit the dispute." [Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1, 611 F.2d](#)

[580, 584 \(5th Cir. 1980\)](#). This court in *Daniel* concluded that the appellant's "conduct demonstrated he agreed to submit this conflict to arbitration and waived any right to object." [Daniel, 724 F.2d at 1357](#).

Finally, the Supreme Court has held that [HN4](#) "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.](#), 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985) (quoting [Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.](#), 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)) (emphasis added). [\[**8\]](#) Therefore, we hold that Nghiem has waived any objection to the arbitrator's authority to decide his claims.

NEC argues, as it did before the district court, that if the federal courts do not confirm the arbitration award pursuant to the FAA, the courts should, in the alternative, dismiss Nghiem's action or grant summary judgment based on res judicata or collateral estoppel, or both. Like the district court, we do not reach these arguments because we conclude that Nghiem clearly submitted his claim to binding arbitration.

III

Even if the arbitration is valid, Nghiem nevertheless claims that his employment discrimination complaint cannot be settled through such process and must be adjudicated [\[*1441\]](#) in federal court. Although the earlier Supreme Court cases precluded Title VII cases from being subjected to compulsory arbitration, [Alexander v. Gardner-Denver Co.](#), 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974), the Court has recently opened the door to arbitration of these claims. [Gilmer v. Interstate/Johnson Lane, Corp.](#), 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). [\[**9\]](#) Before *Gilmer*, this court read *Alexander* as holding "that an employee's statutory right to trial de novo under Title VII is not foreclosed by prior submission of her claim to final arbitration under a collective-bargaining agreement." [Perugini v. Safeway Stores, Inc.](#), 935 F.2d 1083, 1086 (9th Cir. 1991). Although "the Supreme Court [did] not overrule *Alexander* in *Gilmer*, it [did] reject a reading of *Alexander* as prohibiting the arbitration of employment discrimination claims." [Willis v. Dean Witter Reynolds, Inc.](#), 948 F.2d 305, 308 (6th Cir. 1991).

[HN5](#) The test of whether a statutory claim may be subject to arbitration is congressional intent. [Shearson/American Express, Inc. v. McMahon](#), 482 U.S. 220, 227, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987). Nghiem does not argue that Congress intended to exclude Title VII claims from arbitration. In any event, subsequent to *Gilmer*, this court has specifically upheld an employer's ability to arbitrate a Title VII claim. [Mago v. Shearson Lehman Hutton, Inc.](#), 956 F.2d 932, 935 (9th Cir. 1992) [\[**10\]](#) (plaintiff did not meet "her burden of showing that Congress, in enacting Title VII, intended to preclude arbitration of claims under the Act").

Nghiem rather argues that *Gilmer* does not apply because the 1991 amendments to Title VII provide for jury trial. We conclude, however, that establishing a right to jury trial for Title VII claims does not evince a congressional intent to preclude arbitration; it merely defines those procedures which are available to plaintiffs who pursue the federal option, as opposed to arbitration.

[HN6](#) Title VII claims are clearly subject to arbitration and Nghiem's argument, therefore, fails.

IV

Nghiem further contends that his antitrust claims should be heard in federal court because antitrust claims are not subject to arbitration. Nghiem relies on [American Safety Equipment Corp. v. J.P. Maguire & Co.](#), 391 F.2d 821 (2d Cir. 1968). In *American Safety*, the Second Circuit held that antitrust claims cannot be arbitrated because of the public interest in enforcing antitrust laws, the potential bias and limited expertise of arbitrators, the complexity of [antitrust law](#), and the procedural differences between trials and arbitrations. [\[**11\]](#) *Id. at 826-27*. Until now, this circuit has followed the holding and reasoning of [American Safety. Lake Communications, Inc. v. ICC Corp.](#), 738 F.2d 1473, 1479 (9th Cir. 1984).

In light of more recent Supreme Court decisions, however, we must review whether it is appropriate to continue to follow *American Safety*. [HN7](#) "We are bound by decisions of prior panels' unless an en banc decision, Supreme

Court decision or subsequent legislation undermines those decisions." *United States v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989) (quoting *Montana v. Johnson*, 738 F.2d 1074, 1077 (9th Cir. 1984)). In *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 632-35, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985), however, the Supreme Court has indeed undermined the reasoning behind *American Safety*. In *Mitsubishi*, the Court held that an antitrust claim could be submitted to an international arbitral tribunal.

Although *Mitsubishi* found "it unnecessary to assess the legitimacy of the [**12] *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions," *Mitsubishi*, 473 U.S. at 629, we are persuaded that the decision is not restricted to the international context. Several reasons support this conclusion. First, the Supreme Court has subsequently cited *Mitsubishi* for the general proposition that antitrust claims can be arbitrated. *Gilmer*, 111 S. Ct. at 1652.

Second, in *Mitsubishi* the Supreme Court specifically refuted the analysis of *American Safety*, confessing its "skepticism of certain aspects of the *American Safety* doctrine." *Mitsubishi*, 473 U.S. at 632. Initially, the Court reasoned [*1442] that "the mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted." *Id.* With respect to complexity, the Court explained that "the anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and [**13] arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." *Id. at 633*. The Court concluded that "the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter." *Id. at 633-34*. Regarding arbiter bias, the Court took note that international arbitrators are frequently drawn from the legal and business communities, and "declined to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Id. at 634*. Finally, the Court addressed "the core of the *American Safety* doctrine," that the private cause of action is fundamental to enforcing antitrust laws, by concluding that "the importance of the private damages remedy . . . does not compel the conclusion that it may not be sought outside an American court." *Id. at 635*. [**14] Given the Court's meticulous step-by-step disembowelment of the *American Safety* doctrine, this circuit will no longer follow *American Safety*. We hold that *Mitsubishi* effectively overruled *American Safety* and its progeny, including *Lake Communications*.

Third, *Mitsubishi* may be seen as evidence of the Supreme Court's desire to make statutory rights subject to arbitration. In holding that claims brought under section 10(b) of the Exchange Act of 1934, *15 U.S.C. § 78j(b)*, and RICO, *18 U.S.C. § 1961*, can be subject to arbitration, the Supreme Court noted that *HN8*↑ the "federal policy favoring arbitration" established by the FAA "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/American Express v. McMahon*, 482 U.S. 220, 226, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987). One scholar summed up the situation concisely:

The reasoning used by the Court in *McMahon* to support its holding regarding the arbitrability of 1934 Act and RICO claims, however, suggests that domestic antitrust [**15] disputes are likewise subject to arbitration. . . . The *McMahon* Court made no distinction between the international and domestic arbitral forums, but rather stated that domestic and international arbitrators are equally able to handle complex statutory schemes involving treble damage remedies. Such reasoning, in combination with the FAA can only mean the judicially implied antitrust exemption to the FAA no longer exists.

G. Richard Shell, "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration," *35 UCLA L. Rev. 623, 624 n.7 (1988)* (citations omitted) (emphasis added). Because *HN9*↑ arbitrators are not precluded from entertaining antitrust claims, Nghiem's argument fails.

V

Finally, Nghiem argues that the arbitrator's decision was arbitrary and capricious. Not only was this argument not made in the district court, but Nghiem raises it for the first time in his reply brief. Nghiem now alleges witness perjury, procurement of arbitration award by undue means, arbitrator's manifest disregard of the law, and misconduct.

25 F.3d 1437, *1442 (1994 U.S. App. LEXIS 13086, **15

We dismiss these arguments as untimely raised. [HN10](#) [↑] An appellate court will dismiss arguments not raised at the district court [**16] unless there are exceptional circumstances. [*FSLIC v. Butler, 904 F.2d 505, 509 \(9th Cir. 1990\)*](#). Nghiem does not even attempt to show exceptional circumstances.

VI

We conclude that the arbitrator had authority over the claim because Nghiem voluntarily submitted to binding arbitration and is, therefore, bound by the arbitrator's decision. The arbitrator was not precluded from deciding the Title VII and antitrust claims.

AFFIRMED.

End of Document

Sullivan v. Tagliabue

United States Court of Appeals for the First Circuit

June 6, 1994, Decided

No. 93-2153

Reporter

25 F.3d 43 *; 1994 U.S. App. LEXIS 13286 **; 1994-1 Trade Cas. (CCH) P70,606

CHARLES W. SULLIVAN, Plaintiff, Appellant, v. PAUL TAGLIABUE, ET AL., Defendants, Appellees.

Prior History: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Edward F. Harrington, U.S. District Judge.

Core Terms

antitrust, factors, damages, stadium, teams, football, stadia, anti trust law, lease, antitrust violation, speculative, district court, competitor, conspiracy, restrained, indirect, professional football, claim for damages, psychologists, renovations, refinancing, injuries, causal, stock, antitrust action, anticompetitive, reimbursement, relocation, ownership, motive

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN1 [down arrow] Standards of Review, De Novo Review

An appellate court's review of a grant of summary judgment is plenary.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

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

HN2 [down] **Clayton Act, Claims**

See [15 U.S.C.S. § 15\(a\)](#).

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

HN3 [down] **Private Actions, Standing**

The Supreme Court has outlined a series of factors to be evaluated on a case-by-case basis to determine whether a plaintiff has standing to bring an antitrust action. These factors are: (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws ("antitrust injury"); (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages.

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

HN4 [down] **Private Actions, Standing**

The presence of an improper motive on the part of the defendants is not, by itself, determinative of antitrust standing.

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

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

HN5 [down] **Private Actions, Standing**

The absence of antitrust injury weighs heavily against a grant of standing to sue under [15 U.S.C.S. § 15\(a\)](#).

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

HN6 [down] **Clayton Act, Claims**

To recover treble damages under § 4 of the Clayton Act, a plaintiff must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

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

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

[HN7](#) [down] **Private Actions, Standing**

Whether a landlord has standing to sue for antitrust injury to its tenant depends, in part, on the relationship of the landlord to the relevant market and to the antitrust violation.

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

[HN8](#) [down] **Private Actions, Remedies**

The circuits are split over the question of whether a plaintiff must be either a consumer or competitor in the market harmed by the antitrust violation at issue in order to establish antitrust injury. Some courts have held that a plaintiff may establish antitrust injury by proof that he is a consumer or competitor in the relevant market, or by showing that his injury is inextricably intertwined with the injury to competition, in that the plaintiff was manipulated or utilized by defendant as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographic market. Other courts interpret caselaw and the antitrust laws more narrowly, holding that a plaintiff must be a market participant in order to establish antitrust injury.

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

[HN9](#) [down] **Private Actions, Standing**

Existence of an identifiable class of persons whose self-interest is likely to motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to sue.

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

[HN10](#) [down] **Private Actions, Standing**

In considering the risk of duplicativeness and complex apportionment of damages, courts are concerned with keeping antitrust actions within judicially manageable limits by curtailing litigation involving apportionment of damages among an array of parties claiming injury. In considering directness, courts are concerned with the question of which among the affected parties are most likely to be motivated to pursue an antitrust action. While in the usual case, this would be those most directly affected by the antitrust violation, in some cases, more remote parties might be more likely to detect and pursue an antitrust action.

Counsel: Joseph L. Alioto with whom Angela M. Alioto, Frederick P. Furth, Bruce J. Wecker, Michael P. Lehmann and Alan R. Hoffman were on brief for appellant.

John Vanderstar with whom Sonya D. Winner, Ethan M. Posner, Jeremiah T. O'Sullivan, Sarah Chapin Columbia, Joseph W. Cotchett and Susan Illston were on brief for appellees.

Judges: Before Breyer, * Chief Judge, Coffin, Senior Circuit Judge, and Torruella, Circuit Judge.

Opinion by: COFFIN

Opinion

[*44] COFFIN, Senior Circuit Judge.

Plaintiff Charles Sullivan brought this action individually and as assignee of the assets of Stadium Management Corporation (SMC) challenging, as an illegal restraint in trade, a National Football League (NFL) Rule prohibiting the sale of shares in an NFL franchise to any company not engaged in the business of professional football, [**2] in violation of Sections 1 and 2 of the Sherman Act.¹ See 15 U.S.C. §§ 1, 2. The district court held that plaintiff lacked standing to bring this claim and granted summary judgment for defendants.² After a review of the record, we affirm.

[**3] I. *Factual Background.*

Charles Sullivan (plaintiff or Sullivan) is the former owner and sole stockholder of SMC, which owned the stadium where the New England Patriots play their games. His father, William Sullivan, was the Patriots' owner at all relevant times.

In 1987, William Sullivan sought to sell a 49% interest in the Patriots to an investment banking firm not in the business of football, which, in turn, was to sell the shares to the public. Through this transaction, plaintiff, through SMC, expected to obtain financing for his stadium.

Under the terms of the NFL Constitution and By-Laws, member teams are not permitted to sell shares to the public unless three-fourths of the members approve. William Sullivan was unable to persuade the other NFL owners to allow his proposed deal, and in October 1988, he instead sold the team to a private buyer. In February 1988, SMC [*45] filed a Chapter 11 petition in bankruptcy, and the stadium subsequently was sold for the "bargain basement price" of \$ 25 million.

In May 1991, William Sullivan sued the NFL, alleging that its policy against public ownership violated the federal antitrust laws because it unreasonably restrained trade in ownership [*4] interests in NFL teams.³ Charles

* Chief Judge Stephen Breyer heard oral argument in this matter but did not participate in the drafting or the issuance of the panel's opinion. The remaining two panelists therefore issue this opinion pursuant to 28 U.S.C. § 46(d).

¹ Sullivan also alleged supplemental state law claims of breach of fiduciary obligations, interference with prospective advantageous contract, unfair trade practices, and intentional infliction of emotional distress. When the district court granted summary judgment on the federal antitrust claims, it declined to exercise supplemental jurisdiction over the state law claims. See Sullivan v. Tagliabue, 828 F. Supp. 114, 120 n.6 (D. Mass. 1993).

² Defendants named in this action are the NFL, current NFL Commissioner Paul Tagliabue and his predecessor Pete Rozelle. Paragraph 7 of the complaint also names the following 21 organizations owning NFL franchises: The Five Smiths, Inc.: Indianapolis Colts, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The Detroit Lions, Inc.; Green Bay Packers, Inc.; Houston Oilers, Inc.; Los Angeles Rams Football Co.; Minnesota Vikings Football Club, Inc.; New Orleans Saints LP; New York Jets Football Club, Inc.; B & B Holdings, Inc.; Pittsburgh Steelers, Inc.; Tampa Bay Area NFL Football, Inc.; Pro-Football, Inc.; Chargers Football Co.; and Seattle Professional Football Club, Inc.

The caption of plaintiff's complaint names a slightly different set of defendants. It fails to include either the Los Angeles Rams Football Co. or the Charges Football Co. as defendants, and adds the New York Football Giants, Inc. to the list.

³ On October 22, 1993, a jury awarded William Sullivan \$ 38 million, which was reduced by the district court upon motion by the defendants to \$ 17 million, before trebling. The NFL defendants have appealed this verdict.

Sullivan filed this lawsuit several months later against the NFL and other parties allegedly responsible for enforcing the challenged rule. He claims that, had the public offering of Patriots' stock been permitted, SMC would have received a \$ 40 million dollar loan from the investment banking firm that would have been used to pay off debts and to make significant renovations to the stadium. In addition, in 1987, the stadium held a lease with the Patriots which extended until 2002, which Sullivan alleges would have been extended for 20 years had the sale of the Patriots stock gone through. Finally, he claims, the NFL policy prevented the Patriots from making their own investment in the maintenance of the stadium, thus undermining SMC's ability to keep the Patriots from breaking their lease with SMC and moving to another location.⁴

[**5] As damages, plaintiff claims the amount of the enhanced market value of the stadium that would have resulted from the planned renovations and the lease extension.

The district court granted summary judgment for defendants, holding that Sullivan lacked antitrust standing. The court reached this conclusion by determining that the materials submitted indisputably showed that the injury plaintiff suffered was not within the type contemplated by the antitrust laws; that its impact was too indirect; and that the damages claimed were too speculative. Plaintiff now appeals.

HN1 Our review of a grant of summary judgment is plenary. *Mendes v. Medtronic, Inc., 18 F.3d 13, 15 (1st Cir. 1994)*.

II. General Principles of Antitrust Standing

Sullivan asserts that under Section 4 of the Clayton Act, *15 U.S.C. § 15(a) (1994)*, he has standing both individually and on behalf of SMC to maintain a private damage action against the NFL. Under Section 4, **HN2** "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the [**6] district in which the defendant resides or is found . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."⁵

This statutory language is broad, conferring the right to sue on "any person" claiming an injury causally related to an antitrust injury. However, the class of persons entitled to recover damages under Section 4 has been limited by caselaw through the doctrine of "antitrust standing." See *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 529-35, [*46] 103 S. Ct. 897, 903-07, 74 L. Ed. 2d 723 (1983)*; [**7] *Blue Shield of Virginia v. McCready, 457 U.S. 465, 472-73, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*.

⁴ During the bankruptcy proceedings, plaintiff received an assignment of all SMC's causes of action in consideration of the release of claims against SMC by plaintiff.

The NFL argues that Sullivan, as SMC's assignee, is precluded from pursuing its antitrust claims against the NFL defendants because SMC did not disclose these claims during the course of the bankruptcy proceedings. They contend that, at least by October, 1990, when he entered into a stipulation with the bankruptcy trustee resolving claims by and against him, Sullivan was fully aware of all of the facts upon which his complaint is based and that his antitrust claims should have been raised in the bankruptcy proceedings. In their view, SMC is therefore estopped from bringing a legal action to enforce the claims against the NFL defendants.

For the purposes of this decision, we assume, without deciding, that SMC is not estopped from bringing a legal action to enforce these claims.

⁵ It is unquestioned that the requirements of antitrust standing exceed those of standing in a constitutional sense. See *Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n.31, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1977)*; see also Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 813 n.11 (1977).

In *Associated General Contractors*, [HN3](#)[↑] the Supreme Court outlined a series of factors to be evaluated on a case-by-case basis to determine whether a plaintiff has standing to bring an antitrust action.⁶ These factors are: (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws ("antitrust injury"); (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages. [459 U.S. at 537-45](#); See also [Lovett v. General Motors Corp.](#), 975 F.2d 518, 520 (8th Cir. 1992) (listing factors).

[**8] Though *Associated General Contractors* outlined a comprehensive approach to the question of antitrust standing, it gives little guidance as to how to weigh the various factors, and whether the absence of a particular factor would be fatal to standing in every instance. In *Associated General Contractors* itself, the Court found that two factors, the causal connection between the Union's alleged injuries and the violation of the antitrust laws, and the allegation of improper motive, supported a grant of standing, [459 U.S. at 537](#), but that a consideration of the remaining relevant factors weighed heavily against standing, [id. at 545](#). The Court concluded that, in the circumstances of that case, these latter factors were controlling, and denied standing to the plaintiffs. [Id. at 545-46](#).

We draw from the Court's discussion in *Associated General Contractors* the requirement that courts consider the balance of factors in each case in an effort to guard against "engrafting artificial limitations on the § [**9] 4 remedy." [McCready](#), 457 U.S. at 472. See also [Los Angeles Memorial Coliseum v. NFL](#), 791 F.2d 1356, 1363 (9th Cir. 1986) ("Most cases will find some factors tending in favor of standing . . . , and some against . . . , and a court may find standing if the balance of factors so instructs."); accord [Southaven Land Co. v. Malone & Hyde, Inc.](#), 715 F.2d 1079, 1085-86 (6th Cir. 1983); [Ashmore v. Northeast Petroleum Corp. of Cape Cod](#), 843 F. Supp. 759, 765 (D. Me. 1994).

III. Application to Claims Brought on Behalf of SMC

A. Factors Supporting Standing

Sullivan argues that the district court was correct when, evaluating the relevant factors as they applied to claims brought on behalf of SMC, it found that plaintiff had alleged, and presented evidence of, a causal connection between the alleged antitrust violation and the harm to the plaintiff, and an improper motive on the part of defendants; and when it found no significant risk of duplicate recoveries or danger of complex apportionment in this case. He maintains, [**10] however, that the court erred in its determination that the absence of the remaining *Associated General Contractors* factors required the court to deny standing. He contends that he has satisfied the remaining factors, and that the court should have granted him standing to [*47] press his antitrust suit, both individually and on behalf of SMC.

We agree that the district court correctly found that Sullivan's complaint met three of the *Associated General Contractors* factors. Sullivan alleged, and presented evidence, of a causal connection between the application of the NFL Rule and SMC's inability to refinance the stadium because the sale of Patriots' stock to the public was prohibited. Sullivan also alleged an improper motive on the part of defendants in that they "sought to restrain and monopolize interstate commerce in professional football" and took the actions they did in furtherance of that goal. In

⁶ Prior to *Associated General Contractors*, circuit courts had crafted a variety of tests to determine whether a party injured by an antitrust violation had standing to bring an action for treble damages under Section 4 of the Clayton Act. The two most commonly stated tests focused on the "directness of the injury" to the alleged antitrust violation, and whether a plaintiff was in the "target area" of the antitrust conspiracy. See [Associated General Contractors](#), 459 U.S. at 535-36 & n.33 (citations omitted); Phillip E. Areeda & Herbert Hovenkamp, [Antitrust Law](#), P 334.1 (1993 Supp.). A third test considered whether the injury was "arguably within the zone of interests protected by the antitrust laws." [Associated General Contractors](#), 459 U.S. at 536 n.33 (citation omitted). In *Associated General Contractors*, the Court, noting that it was "virtually impossible to announce a black-letter rule that will dictate the result in every case," [459 U.S. at 536](#), drew on these tests to outline a series of factors to guide courts in deciding whether a private plaintiff should have standing to pursue an antitrust action in a particular case. See [id. at 536-46](#).

addition, Sullivan indicated that defendants intended to block the refinancing of the stadium by their actions, or, at the very least, that such a harm was a foreseeable consequence of the application of the Rule to the Patriots.⁷ Nor does there appear to be a significant risk of [**11] duplicate recovery or danger of complex apportionment in this case, as the injuries of which Sullivan complains are sufficiently distinct from those alleged by William Sullivan, the only other plausible litigant in this case.⁸

[**12] B. Factors Defeating Standing

We are not persuaded, however, by Sullivan's argument that he satisfies the remaining *Associated General Contractors*' factors. The existence of antitrust injury is a central factor in the standing calculus.⁹ In this case, its absence, together with the indirectness of the injury to Sullivan, and the speculative nature of the claimed damages, outweighs the remaining factors. We therefore conclude that plaintiff lacks standing to pursue the claims brought on behalf of SMC.

[**13] 1. The Nature of the Injury: Is it Antitrust Injury?

Sullivan contends that he has suffered "antitrust injury," that is, the type of injury that the antitrust laws were designed to prevent. He relies principally on *McCready*, 457 U.S. at 465, and *Los Angeles Coliseum*, 791 F.2d at 1356, to support this claim.

The Supreme Court first articulated the concept of "antitrust injury" in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). In *Brunswick*, several small bowling centers brought suit, challenging the acquisition of several of their competitors by the much larger Brunswick Corporation as an anticompetitive merger under Section 7 of the Clayton Act, 15 U.S.C. § 18, and seeking treble damages under Section 4 for profits they would have made had the acquired centers gone out of business. *Id.* at 480-81.

Although plaintiffs had alleged that Brunswick had engaged in predatory practices designed [**14] to lessen competition in the markets it had entered, they could prove only that [*48] Brunswick's acquisitions had deprived them of profits they would have made had the acquired firms closed. *Id.* at 488, 490 & nn.15, 16. The Court noted that, in essence, plaintiffs were not complaining that Brunswick's actions had reduced competition, but preserved it, thereby depriving plaintiffs of the benefits of increased concentration. *Id.* at 488. Rejecting the lower court's holding that any loss "causally linked" to "the mere presence of the violator in the market" was compensable, *id.* at 486-87, the Court found that plaintiffs' injury was not of "the type the [antitrust laws] were intended to forestall," 429 U.S. at

⁷ Of course, as the Supreme Court has noted, HN4[] the presence of an improper motive on the part of the defendants is not, by itself, determinative of antitrust standing. See *Associated General Contractors*, 459 U.S. 519, 537 & n.37 (noting that "the availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators") (quoting *McCready*, 457 U.S. at 479).

⁸ We recognize that there is a risk of duplicate recovery and complex apportionment of damages as between Sullivan, in his individual capacity, and SMC, in light of their seemingly overlapping injuries. We think that this can be avoided, however, given that plaintiff brings this single action for damages suffered by both.

⁹ Some courts have concluded that a consideration of antitrust injury is of threshold significance in the Section 4 standing inquiry. See, e.g., *Balaklaw v. Lovell*, 14 F.3d 793, 797-98 & n.9 (2d Cir. 1994); *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1449 (11th Cir. 1991); see also *State of South Dakota v. Kansas City Southern Industries*, 880 F.2d 40, 46 (8th Cir. 1989) (noting primacy of antitrust injury requirement). Cf. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110, n.5, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986) (pointing out, in the course of considering antitrust injury requirement for private plaintiffs seeking an injunction under Section 16 of the Clayton Act, that a showing of antitrust injury was a necessary (though not always sufficient) element of standing to sue for damages under Section 4).

We agree that HN5[] the absence of antitrust injury weighs heavily against a grant of standing. We need not consider, however, whether this should be fatal to standing in every instance, because in the circumstances of this case, we conclude that the balance of factors as a whole weighs against a grant of standing.

[487-88](#) (citation omitted). The Court held that [HN6](#) to recover treble damages under Section 4, a plaintiff 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 [\[**15\]](#) defendants' acts unlawful." [Id. at 489](#) (emphasis in original).

In [Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 \(1982\)](#), the first case explicitly to address antitrust standing, the Court incorporated a focus on "antitrust injury" into its Section 4 standing inquiry. The plaintiff in *McCready* was a subscriber of Blue Shield, a health insurance plan that did not provide reimbursement for psychotherapy treatment rendered by psychologists (unless "prescribed" by and billed through a medical doctor), while providing reimbursement for the same treatment if given by a psychiatrist. *McCready* was treated by a psychologist, and Blue Shield refused to reimburse her for this treatment. *McCready* brought suit, alleging that Blue Shield and an association of psychiatrists had engaged in an unlawful conspiracy "to exclude and boycott clinical psychologists from receiving compensation under" the Blue Shield plans, and that Blue Shield's failure to reimburse was in furtherance of this conspiracy. [McCready, 457 U.S. at 470.](#) [\[**16\]](#)

The defendants argued that *McCready* had not suffered "antitrust injury" because her injury did not reflect the anti-competitive effect of the alleged antitrust violation. [Id. at 481-82](#). *McCready* had not paid inflated fees for psychotherapy to psychiatrists, the supposed beneficiaries of the conspiracy; nor had she alleged that her psychologists' bills were higher than they would have been had the conspiracy not existed. [Id. at 481.](#)

The Court, however, refused to so limit recovery. While not a competitor of the conspirators, the injury *McCready* suffered -- sanction in the form of the unreimbursed psychologists' services -- "was inextricably intertwined with the injury the conspirators sought to inflict" on the market. [Id. at 483-84](#). *McCready* suffered injury by virtue of the role she played in Blue Shield's anticompetitive scheme. Denying reimbursement to patients of psychologists was the "very means" by which Blue Shield coerced her to choose between becoming an unwilling participant in its illegal campaign [\[**17\]](#) to boycott the services of psychologists, or to pay the costs of treatment for the therapist of her choice from her own pocket. The harm to *McCready* was thus a "necessary step in effecting the ends of the alleged illegal conspiracy." [Id. at 479](#). The Court therefore found that *McCready*'s injury "flowed from that which makes defendants' acts unlawful," within the meaning of *Brunswick*, falling "squarely within the area of congressional concern." [Id. at 484.](#)

Sullivan argues that the logic of *McCready* supports his standing. In Sullivan's view, the NFL rule at issue affected competition in the market for football stadia by preventing SMC from obtaining refinancing to pay for renovations that would have led the Patriots to extend their lease, and by interfering with the Patriots' capacity to invest money in the maintenance of their stadium, thus undermining SMC's ability to keep the Patriots from breaking their lease with SMC and moving to another location. Further, the injury to SMC was "inextricably intertwined" with that to the owner of the New England Patriots, [\[**18\]](#) since SMC expected to benefit from a joint proposal to conduct a public offering of a minority ownership in the team; and was an "integral aspect" of the conspiracy against the owner of the Patriots and was [\[*49\]](#) likely to result from the implementation of that conspiracy.

Like *McCready*, Sullivan claims, neither the fact that SMC stood in a vertical relationship to the intended victim of the alleged antitrust violation (purchasers of NFL franchises), nor the fact that SMC's injuries might be characterized as "indirect" deprive SMC of standing. Likewise, Sullivan's failure to show an increase in price or a lessening of supply in the stadia market, and the fact that Sullivan's personal losses might be derivative of those suffered by SMC are not dispositive. Sullivan points out that *McCready*'s losses, for example, were at least in part derivative of those suffered by her employer, who as the direct purchaser of the group health insurance from Blue Shield, presumably did not get the benefit of its bargain with Blue Shield.

We disagree that *McCready* favors Sullivan's right to sue.

Sullivan is correct that *McCready* did stand, in part, for the Court's refusal to limit recovery to those [\[**19\]](#) whose injuries result from the anti-competitive effect of the violation, and to extend available recovery at least to some

parties who stand in vertical relationship (such as customers) to the direct victim of an antitrust violation.¹⁰ Thus, the fact that SMC was not a competitor in the market for professional football teams, the direct victim of the alleged antitrust violation, but in the related market for football stadia, does not by itself mean that he lacks standing here. See [McCready at 472](#) (refusing to engraft artificial constraints on Section 4, stating that "the statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers") (internal citation omitted).

[**20] [HN8](#)[

The circuits are split, however, over the question of whether a plaintiff must be either a consumer or competitor in the market harmed by the antitrust violation at issue in order to establish antitrust injury. Some courts have held that a plaintiff may establish antitrust injury by proof that he was a consumer or competitor in the relevant market, or by showing that his injury was "inextricably intertwined" with the injury to competition, in that the plaintiff was "manipulated or utilized by defendant as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographic market." [Province v. Cleveland Press Pub. Co., 787 F.2d 1047, 1052 \(6th Cir. 1986\)](#) (quoting [Southaven, 715 F.2d at 1086](#)); see [Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739, 745-46 \(9th Cir. 1984\)](#) (though neither a consumer nor competitor in the relevant market, fact that injury to plaintiff was a necessary means to achieve the conspirators' illegal end sufficient to establish antitrust injury); [Ashmore v. Northeast Petroleum Division of Cargill, 843 F. Supp. 759, 769-70](#) [**21] (same); [Donahue v. Pendleton Woolen Mills, 633 F. Supp. 1423, 1435-39 \(S.D.N.Y. 1986\)](#) (following Ostrofe).¹¹

Other courts have interpreted Supreme Court caselaw and the antitrust laws more narrowly, holding that a plaintiff must be a market participant in order to establish antitrust injury. See [Bichan v. Chemetron Corp., 681 F.2d 514, 519 \(7th Cir. 1982\)](#) [**22] (Section 4 protects only parties injured as customers or competitors in a defined market, or in a discrete area of the economy); see also [Winther v. DEC International, Inc., 625 F. Supp. 100, 102-03 \(D. Colo. 1985\)](#). We need not resolve this conflict, because even under a broad reading of *McCready*, SMC cannot support its claim of antitrust injury.

[*50] Read broadly, *McCready* extends antitrust standing to parties who can establish that their injury was a "necessary step" and the "means" employed by the conspirators to achieve their illegal ends, regardless of the parties' direct market participation. See [McCready, 457 U.S. at 479, 484 n.21](#); [Ostrofe, 740 F.2d at 745-46](#); [Ashmore, 843 F. Supp. at 768-70](#) & nn.16, 18. Unlike *McCready* and her co-plaintiffs, neither Sullivan nor SMC were "necessary" instruments to effectuate the alleged conspiracy. Denying stadium refinancing was not a "necessary step" in restraining competition in the market for professional football franchises, nor the "very means" by which the defendants sought [**23] to do so. Indeed, according to plaintiff's own complaint, the purpose of the NFL policy was to "exclude competitive entry into the business of professional football by . . . television companies, motion picture producers, investment bankers, owners of other professional sports teams, home entertainment companies, and entertainment companies generally." The policy is not alleged to have a similar anticompetitive effect on stadia. Moreover, the instruments of the alleged conspiracy were the NFL and member club owners, not Sullivan or SMC.

Nor does the Ninth Circuit's holding in *Los Angeles Coliseum* bolster Sullivan's claim that he suffered antitrust injury. In that case, the Los Angeles Coliseum and the Oakland Raiders attempted to negotiate a deal to relocate

¹⁰ In this respect, we disagree with defendants' argument that SMC, merely by virtue of its status as the Patriots' landlord, is necessarily barred from bringing suit for injury to its tenant. [HNT](#)[

Whether a landlord has standing to sue for injury to its tenant depends, in part, on the relationship of the landlord to the relevant market and to the antitrust violation. For example, a landlord may have standing to sue for injuries to a tenant based on its status as a competitor in an adjacent market, see [Los Angeles Coliseum, 791 F.2d at 1363-65](#).

¹¹ These courts reason that the injury suffered by a plaintiff used as a means to effect an antitrust violation is within the core of Congressional concern underlying the antitrust laws, which is "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." [Ashmore, 843 F. Supp. at 770](#) (quoting [McCready, 457 U.S. at 472](#)); see also [Ostrofe, 740 F.2d at 746-47](#).

the Raiders to Los Angeles to play in the Coliseum (the Rams' old home field), following the Rams' move to Anaheim. In its effort to block this move, the NFL invoked a league rule requiring three-fourths of the member teams to approve a team's relocation into another team's league territory. The Coliseum and the Raiders brought suit, claiming that this was an unlawful restraint of trade, in violation of Section 1 of the Sherman [**24] Act, 15 U.S.C. § 1. A jury found that the NFL rule violated the antitrust laws, and awarded damages to both the Coliseum and the Raiders.

In holding that the Coliseum had standing to bring this antitrust action, the court found that the Coliseum had suffered "antitrust injury," because the NFL had "restrained competition . . . among football stadia by restraining the Raiders['] attempt to move and *operate* in Los Angeles." 791 F.2d at 1364 (emphasis in original). Had the Raiders been permitted to move to Los Angeles, the Coliseum would have been able to bid effectively to have them as a tenant. The rule restraining such a move, the court held, was precisely of the type that the antitrust laws were designed to prevent. *Id.*

The rule at issue here posed no similar restraint on SMC's capacity to compete for a pro football team's tenancy. In fact, in 1987, the year of the attempted sale, SMC and the Patriots had a lease that ran until the year 2002, regardless of the team's ownership.

2. Directness of the Injury

Sullivan argues that SMC suffered direct harm as a result of the NFL's restraints on the stadia market. He [**25] maintains that *Los Angeles Coliseum* supports this claim, and compares SMC's status to that of the Coliseum.

In *Los Angeles Coliseum*, the Coliseum had been engaged in a bidding struggle with a rival stadium for the tenancy of the Oakland Raiders when the NFL's invocation of its restrictive relocation rule foreclosed further negotiations, thus depriving the Coliseum of expected revenue for leasing the facility to the Raiders for their games. 791 F.2d at 1365. The Ninth Circuit concluded that the NFL's illegal territorial restraints directly and foreseeably restrained competition in the stadia market, in which the Coliseum participated, and that the harm it suffered was a direct result of the NFL's illegal territorial restraints. *Id.*

In an attempt to limit the reach of this holding, the court stated that it was "confident that [this] ruling will not be misinterpreted as being a broad endorsement of antitrust standing for all parties who might have contracted with the Raiders had they not been restrained in their relocation plans. Football stadia constitute a special market distinguished from those comprised by, say, hotels, laundering establishments, [**26] or limousine services, by their indispensable and intimate connection with professional football [*51] and football teams. An injury such as that suffered by the Coliseum in the present case cannot be characterized fairly as an indirect 'ripple effect.'" Id. at 1365.

Sullivan seems to argue that since SMC, like the Coliseum, is a participant in the market for football stadia, it enjoys similar distinguished status by virtue of its "indispensable and intimate connection with professional football and football teams," and should be able likewise to recover. The injury to SMC, and its relation to the rule at issue in this case, are, however, clearly distinguishable.

The rule at issue in *Los Angeles Coliseum* affected *where* a team could be located. In precluding a team from relocating in a particular area, the rule necessarily restrained competition in the related market for football stadia. Once the NFL invoked its rule to block the Raiders from moving into the Rams' territory, the Coliseum (and, indeed, all other stadia in that location) was barred from competing with other stadia for the Raiders' tenancy.

The rule at issue in this case had no similar direct [**27] effect on SMC, nor on the market in which it was a participant. Plaintiff claims that the NFL rule restricting public ownership of NFL teams was the "but for" cause of the loss of his stadium, injuring SMC as follows: the NFL rejected William Sullivan's plan to sell 49% of his stock to an investment bank, which, in turn, would sell the stock to the public; as a result, SMC did not get refinancing; SMC therefore could not pay its debts, nor complete renovations; SMC could not get an extension on its lease (which was contingent on the sale of Patriots' stock), and was forced to file for bankruptcy. We think that any injury

suffered by SMC as a result of the NFL rule was indirect, and a consequence of the direct injury inflicted on the Patriots' owner.

In addition, the fact that William Sullivan, the party most directly harmed by the alleged violation, has pursued (and indeed, obtained a verdict in) his own antitrust action diminishes another possible rationale for allowing Sullivan to proceed in this case. See [Associated General Contractors, 459 U.S. at 542 HN9](#)¹² (existence of an identifiable class of persons whose self-interest [**28] likely to motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to sue).¹²

[**29] 3. Speculative Nature of the Damages

The district court found that "given that an extended chain of independent events would have had to have occurred to give credence to the Plaintiff's damages claim on behalf of SMC," the damages claims were "at best, highly speculative." [828 F. Supp. at 118](#). Sullivan claims that damages to SMC are measurable in terms of the enhanced market value of the stadium which would have resulted from the planned renovations, the extension of the lease with the Patriots, and the potential for deals with promoters for other entertainment and sports events. We think that calculating these damages would "necessitate wide ranging speculation," [Southaven Land Co., 715 F.2d at 1088](#), about the future value of a refinanced, renovated, debt-free stadium with a new lease. Because the harm to SMC was indirect, and was caused, in part, by independent intervening [*52] factors (notably, its prior serious indebtedness, as well as its failure to secure additional sources of commercial financing), we agree with the district court that SMC's damages claims are "highly speculative," and are an additional factor weighing [**30] against a grant of standing in this case. See [Associated General Contractors, 459 U.S. at 542](#) (finding that damages were speculative because injury was indirect, and because it may have been produced by independent intervening factors).

The Ninth Circuit's holding in *Los Angeles Coliseum* is not to the contrary. In that case, the estimated damages claimed by the Coliseum included claims for lost profits that would have been earned had luxury stadium boxes been built in the Coliseum and rented for the 1980 football season. [791 F.2d at 1366](#). The court noted these estimates may have been unfounded due to lack of proof of causation. *Id.* Nonetheless, the court upheld the damages award, holding that even without considering the elements in question (lost profits from would-have-been luxury boxes), there was sufficient evidence, including attendance and seat price estimates offered by the Raiders, to uphold the total award of damages. *Id.*

Los Angeles Coliseum is distinguishable in several important respects. As the Ninth Circuit found, the Coliseum suffered direct harm as a result of the NFL's [**31] antitrust violation: but for the NFL's interference in its negotiations with the Raiders, the Coliseum likely would have secured their tenancy. [Id. at 1365](#). The damages suffered were therefore intimately connected with the antitrust violation. Moreover, losses based on attendance and

¹² Contrary to plaintiff's assertion, the district court's finding that there was no significant risk of duplicative recoveries or danger of complex apportionment of damages is not at odds with its determination that the fact that William Sullivan was pursuing his own antitrust action weighed against a grant of standing. [HN10](#)¹² In considering the risk of duplicativeness and complex apportionment of damages, courts are concerned with keeping antitrust actions within judicially manageable limits by curtailing litigation involving apportionment of damages among an array of parties claiming injury. See [Associated General Contractors, 459 U.S. at 543-45](#) & nn.50-51; see also [Southaven, 715 F.2d at 1087](#). In considering directness, courts are concerned with the question of which among the affected parties are most likely to be motivated to pursue an antitrust action. While in the usual case, this would be those most directly affected by the antitrust violation, in some cases, more remote parties might be more likely to detect and pursue an antitrust action. See [Associated General Contractors, 459 U.S. at 542](#); see also [Ashmore, 843 F. Supp. at 766-67](#) (appropriate to grant standing to employees discharged for refusal to implement discriminatory pricing system, because purchasers, though directly damaged by anticompetitive effect of violation, are least likely to discover it).

ticket price estimates were the foreseeable result of these damages, and are precisely the type of damages courts can calculate easily. By contrast, the asserted harm here is indirect, and likely the result, at least in part, of independent intervening factors; nor is the enhanced market value of a refinanced, renovated, debt-free stadium with a new lease easy to calculate. It is the combination of these factors that leads us to conclude that any damages to SMC as a result of the alleged antitrust violation are highly speculative. See [Associated General Contractors, 459 U.S. at 542.](#)

Having considered the relevant *Associated General Contractors*' factors, we conclude that the balance in this case weighs against a grant of standing. We therefore conclude that Sullivan may not pursue an antitrust action on behalf [**32] of SMC.

IV. Application to Sullivan's Personal Damages Claims

Sullivan also claims that the NFL's restrictive rule directly damaged him in his individual capacity, by charging him with an array of expenses arising out of the SMC bankruptcy, including the payment of legal and other professional fees associated with the bankruptcy proceeding itself, lost opportunity to purchase debt at a discounted rate, lost compensation and benefits, and anguish and emotional distress. In that, as the district court found, these damages "merely flow from the alleged injuries to SMC," [828 F. Supp. at 120](#), they are that much further removed from the injuries claimed on behalf of SMC. We therefore conclude, consistent with our conclusion that SMC did not suffer "antitrust injury," and that any damages suffered were too indirect and speculative to sustain an action on its behalf, that Sullivan likewise lacks standing to pursue an antitrust action for damages suffered in his individual capacity.

The decision of the district court is AFFIRMED.

End of Document



Heisen v. Pacific Coast Bldg. Prods.

United States Court of Appeals for the Ninth Circuit

May 24, 1994, ** Submitted; June 9, 1994, Filed

No. 92-16661

Reporter

1994 U.S. App. LEXIS 14332 *; 1994-2 Trade Cas. (CCH) P70,839

CHARLES HEISEN, Plaintiff-Appellant, v. PACIFIC COAST BUILDING PRODUCTS, INC., a California Company; DAVID LUCCHETTI; ALBERT K. MUELLER; JEAN RODNEY, Esq.; MARK BEGNAUD, Esq., Defendants-Appellees.

Notice: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

Subsequent History: Reported as Table Case at: 26 F.3d 130, 1994 U.S. App. LEXIS 21736.

Prior History: Appeal from the United States District Court for the District of Nevada. D.C. No. CV-92-00210-HDM(R). Howard D. McKibben, District Judge, Presiding

Disposition: AFFIRMED.

Core Terms

antitrust, allegations, district court, markets, anti trust law, Sherman Act, defendants', competitor, failure to state a claim, silica, leave to amend, federal court, state court, anticompetitive, requisite, damages, parties, gypsum, injure, amend

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] Standards of Review, De Novo Review

The district court's dismissal of an action under [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim is reviewed de novo.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

[**HN2**](#) [down] Motions to Dismiss, Failure to State Claim

If matters outside the pleadings are presented and not excluded by the district court, a motion to dismiss for failure to state a claim must be treated as one for summary judgment and disposed of as provided by [Fed. R. Civ. P. 56](#). [Fed. R. Civ. P. 12\(b\)](#). Nevertheless, on a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to one for summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN3**](#) [down] Antitrust & Trade Law, Sherman Act

To state a claim under either section 1 or section 2 of the Sherman Act, a plaintiff must allege antitrust injury, i.e., injury to the market or to competition in general, not merely injury to individuals or individual firms. The factual support needed to show injury to competition must include proof of the relevant geographic and product markets and demonstration of the restraint's anticompetitive effects within those markets.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN4**](#) [down] Sherman Act, Claims

To establish a violation of section 1 of the Sherman Act, a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination 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, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., "antitrust injury"). To establish a section 2 violation for an attempt to monopolize, a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

[**HN5**](#) [down] Motions to Dismiss, Failure to State Claim

When a complaint is dismissed for failure to state a claim, leave to amend should be granted unless it can be determined that no possible amendment would cure the complaint's deficiencies. Moreover, an amended complaint may only allege other facts consistent with the challenged pleading.

Judges: Before: HUG, D.W. NELSON, and FERNANDEZ, Circuit Judges.

Opinion

MEMORANDUM *

Charles Heisen appeals pro se [HN1](#)[] the district court's dismissal of his antitrust action under [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim. We review de novo, [Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 507 \(9th Cir. 1989\)](#), and we affirm.

The discord between the parties to this appeal dates back to July 30, 1988, when Heisen hired a bulldozer and directed its operator to sever the primary commercial access road to a plant owned by [\[*2\]](#) pacific Coast Building Products, Inc. ("PABCO"). PABCO sued Heisen and his employer, International Silica Corporation, in federal court. In March 1991, the district court awarded PABCO \$ 40,000 in compensatory damages and \$ 5,000 in punitive damages. In April 1991, Heisen filed a complaint in Nevada state court alleging fifteen state antitrust claims against the same defendants whom he sued in this action. In November 1991, the state court entered judgment in favor of the defendants.

In March 1992, Heisen filed the complaint that is the subject of this appeal. The allegations in Heisen's complaint are identical to those asserted in the state court action, except that Heisen claimed violations of federal [**antitrust law**](#) rather than state [**antitrust law**](#). The defendants filed a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim upon which relief could be granted.¹ After a hearing, the district court granted the defendants' motion and dismissed the complaint with prejudice. This appeal followed.

[\[*3\]](#) Heisen contends that the district court erred by dismissing his complaint pursuant to [Rule 12\(b\)\(6\)](#). We disagree.

Heisen's complaint does not specify the section of the Sherman Act upon which his claims are based.² Nevertheless, [HN3](#)[] to state a claim under either section 1 or section 2 of the Sherman Act, a plaintiff must allege antitrust injury, i.e. "injury to the market or to competition in general, not merely injury to individuals or individual firms[.]" [McGlinchy v. Shell Chem. Co., 845 F.2d 802, 812 \(9th Cir. 1988\)](#); [Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 734 \(9th Cir. 1987\)](#) ("indispensable to any section 1 claim is an allegation that competition has been injured rather than merely competitors"); see also [Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8](#)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by [9th Cir. R. 36-3](#).

¹ The defendants attached to their motion to dismiss several documents that had been filed in the other state and federal lawsuits. Generally, [HN2](#)[] if matters outside the pleadings are presented and not excluded by the district court, a motion to dismiss for failure to state a claim must be treated as one for summary judgment and disposed of as provided by [Fed. R. Civ. P. 56](#). [Fed. R. Civ. P. 12\(b\)](#). Nevertheless, "on a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a [Rule 12\(b\)\(6\)](#) motion to one for summary judgment." [Mack v. South Bay Beer Distribrs., Inc., 798 F.2d 1279, 1282 \(9th Cir. 1986\)](#). Accordingly, the district court properly considered the defendants' motion as one brought under [Rule 12\(b\)\(6\)](#). See *id.*

² [HN4](#)[] To establish a violation of section 1 of the Sherman Act, "a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination 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, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., 'antitrust injury')."[McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 \(9th Cir. 1988\)](#). To establish a section 2 violation for an attempt to monopolize, a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury." *Id.*

L. Ed. 2d 510, 82 S. Ct. 1502 (1962) (the antitrust laws were enacted for the "protection of competition, not competitors"). "Ordinarily, the factual support needed to show injury to competition must include proof of the relevant geographic and product markets and demonstration [*4] of the restraint's anticompetitive effects within those markets. Les Shockley Racing, 884 F.2d at 508. Moreover, "the pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiff[] will get nowhere merely by dressing them up in the language of antitrust." Rutman, 829 F.2d at 736 (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985)).

[*5] Here, Heisen's complaint alleges that the defendants' actions have injured his own business interests. But the complaint is devoid of any facts that demonstrate an "antitrust injury." See McGlinch, 845 F.2d at 811. Heisen's complaint does not allege a reduction of competition in the gypsum and silica markets in general; instead, he alleges injury only to his own position as a competitor in these markets. Such allegations are insufficient to state a claim under the Sherman Act. See Les Shockley Racing, 884 F.2d at 508 (although proof of plaintiffs' allegations of market exclusion and resulting loss of income would establish harm to their business interests, such proof would not show injury to competition in the market as a whole); McGlinch, 845 F.2d at 811-12; Rutman, 829 F.2d at 736; Car Carriers, 745 F.2d at 1109 ("tortious activities in the form, for example, of unfair competition do not contravene the antitrust laws unless accompanied by the requisite anticompetitive effect").³ Accordingly, the district court correctly determined [*6] that Heisen's complaint failed to state a claim upon which relief could be granted.⁴

[*7] Heisen next argues that he should have been allowed to amend his complaint before it was dismissed. This argument fails.

HN5 When a complaint is dismissed for failure to state a claim, leave to amend should be granted unless it can be determined that no possible amendment would cure the complaint's deficiencies. Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990), cert. denied, 116 L. Ed. 2d 272, 112 S. Ct. 332 (1991). Moreover, an "amended complaint may only allege other facts consistent with the challenged pleading." *Id.* at 297 (quotation omitted).

Our review of Heisen's complaint and its attachments convinces us that no amendment would produce a federal claim in this case.⁵ [*9] As we already have explained, Heisen did not allege that the defendants' actions were intended to injure, or did injure, competition in the silica or gypsum market. To the contrary, Heisen specifically alleged that the defendants' actions were motivated by their animosity toward Heisen, and that they intended to prevent him from becoming a competitor in these markets. Because "it would not be [*8] possible for [Heisen] to amend his complaint to allege a completely new injury . . . without contradicting any of the allegations of his original complaint[,]" the district court did not err by dismissing Heisen's complaint without giving him leave to amend. See *id.* at 296-97; cf. Rutman, 829 F.2d at 736 (affirming Rule 12(b)(6) dismissal of antitrust complaint because "the specific intent to harm competition [was] insufficiently pleaded"); Car Carriers, 745 F.2d at 1106 ("when the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal

³ Nor has Heisen alleged any facts that suggest that "the relevant market is both narrow and discrete and the market participants are few." See Les Shockley Racing, 884 F.2d at 508-09. Accordingly, this is not a case in which injury to one market competitor is tantamount to injury to competition. See *id.*

⁴ The district court found that Heisen's complaint failed to state a claim because the defendants were all agents or employees of PABC, and therefore could not be conspirators within the meaning of the Sherman Act. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984) ("officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy"). We decline to rest our decision on this ground. See Smith v. Block, 784 F.2d 993, 996 n.4 (9th Cir. 1986) ("in reviewing a district court decision, we may affirm on any ground finding support in the record").

⁵ "If a complaint is accompanied by attached documents, . . . these documents are part of the complaint and may be considered in determining whether the plaintiff can prove any set of facts in support of the claim." Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.), cert. denied, 484 U.S. 944 (1987).

courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint").⁶

Accordingly, we affirm the district court's judgment.⁷

[*10] AFFIRMED.

End of Document

⁶ All fifteen claims in Heisen's complaint also refer to the Clayton Act, but do not cite to any specific section. Nevertheless, Heisen fails to state a claim under the Clayton Act, as amended by the Robinson-Patman Act, because the complaint does not allege any conduct prohibited by the statute. See [15 U.S.C. § 13\(a\)](#) (prohibiting price discrimination); [15 U.S.C. § 14](#) (prohibiting exclusive dealing contracts).

⁷ In his briefs, Heisen also argues that the district court erred by (1) failing to consider all of his causes of action, (2) failing to consider his request for punitive sanctions against opposing counsel, (3) failing to consider that Heisen appeared pro se, (4) threatening to sanction Heisen if he filed future actions against the same defendants, (5) denying discovery, and (6) depriving Heisen of his rights to a jury trial and to due process. We have considered these issues and conclude that they are meritless.

Phoenix Bit & Tool v. Texaco

Court of Appeals of Texas, Fourteenth District, Houston

June 9, 1994, Rendered ; June 9, 1994, Filed

No. B14-93-00158-CV

Reporter

879 S.W.2d 277 *; 1994 Tex. App. LEXIS 1344 **

PHOENIX BIT & TOOL, INC., Appellant v. TEXACO INC., TEXACO PRODUCING INC., TEXACO OILS INC., FOUR STAR OIL AND GAS COMPANY, AND TEXACO SERVICES INC., Appellees

Subsequent History: Writ denied by, 12/08/1994

Rehearing of writ of error overruled, 01/12/1995

Prior History: **[**1]** On Appeal from the 157th District Court. Harris County, Texas. Trial Court Cause No. 90-65585. Norman R. Lee, Judge.

Disposition: Affirmed

Core Terms

drill bit, exclusive right, trial court, dispose, seller, summary judgment, mediation, quantity, parties, output contract, anti trust law, unenforceable, competitors, blanket order, ambiguous, mutuality, buyer, summary judgment motion, contracts, construe, contends, buy

LexisNexis® Headnotes

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

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

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

Civil Procedure > Appeals > Standards of Review

HN1 Summary Judgment, Burdens of Proof

In reviewing a summary judgment, the appellate court must determine whether the movant has shown that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. In deciding whether or not there is a disputed fact issue, the court must take as true all evidence favorable to the non-movant, indulging all reasonable inferences and resolving all doubts in the non-movant's favor.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Estate, Gift & Trust Law > ... > Conservators & Guardians > Conservators > General Overview

Family Law > Alternative Dispute Resolution > Mediation

HN2 [down arrow] Alternative Dispute Resolution, Validity of ADR Methods

See [Tex. Civ. Prac. & Rem. Code Ann. § 154.002](#) (1994).

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN3 [down arrow] Contract Interpretation, Ambiguities & Contra Proferentem

Where there is no ambiguity, the construction of a contract is a question of law for the court. In interpreting contracts, the primary concern is to ascertain and give effect to the intentions of the parties as expressed in the instrument.

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

HN4 [down arrow] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

See [Tex. Bus. & Com. Code Ann. § 15.05\(c\)](#) (1987).

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Output & Requirements Contracts

HN5 [down arrow] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

An output contract measures the quantity to be sold by an amount equal to the seller's total good-faith output and even if it requires the sale of products exclusively to one buyer, it is usually not a violation of Texas antitrust laws. An ordinary supply contract measures the quantity to be sold by stating a specific, fixed amount and such a contract requiring the sale of the product to one buyer may violate antitrust laws.

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts Law > Contract Interpretation > General Overview

HN6[] Defenses, Ambiguities & Mistakes

A written instrument is not ambiguous if it is so worded that it can be given a certain or definite legal meaning or interpretation.

Counsel: Robert D. Lemon of Perryton, TX, John Sullivan of Denver, CO., for appellant.

William T. Hankinson, Lori L. Dalton of Dallas, TX, for appellees.

Judges: Panel consists of Justices Sears, Lee, and Morse (sitting by designation).

Opinion by: ROBERT E. MORSE, JR.

Opinion

[*278] MAJORITY OPINION

This is a summary judgment case. Appellant, Phoenix Bit & Tool, Inc., brought a breach of contract suit against appellees, claiming that a contract gave appellant the exclusive right to purchase used drill bits. Appellees, Texaco Inc., Texaco Producing Inc., Texaco Oils Inc., Four Star Oil and Gas Company, and Texaco Services Inc., moved for summary judgment and the trial court granted this motion. Appellant raises one point of error. We affirm.

[*279] In 1986, Texaco sent out an invitation for bids on a proposed blanket order covering the sale of used drill bits. Texaco awarded the contract to Phoenix and a blanket order, dated September 16, 1986, was prepared by Texaco providing that it covered the following material: "Such quantities [*2] of used drill bits in various sizes, that Seller may want to dispose of from the Denver, Los Angeles, Midland and New Orleans operations of [Texaco]." The contract effective term was from September 15, 1986 through March 15, 1987, but the contract continued thereafter. The contract provided for termination upon thirty days written notice. Phoenix gave Texaco thirty days written notice and the contract was terminated on March 8, 1991.

Phoenix filed suit against appellees, contending that the contract gave Phoenix the *exclusive* right to buy all of the used drill bits Texaco wanted to dispose of and that Phoenix was obligated to purchase such bits. The trial court entered a mediation scheduling order and the parties commenced mediation on September 11, 1992. The mediation was immediately recessed for three months because Texaco requested time to complete an audit of their records regarding used drill bits sold by Texaco. On this same day, Texaco filed a motion for summary judgment, which the court granted.

In point of error one, Phoenix contends the trial court erred in granting Texaco's motion for summary judgment. Under this broad point, Phoenix presents the following arguments: **[*3]** (1) the trial court violated Texas public policy, as stated in [Tex. Civ. Prac. & Rem. Code Ann. 154.002, 154.003](#), in granting Texaco's motion pending the results of an on-going mediation proceeding which the court had ordered on its own motion; (2) the rules of construction for an unambiguous contract call for an interpretation granting the buyer the exclusive right to purchase such used drill bits that the seller may want to dispose of; (3) the exclusive right to purchase does not render the contract illegal and unenforceable pursuant to the Texas antitrust statute; (4) the intent of the parties under the contract must be drawn exclusively from the language used in the contract and not from extrinsic evidence; and (5) alternatively, the contract is ambiguous and genuine issues of material fact were present regarding the intent of the parties to the contract.

HN1[] In reviewing a summary judgment, we must determine whether the movant has shown that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. [Nixon v. Mr. Property Mgmt. Co., 690 S.W.2d 546, 548-49 \(Tex. 1985\)](#). In deciding whether or not there is a disputed fact issue, we must

take [**4] as true all evidence favorable to the non-movant, indulging all reasonable inferences and resolving all doubts in the non-movant's favor. [Id. at 549.](#)

Phoenix first claims the trial court violated public policy by granting summary judgment while mediation was ongoing. Public policy regarding mediation is stated in the following statute:

HN2[[↑]] It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

[Tex. Civ. Prac. & Rem. Code Ann. 154.002](#) (Vernon Supp. 1994). [Section 154.003](#) imposes upon all trial and appellate courts the responsibility of implementing this policy. [Tex. Civ. Prac. & Rem. Code Ann. 154.003](#) (Vernon Supp. 1994). Other than these statutes, Phoenix admits there is no law supporting its argument.

Appellees respond that Phoenix waived this argument by failing to present it to the trial court and that no authority supports this argument. We agree with appellees that [**5] Phoenix's argument is without merit. Phoenix did not seek an order staying the summary judgment proceedings pending the outcome of mediation. Furthermore, summary judgment is a method for orderly disposition of cases.

Phoenix next claims that the rules of construction require a finding that the contract granted Phoenix the exclusive right to purchase Texaco's used drill bits. Both parties contend the contract is unambiguous. **HN3**[[↑]] [*280] Where there is no ambiguity, the construction of a contract is a question of law for the court. [Westwind Exploration, Inc. v. Homestate Sav. Ass'n, 696 S.W.2d 378, 382 \(Tex. 1985\)](#). In interpreting contracts, the primary concern is to ascertain and give effect to the intentions of the parties as expressed in the instrument. [Zieben v. Platt, 786 S.W.2d 797, 800](#) (Tex. App.--Houston [14th Dist.] 1990, no writ).

Based on these rules of construction, Phoenix contends that the language of this contract expresses the intent that Phoenix was to have an exclusive right to purchase drill bits that Texaco wanted to sell. In support of this contention, Phoenix cites [Ives v. City of Willimantic, 121 Conn. 408, 185 A. 427 \(Conn. 1936\)](#). In *Ives* [**6] , the city contracted to sell "such quantity of ice . . . as the city owns or shall harvest [in] that period of time . . ." [Id. at 427](#). Because the contract stated that the quantity of ice to be sold was the amount the city "shall harvest," the Connecticut court held that the city was only bound to sell ice to Ives if any ice was harvested, but that the plain language of the contract did not require the city to harvest any ice. [Id. at 428](#).

This case does not support appellant's position. In fact, this case supports appellees' argument that Texaco was not obligated to sell any, much less all, used drill bits to appellant. The language of the blanket order indeed does not require Texaco to sell Phoenix such drill bits as it *shall* dispose of. Rather, the contract allows Texaco to sell Phoenix such drills as it *wants* to dispose of. Thus, the plain language of this order reveals that there was no intent to require Texaco to sell all used drill bits to Phoenix. Absent any indication of intent, we may not imply an obligation on Texaco's part to sell drill bits exclusively to Phoenix. Were we to imply an obligation by Texaco to sell all used drill bits exclusively to [**7] Phoenix, as Phoenix suggests, we would be revising the order and creating an agreement different from that actually entered by the parties. We are not at liberty to do this. See [General Am. Indem. Co. v. Pepper, 161 Tex. 263, 339 S.W.2d 660, 661 \(1960\)](#).

Appellees argue that the plain language of the contract reveals no mutuality of obligations. In support of this argument, Texaco cites [Texarkana Casket Co. v. Binswanger & Co., 3 F.2d 611 \(E.D. Tex. 1924\)](#) and [Streich v. General Motors Corp., 5 Ill. App. 2d 485, 126 N.E.2d 389 \(1955\)](#). Texaco did not expressly raise this specific argument in its motion for summary judgment and thus, lack of mutuality may not be raised for the first time in the appellate court. See [McConnell v. Southside Indep. School Dist., 858 S.W.2d 337, 341 \(Tex. 1993\)](#).

Phoenix next challenges the summary judgment on the ground that an exclusive right to purchase does not render the contract illegal and unenforceable pursuant to the Texas antitrust statute. Although appellees raised this illegality argument in the trial court, they do not argue it on appeal as a ground for affirming the judgment.

The statute upon which appellees relied in [**8] the trial court [HN4](#)[↑] was [Tex. Bus. & Com. Code Ann. 15.05\(c\)](#) (Vernon 1987), which provides:

(c) It is unlawful for any person to sell, lease, or contract for the sale or lease of any goods, whether patented or unpatented, for use, consumption, or resale or to fix a price for such use, consumption, or resale or to discount from or rebate upon such price, on the condition, agreement, or understanding that the purchaser or lessee shall not use or deal in the goods of a competitor or competitors of the seller or lessor, where the effect of the condition, agreement, or understanding may be to lessen competition substantially in any line of trade or commerce.

We first note that this statute does not make unlawful any required exclusivity of a seller's commitment to deal only with the *purchaser*, and not the purchaser's competitors. Thus, we find that the language of the statute itself indicates its inapplicability to our facts. Furthermore, the case law construing this statute reveals another basis for upholding the trial court's judgment.

In [Brown v. Faulk, 231 S.W.2d 743, 744](#) (Tex. Civ. App.--San Antonio 1950, orig. proceeding), the appellant alleged that a note and [**9] chattel mortgage were void because it [*281] required appellant to sell all of his milk to appellee. The court disagreed, saying:

A producer of milk has the right to contract or sell all of his production to one person if he sees fit to do so, and such an agreement is not an illegal contract in the absence of a showing that the intention was to form a monopoly or an illegal combination in restraint of trade.

Id. at 745. The court also noted that the chattel mortgage contained no agreement regarding price and did not bind appellee to purchase the milk. *Id. at 744*.

In [Cooper v. Fortney, 703 S.W.2d 217](#) (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.), a panel of this court noted the differences between output contracts and ordinary supply contracts. [HNS](#)[↑] An output contract "measures the quantity to be sold by an amount equal to the seller's total good-faith output" and even if it requires the sale of products exclusively to one buyer, it is usually not a violation of Texas antitrust laws. *Id. at 219*. An ordinary supply contract "measures the quantity to be sold by stating a specific, fixed amount" and such a contract requiring the sale [**10] of the product to one buyer may violate antitrust laws. *Id.* Even if the court determines that the contract is an ordinary supply contract, it does not violate antitrust laws unless its provisions unduly restrict trade. See *id.*

The blanket order did contain information about price, but it did not bind appellees to sell all used drill bits or to sell all of them to appellant. Consequently, we do not find his order to be either an output contract or an ordinary supply contract. We have scrutinized the provisions of the order and we find no intention to form a monopoly or an illegal combination in restraint of trade. In fact, the order does not even require appellees to sell anything to appellant. Thus, we find no illegality or violation of the Texas antitrust statute and this ground cannot support the summary judgment.

Appellant also complains that Texaco relied on inadmissible extrinsic evidence that the trial court should not have considered in ruling on the motion for summary judgment. Even if it was error for the trial court to consider the affidavits submitted by Texaco, any such error is harmless because the lack of intention to create an exclusive obligation to sell drill [**11] bits to Phoenix is apparent from the express language of the order. See [Medical Towers, Ltd v. St. Luke's Episcopal Hosp., 750 S.W.2d 820, 822-24](#) (Tex. App.--Houston [14th Dist.] 1988, writ denied).

Finally, Phoenix argues in the alternative that the contract is ambiguous and that genuine facts issues exist regarding the parties' intent. [HN6](#)[↑] A written instrument is not ambiguous if it is so worded that it can be given a certain or definite legal meaning or interpretation. [Coker v. Coker, 650 S.W.2d 391, 393 \(Tex. 1983\)](#). We find no error by the trial court in determining that the provisions of the blanket order could be given a definite legal meaning. We overrule appellant's point of error.

We affirm the judgment of the trial court.

Robert E. Morse, Jr.

Justice

Judgment rendered and Majority and Dissenting Opinions filed June 9, 1994.

Panel consists of Justices Sears, Lee, and Morse (sitting by designation).

Dissent by: NORMAN R. LEE

Dissent

DISSENTING OPINION

Because I disagree with the majority's holding that the contract does not give appellant the exclusive right to buy all used drill bits that appellees dispose of, I respectfully dissent. I would hold [**12] that appellees failed to meet their summary judgment burden of proving (1) that the contract does not give appellant the exclusive right to buy the used drill bits appellees dispose of, and (2) failed to prove that such a construction renders the contract unenforceable.

The contract in question is a form "sale order" covering "sale of [the following materials] on 'as is - where is' basis:" MATERIAL: Such quantities of used drill bits in various sizes, that Seller, may want to dispose of from the Denver, Los Angeles, Midland and New Orleans operations of:
Texaco Inc. - Producing Texaco Producing Inc. Texaco Oils Inc. Getty Oil Company

Appellees asserted in their motion for summary judgment the following arguments:

- (1) the language of the contract is inconsistent with appellant's position that it had [*282] the exclusive right to purchase used drill bits from appellees; and
- (2) even if the contract does give appellant the exclusive right to purchase used drill bits from appellees, the contract is illegal and unenforceable under the Texas Antitrust Statute, [Tex. Bus. & Com. Code Ann. 15.05\(c\)](#) (Vernon 1968).

In support of its claim that [**13] the contract did not give appellant the exclusive right to purchase used drill bits, appellees attached the affidavits of four of its employees, including Richard N. Johnson, the custodian of the blanket orders and a senior buyer in the Purchasing Department, J. E. Toumbs, a senior clerk, H. O. Baker, a materials coordinator, and T. W. LeBlanc, a yard foreman. Johnson testified that appellees did not intend to give appellant an exclusive right to purchase used drill bits. Toumbs testified that, on two occasions, appellant refused to purchase drill bits offered. Baker testified that communication with appellant was difficult, they often failed to keep appointments, and they were selective about the drill bits they would purchase. LeBlanc testified that appellant failed to keep appointments, was often late, and that he was never advised that appellant was to only company to whom he could sell used drill bits.

We may not consider any of this summary judgment proof because to do so would violate the rules of contract construction. In construing a contract, we are to "take the wording of the instrument, considering the same in the light of the surrounding circumstances, and apply the pertinent [**14] rules of construction. . ." [Sun Oil Co. v. Madeley, 626 S.W.2d 726, 731 \(Tex. 1981\)](#). If the contract is unambiguous, we must give effect to the parties' intention as expressed or as is apparent in the writing. *Id.* Usually, the intention of the parties will be determined from the instrument alone because it is the objective, and not the subjective, intent that controls. *Id.* Parol evidence is inadmissible to render a contract ambiguous, which on its face can be given a definite legal meaning. [Id. at 732](#). Neither party contends the contract is ambiguous; therefore, we may not consider the extrinsic evidence attached to appellees' motion. See *id.*

Furthermore, we should construe a contract in such a way as to make the obligation imposed on the parties mutually binding. [Portland Gasoline Co. v. Superior Marketing Co., 150 Tex. 533, 243 S.W.2d 823, 824 \(Tex. 1951\)](#). This coincides with the rule that courts should construe contracts in a way that renders them effective, rather than ineffective. *Id.*; [Harris v. Rowe, 593 S.W.2d 303, 306 \(Tex. 1980\)](#).

Appellant argues that if we construe this contract to deny an exclusive right to buy appellees' used drill bits, [**15](#) there is a lack of mutuality of obligation rendering it unenforceable and such a construction would violate the rules of contract construction. The majority holds that the contract does not give appellant the exclusive right to buy all used drill bits appellees want to dispose of. This holding means that appellees are not obligated to sell the drill bits to appellant, but may sell to whomever they wish. Where a contract imposes no definite obligation on one party to perform, it lacks mutuality. [Bank of El Paso v. T.O. Stanley Boot Co., Inc., 809 S.W.2d 279, 285 \(Tex. App.--El Paso 1991\), aff'd in part, rev'd in part on other grounds, 847 S.W.2d 218 \(Tex. 1992\)](#). I disagree with the majority's approach because it renders the contract unenforceable for lack of mutuality.

Appellant contends that the language of the contract creates an output contract. An output contract is one in which the quantity of materials sold consists of the seller's good faith output. [Cooper v. Fortney, 703 S.W.2d 217, 219 \(Tex. App.--Houston \[14th Dist.\] 1985, writ ref'd n.r.e.\)](#). Even if an output contract requires the seller to sell only to one buyer, it is usually not violative of Texas antitrust [**16](#) laws. Because this contract gives appellant the right to purchase those used drill bits that appellees want to dispose of, I would hold that the contract in question is an output contract, for which the quantity of drill bits sold consists of appellees' good faith output, i.e. the bits they decide to sell.

Appellees argue that, even if the contract is an output contract, it is illegal and unenforceable because it violates Texas antitrust laws. Texas [antitrust law](#) makes unlawful any contract in restraint of trade or commerce. [Tex. Bus. & Com. Code Ann. 15.05\(a\)](#) [*283](#) (Vernon 1987). The portion of the statute upon which appellees relied in their motion provides:

(c) It is unlawful for any person to sell, lease, or contract for the sale or lease of any goods, whether patented or unpatented, for use, consumption, or resale or to fix a price for such use, consumption, or resale or to discount from or rebate upon such price, *on the condition, agreement, or understanding that the purchaser or lessee shall not use or deal in the goods of a competitor or competitors of the seller or lessor*, where the effect of the condition, agreement, or understanding may be to lessen competition [**17](#) substantially in any line of trade or commerce.

[Tex. Bus. & Com. Code Ann. 15.05\(c\)](#) (Vernon 1987) (emphasis added). The italicized portion of this statute indicates that a contract is unlawful if it precludes the buyer from dealing in the goods of competitors of the seller. This section is inapplicable to the contract here because there is no condition limiting appellant's right to deal with any of appellees' competitors.

In conclusion, I would find that appellees failed to meet their burden of establishing that the contract does not give appellant the exclusive right to purchase appellees' used drill bits. Likewise, appellees failed to establish that the contract violates Texas antitrust laws. Therefore, I would sustain appellant's point of error, reverse the judgment, and remand the cause for trial.

Norman R. Lee

Justice

Judgment rendered and Majority and Dissenting Opinions filed June 9, 1994.

Panel consists of Justices Sears, Lee, and Morse (Morse, J. sitting by designation).



Advo, Inc. v. Philadelphia Newspapers

United States District Court for the Eastern District of Pennsylvania

June 10, 1994, Filed; June 13, 1994, Entered

CIVIL ACTION NO. 93-3253

Reporter

854 F. Supp. 367 *; 1994 U.S. Dist. LEXIS 7987 **; 1994-1 Trade Cas. (CCH) P70,663

ADVO, INC., Plaintiff, v. PHILADELPHIA NEWSPAPERS, INC. d/b/a PHILADELPHIA INQUIRER and PHILADELPHIA DAILY NEWS, Defendant

Core Terms

advertising, Circulars, competitors, customers, newspaper, delivery, prices, monopolize, monopoly power, Inquirer, players, preprinted, mail, probability, percent, advertising material, anti trust law, alternate, predatory, markets, market share, monopoly, printed, high density, distribute, leveraging, discount, targeted, households, recoupment

LexisNexis® Headnotes

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

HN1 [down arrow] **Attempts to Monopolize, Sherman Act**

The Sherman Act makes it unlawful for every person to monopolize, or attempt to monopolize any part of the trade or commerce among the several States. [15 U.S.C.S. § 2](#).

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

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

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

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

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

HN2 [down arrow] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). At the summary judgment stage, the court does not weigh the evidence and determine the truth of the matter. Rather it determines whether or not there is a genuine

issue for trial. The moving party has the burden of showing there are no genuine issues of material fact, and the non-moving party may not rely merely upon bare assertions, conclusory allegations or suspicions.

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

[**HN3**](#) **Regulated Practices, Monopolies & Monopolization**

A significantly larger market share than 55 percent is required to demonstrate *prima facie* monopoly power. Monopoly power is the power to force a purchaser to do something that a purchaser would not do in a competitive market.

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

[**HN4**](#) **Sherman Act, Scope**

The Sherman Act does not proscribe anti-competitive unilateral conduct that falls shy of threatened monopolization. [Section 2](#) of the Sherman Act makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. The antitrust laws protect competition, not competitors. Consumers benefit from unilateral competition. To hold that the antitrust laws protect competitors from the loss of profits due to price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share.

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

[**HN5**](#) **Regulated Practices, Trade Practices & Unfair Competition**

Application of the antitrust laws to price competition requires caution to avoid costly, mistaken inferences. Courts should treat with great skepticism complaints by competitors who are injured by low prices that customers adore, when the customers are content.

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

[**HN6**](#) **Regulated Practices, Trade Practices & Unfair Competition**

A prerequisite to hold a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a dangerous probability of recouping its investment in below-cost prices. In other words, a successful monopolist must be able to sustain charging supracompetitive prices. It is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. The success of any predatory scheme depends on maintaining monopoly power long enough to recoup the predator's losses and to harvest some additional gain.

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

[**HN7**](#) **Sherman Act, Scope**

The Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured.

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

HN8 **Regulated Practices, Trade Practices & Unfair Competition**

A seller faced with a choice of making a sale at above marginal costs but below total costs, or foregoing the sale, will choose to make the sale. Such a profit maximizing sale cannot be indicative of predatory intent.

Counsel: **[**1]** For ADVO, INC., PLAINTIFF: JOHN R. EMBICK, KITTREDGE, DONLEY, ELSON, FULLEM AND EMBICK, PHILA, PA, MARGARET M. ZWISLER, WASHINGTON, DC, DIMITRI J. NIONAKIS, EDWARD B. SCHWARTZ, DAVID T. SMUTNY, HOWREY & SIMON, WASHINGTON, DC.

For PHILADELPHIA NEWSPAPERS, INC. d/b/a PHILADELPHIA INQUIRER, PHILADELPHIA DAILY NEWS, DEFENDANT: JUDY L. LEONE, ROBERT C. HEIM, RICHARD C. RIZZO, DECHERT, PRICE & RHOADS, PHILA, PA, DONALD T. PETROSA, PETRIKIN, WELLMAN, DAMICO, CARNEY & BROWN, MEDIA, PA.

Judges: KATZ

Opinion by: BY THE COURT; MARVIN KATZ

Opinion

[*369] ORDER AND MEMORANDUM

AND NOW, this 10th day of June, 1994, upon consideration of the parties' submissions, and after a hearing, it is hereby **ORDERED** that Defendant Philadelphia Newspapers Inc.'s Motion for Summary Judgment is **GRANTED** on the federal claims and the state law claims are **DISMISSED** without prejudice.

I. FACTS

A. Overview

A newspaper chain is competing to distribute advertising circulars in the Philadelphia area with the country's largest full-service direct mail marketing firm. The newspaper chain's Motion for Summary Judgment raises the viability of its competitor's predatory pricing claim in this antitrust case. I find that there **[**2]** is no showing of a dangerous probability of achieving monopoly power in the relevant market.

Plaintiff Advo, Inc. (Advo) brings claims against defendant Philadelphia Newspapers, Inc. (PNI) for allegedly violating [Section 2](#) of the Sherman Act.¹ Advo accuses PNI of monopolizing and attempting to monopolize the market for high density distribution of printed Advertising Materials² and Advertising Circulars.³ Compl. PP 30-49.

¹ **HN1**  The Sherman Act makes it unlawful for "every person [to] monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States." [15 U.S.C. § 2](#).

² Advo defines the "Advertising Materials market" as the market for the distribution of all printed advertising materials including Run of Press (ROP) advertising and advertising circulars. Compl. P 31.

Plaintiff also brings a claim against PNI for tortious interference with Advo's contractual relations with its customers in violation of state law. Compl. PP 50-55.

[**3] Advo distributes printed advertising materials to households via mail and hand deliveries. Compl. P 4. Advo is the nation's largest full-service direct mail marketing company. Def. Ex. 12. Advo's revenues in fiscal year 1993 were \$ 911 million. Stipulated Facts, P 3. Advo delivers more than 24 billion pieces of advertising annually, and reaches, on average, more than 53 million households each week. Def. Ex. 12. In October, 1992, Advo acquired CBA Shared Mail Systems, Inc. (CBA). Compl. P 26. Prior to the acquisition, CBA competed against Advo in the Advertising Circulars market. Compl. P 22.

Defendant PNI owns and operates the Philadelphia Inquirer (Inquirer) and the Philadelphia Daily News (Daily News). Stipulated Facts, P 12. The Inquirer and the Daily News are the only two newspapers that cover the entire eight county greater Philadelphia area.⁴ Pl.'s Ex. 31, p. 2. Run-of-Press (ROP) advertisements are the advertisements that are printed on newsprint and appear directly on a newspaper's editorial pages. Compl. P 10. PNI serves many different ROP advertisers. Pl.'s Ex. 31, p. 5. No ROP advertiser accounts for more than five (5) percent of PNI's ROP advertising revenues. Id. [**4]

Broadly stated, this action concerns the market for high density advertising in the eight county greater Philadelphia area. Compl. P 31, 44. For purposes of this motion, [**370] the court examines three markets: 1) the Advertising Circulars market; 2) the ROP advertising market; and 3) the Advertising Materials market, including both advertising circulars and ROP advertisements. Printed advertising materials are distributed through newspapers, by direct mail and by hand delivery to consumers in the Philadelphia market. Compl. P 6. Participants in these markets seek distribution of their circulars to 95 percent of the households in a targeted area. See Def. Ex. 8; Pl.'s Ex. 8, DiMartino Dep. Ex. 13, p. 6.

Advo delivers circulars in one of two ways: either shared mail or hand delivery. Companies that make deliveries [**5] in this manner are known in the trade as alternate delivery companies. Shared mail combines the circulars of multiple advertisers in one mailed package. Compl. P 12. Shared mail and hand delivery packages can be targeted to specific zip codes for delivery. Compl. P 12. The mix of circulars in these packages may vary from week to week and from place to place. Compl. P 14.

Traditionally, newspapers included preprinted advertising circulars as inserts in their papers. These circulars, however, only reached subscribers and other purchasers of the papers. Consequently, traditional newspaper advertising circular distribution could not offer advertisers the desired 95% saturation rates achieved by alternate delivery companies. Pl.'s Ex. 8, DiMartino Dep. Ex. 13, p. 6. In response to the success of alternate delivery companies, newspaper companies like PNI developed programs to provide advertisers with circular distribution to non-newspaper subscribers by mail and/or hand-delivery. Compl. P 18. These programs generally are known as Total Market Coverage (TMC) plans. Id. By 1991, ten of twelve of PNI's newspaper competitors had implemented TMC programs. Pl.'s Ex. 8, DiMartino Dep. Ex. [**6] 13, p. 6.

Principal advertisers or "base players" are key to a firm's successful entry into the Advertising Circulars market.⁵ An alternate delivery company will not typically enter a new market without securing a base player. See Pl.'s Ex. 15, Kamerschen Dep., p. at 146.

³ The "Advertising Circulars market" is the market for the high density distribution of preprinted advertising circulars. Compl. P 44; see also Pl.'s Ex. 31 at 10. Plaintiff's complaint asserts the two monopolization claims in the alternative. See Compl. P 41. The second count asserts that PNI used its monopoly position in the ROP market to monopolize the "Advertising Circulars market" as defined above. Compl. 47.

⁴ The eight county greater Philadelphia area consists of Bucks, Chester, Delaware, Montgomery and Philadelphia counties in Pennsylvania, and Burlington, Camden and Gloucester counties in New Jersey. Compl. P 8.

⁵ A base player is an advertiser who advertises every single week and whose advertising circular weighs at least half an ounce. Pl.'s Ex. 15, Kamerschen Dep., p. 135. Super Fresh, Acme, Bradlees, Circuit City and Kmart are examples of base player advertisers. Stipulated Facts, P 22.

In the greater Philadelphia area, there are a limited number of base players. Pl.'s Ex. 31 at p. 21. Acme and Super Fresh, two supermarket chains, are the only base players who on their own "could support an alternate delivery program" in the Advertising Circulars market.⁶ Pl.'s Mem. at 11. Acme and Super Fresh are both Advo alternate delivery customers. PNI stated that until it obtains a base player for the Pennsylvania suburbs it will not be able to make a profit [**7] on its TMC program. Pl.'s Ex. 26, Rossi Dep. at 355.

Base players typically utilize ROP advertising in addition to preprinted circular distribution in their advertising plans. Base players use ROP advertising to build images, foster comparison shopping and to create multiple weekly presence. Pl.'s Ex. 31 at p. 10. In 1992, Super Fresh and Acme placed, respectively, \$ 1,099,000 and \$ 2,300,000 worth of ROP advertising with PNI. Id. at 34-35. Base players use advertising circulars principally as "impact" advertising to induce customers to purchase in a given week. Id. at 10.

B. Lost Accounts & Revenues

Since 1988, PNI's Inquirer has been Advo's principal competitor for the high density distribution of advertising circulars in the relevant geographic market. Compl. P 21. In [**8] the years prior to 1991, the Inquirer lost substantial advertising dollars (\$ 10 million) to alternate delivery competitors Advo and CBA. Pl.'s Ex. 8, DiMartino Dep. Ex. 13, p. 6. Plaintiff alleges that PNI used predatory pricing of PNI's ROP advertising [*371] to induce advertisers to use PNI's TMC program.⁷ Compl. P 24.

In 1991, PNI developed a TMC plan to enter the Advertising Circulars market. Pl.'s Ex. 8, DiMartino Dep. Ex. 13. The goal of this plan was to position PNI as the "one-stop buy" for both newspaper and non-newspaper advertising in the Delaware Valley market." [**9] Id. at 5. At that time, PNI's biggest competitors in the Advertising Circulars market were Advo and CBA. Id. at 13.

PNI's TMC program was scheduled to begin in 1992. Id. at 3. The plan had three phases. Id. at 5, 20. The first phase required 18 to 24 months to develop and implement an alternate delivery network. Id. at 5, 10. This phase was categorized by PNI as "primarily defensive." Id. at 20, 22. In 1993, the TMC program was budgeted to lose \$ 1.81 million. Def. Ex. 46, p. 325-26.

Plaintiff claims that the Inquirer sought to contract with CBA's and Advo's "base players" by offering these customers free or deeply discounted ROP advertising in conjunction with extremely discriminatorily low rates for distributing advertising circulars via PNI's TMC program. Through these offers, the Inquirer successfully induced Kmart, a principal CBA customer to cease doing business with CBA.⁸ Compl. P 24.

[**10] Advo identified six present or former customers that it asserts PNI solicited in violation of the antitrust laws. Def. Ex. 20, p. 2 (Advo's Supp. Resp. to Def.'s Second Set of Interrogs. to Pl.).

PNI gave advertisers with large ROP contracts credit towards their ROP contract commitments if they participated in the TMC program.⁹ Def. Ex. 42. Special discounts were also targeted at key Advo/CBA customers. See, e.g., Pl.'s Ex. 22, Montgomery Dep. Ex. 6 (PNI proposal to Super Fresh), Ex. 24 (PNI proposal to Acme Markets). For example, the Sunday Inquirer has "Basic Food Special Rates." Under this rate schedule, PNI sells the first full page

⁶ PNI's National Account Sales Manager, Donald Montgomery, posited "that if you lost one (of the two accounts) you were in trouble but if you lost both you were out of business in Philadelphia." Pl.'s Ex. 22, Montgomery Dep. Ex. 15.

⁷ For purposes of this motion, the court assumes arguendo that to the extent that ROP advertising constitutes a separate market (the "ROP market") from the Advertising Circulars market, PNI has monopoly power over the ROP market. See Def.'s Mem., p. 33 n.24; see also, Pl.'s Ex. 8, DiMartino Dep. Ex. 13, p. 13 ("PNI, with advertising revenues of nearly \$ 300 million, controls the dominant advertising mediums in the Philadelphia market.").

⁸ Advo does not assert a claim against PNI for soliciting Kmart in violation of the Sherman Act. See Def. Ex. 20, p. 2.

⁹ PNI maintains rate cards that list the standard ROP rates that PNI charges by the inch. Stipulated Facts, P 17.

of advertising to customers at the normal contract rate and sells the second page at a 50% discount. Pl.'s Ex. 22, Montgomery Dep. Ex. 16. PNI proposed that if Super Fresh used PNI's TMC program, it could receive a 50% discount on all Sunday Inquirer Food Section pages. Id. If Super Fresh accepted PNI's proposal, it would have raised its yearly advertising with PNI from \$ 1,193,948.50 a year to \$ 3,017,330.50 a year. Id. While PNI encouraged linking ROP advertising with its TMC program, see Pl. Ex. 22, Montgomery Dep. Ex. 15, there **[**11]** is no evidence in the record that advertisers were denied ROP contracts if they failed to participate in PNI's TMC program. See Def. Ex. 35.

Advo alleges that PNI targeted Super Fresh with predatory pricing. Compl. P 27. PNI offered to distribute preprinted Super Fresh circulars for \$ 29.00 per thousand to nonsubscribers and \$ 32.00 per thousand for distribution by inserted preprinted circulars in the newspapers. Def. Ex. 20, p. 3. In response, Advo was forced to drop its price (from \$ 44.00 per thousand to \$ 36.00 per thousand) in order to maintain the Super Fresh contract. Def. Ex. 20, p. 3. Thus, in order to maintain the Super Fresh account, Advo sustained a loss of revenue. While PNI's solicitation of Super Fresh resulted in a "direct and substantial decrease in profits for Advo," it did not cause Advo to operate its contract with Super Fresh at a loss. Def. Ex. 20, p. 3; Def. Ex. 19, p. 462.

[12]** Advo alleges that PNI targeted Advo customers Circuit City and Gordon Furniture. Circuit City contracted with the Inquirer for its high density distribution of advertising circulars. Def. Ex. 20, p. 4-5. Due to PNI's solicitations, Gordon Furniture moved a substantial amount of its preprinted advertising **[*372]** circular distribution business from Advo to PNI. Id. at 4.

The plaintiff alleges that PNI also enlisted other competing newspapers to distribute the Acme account. Compl. P 29. While Advo did retain the Acme account, the plaintiff maintains that it did not receive an anticipated four to five percent rate increase from Acme due to PNI's conduct. Def. Ex. 19, p. 194-95; Def. Ex. 20, p. 4. Nevertheless, Advo is currently making a profit of between \$ 250,000 and \$ 500,000 on the Acme account. Id. Similarly, the plaintiff alleges that it was unable to secure rate increases from Bradlees and Fleming Foods due to PNI's actions. Def. Ex. 20, p. 5.

Advo asserts that if PNI continues to offer Advo customers "predatory rates for distribution of preprints and leveraging of its monopoly power in ROP by linking saving in ROP to distribution of preprints," the financial consequences "would **[**13]** be so severe as to cause Advo to exit the Philadelphia market." Def. Ex. 31, p. 36.

C. Ease of Market Entry

Advo claims that the barriers to entry¹⁰ **[**14]** in this market are high.¹¹ **[**15]** Advo asserts that PNI maintains a 57.6 percent market share of the ROP market and a 40.1 percent market share of the Advertising Circulars market.

¹⁰ There are two alternative definitions of "entry barriers." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law P 409' (1993 Supp.). Under the "Stiglerian" definition, a barrier to entry is identified by "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants." Id. Under the "Bainin" definition, entry barriers are factors in the market that deter entry while permitting incumbent firms to earn monopoly returns. Id.

¹¹ The entry question focuses on whether competitors will choose to enter the relevant market in the event of supracompetitive pricing by PNI, not on whether this particular plaintiff would choose to reenter the market, if it first chooses to leave the Philadelphia market due to PNI's alleged predatory conduct. See Chillicothe Sand & Gravel v. Martin Marietta Corp., 615 F.2d 427, 431 (7th Cir. 1980) (monopoly pricing must be assessed in light of its effect on competition rather than on a competitor). Plaintiff's expert opines that predation "might" discourage entry. Pl.'s Ex. 25, Rapp Dep. p. 263; see also, Pl.'s Surreply Ex. 6, Rapp. Dep. Ex. 7 p. 602-03 ("The 'bodies on the lawn' problem does not mean that recoupment can never be disproved by invoking the structural facts. Rather, this line of research has shown that there are specific market circumstances in which invoking easy entry is not enough to dispel the possibility of recoupment from a predatory pricing campaign.") (emphasis added).

Advo choose not to reenter the Hartford market because "Hartford regional resources would be better spent developing more potentially lucrative opportunities in Boston, Long Island and New York City." Pl.'s Ex. 15, Kamerschen Dep. Ex. 3, p. 1. Plaintiff

¹² Pl.'s Ex. 31, Beyer Report Ex. 12. Advo/CBA does not participate in the ROP market and maintains a 31.3 percent market share of the Advertising Circulars market.¹³ Id. The other competitors in the relevant markets are other daily newspapers,¹⁴ **[**16]** South Jersey Shoppers Guide, both paid and non-paid **[*373]** weekly newspapers, and Shoppers.¹⁵ Id.

In 1989, Super Fresh, an Advo customer, became unhappy with Advo. Def. Ex. 3, p. 128. Super Fresh contacted CBA about entering the Philadelphia market.¹⁶ Def. Ex. 5, pp. 20-22. At that time, CBA operated in the northern New Jersey and Long Island markets, but not in the Philadelphia market. Id. at 21-22. At Super Fresh's urging, CBA entered the Philadelphia market and within five months created a program that reached two million households each week.¹⁷ Def. Ex. 8. In the first five month period, CBA signed exclusive contracts with Caldor, Channel and Ames in addition to a contract with Super Fresh. Id. Within this same period, CBA also recruited Shop-Rite, Bradlees, Shop N Bag, Pharmor, Modell's, Thriftway, McCrory's, Sears, Rickel, JC Penney, and Mr. Goodbuys as regular customers. Id. A conclusory contention that entry is difficult¹⁸ is **[**17]** no substitute for these facts.

In deposition testimony, Advo's President stated that a couple of months would be a reasonable period for someone to enter a new market and turn a profit. Def. Ex. 18, p. 114.

II. DISCUSSION

The plaintiff's complaint asserts three different claims against the defendant. In Count One, Advo accuses PNI of monopolizing and attempting to monopolize the market for high density distribution of printed Advertising Materials. In Count Two, Advo accuses PNI of monopolizing and attempting to monopolize the market for high density **[**18]**

has not demonstrated a predicate for using the Hartford market experience as a predictor of the likelihood of reentry into the Philadelphia market if Advo withdraws due to PNI's predatory pricing. Plaintiff's withdrew from the Hartford market because of its "lackluster performance." Id. at 1, 8. After its exit, a new entrant became "quickly profitable." Id. at 8.

¹² High market share does not necessarily demonstrate an entry barrier. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 518.3b (1993 Supp.); see also, Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 201 (3d Cir. 1992) ("As a matter of law, absent other relevant factors, a 55 percent market share will not prove the existence of monopoly power."), cert. denied, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993).

¹³ The total estimated market revenues for the entire ROP market are \$ 242,478,172. Pl.'s Ex. 31, Beyer Report Ex. 12. The total estimated market revenues for the entire Advertising Circulars market are \$ 109,171,869. Id.

To the extent to which there is a single Advertising Materials market (combining the ROP and Advertising Circulars markets), the total estimated market revenues for this market would be \$ 351,650,041. See Id. PNI's revenues of \$ 183,357,403 equal a 52.2 percent share of this market. See Id. Advo's revenues of \$ 34,161,665 equal a 9.7 percent market share.

¹⁴ Twelve major suburban daily newspaper serve the greater Philadelphia market. Pl.'s Ex. 31, Beyer Report Ex. 15, p. 1. Ten of these newspapers have entered the Advertising Circulars Market. Pl.'s Ex. 8, DiMartino Dep. Ex. 13, pp. 6 and 2-A. These newspapers have a 13.3 percent share of the Advertising Circulars market. Pl.'s Ex. 31, Beyer Report Ex. 12.

¹⁵ "Shoppers" are free weekly newspapers that contain less than 10 percent editorial content. Pl.'s Ex. 31, Beyer Report Ex. 15, p. 7-8. Shoppers have a 7.0 percent share of the Advertising Circulars market. Pl.'s Ex. 31, Beyer Report Ex. 12.

¹⁶ There are more than 100 alternate delivery companies of various sizes serving advertisers throughout the United States. Def. Ex. 33.

¹⁷ CBA's start-up costs were approximately \$ 3 million. Pl.'s Ex. 20, Matzner Dep. at p. 53; Def. Ex. 34, p. 17. It took CBA 14 months to make a profit. Id. at 108. On October 14, 1992, Advo acquired CBA's Philadelphia operations for \$ 4.93 million. Stipulated Facts, P 8.

¹⁸ Pl.'s Ex. 20, Matzner Dep. at p. 20.

distribution of printed Advertising Circulars. In Count Three, Advo accuses PNI of tortiously interfering with Advo's contractual relations with its customers in violation of state law. The court will address each count in turn.¹⁹

[**19] A. Count One

To succeed on Count One, Advo must show that PNI possessed or could possess monopoly power "in the relevant market." *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 197 (3d Cir. 1992), cert. denied, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993). "The relevant product market is defined as those commodities reasonably interchangeable by consumers for the same purposes." *Id.* at 198.

The plaintiff has failed to show that a genuine issue of material fact exists as to the existence of the "Advertising Materials market" as defined in Count One of the Complaint. The plaintiff's expert report does not support the existence of an "Advertising Materials market." The plaintiff's expert has concluded that "there are two relevant product markets for the distribution of printed advertising in the Philadelphia area: ROP (run-of-press) advertising and preprinted advertising." [*374] Pl.'s Ex. 31 at 9 (emphasis added). These two product markets are different. *Id.* at 10. Advertisers use ROP advertising and preprinted advertising to achieve different goals. *Id.* The products [**20] are not interchangeable. Additionally, the plaintiff summarizes its claim against the defendant as one of "predatory pricing" and use of PNI's "monopoly power over 'ROP,' or run-of-press, advertising to drive Advo from the eight-county Philadelphia metropolitan preprint market." Pl.'s Mem. p. 1 (emphasis added). These contentions go to Count Two which concerns monopolization of the Advertising Circulars market. Since no genuine issues of material fact in the record support the existence of a single "Advertising Materials" market, judgment in favor of the defendant on Count One is appropriate.

B. Count Two

In order to prevail on its monopolizing and attempt to monopolize the Advertising Circulars market claims as alleged in Court Two, the plaintiff must prove that (1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 122 L. Ed. 2d 247, 113 S. Ct. 884, 890-91 (1993); *Pastore v. Bell Tel. Co. of Pa.*, 24 F.3d 508 (Cir. 1994). For the purposes of this [**21] motion, the court will assume arguendo that there are genuine issues of material facts with respect to the first two elements.²⁰ Accordingly, the issue is whether plaintiff has made a showing that PNI poses a dangerous probability of monopolizing the Philadelphia Advertising Circulars market. *Brooke Group, Inc. v. Brown & Williamson Tobacco Corp.*, 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2587 (1993); *Pastore*, 1994 WL 189478 at 5.

¹⁹ For an extensive discussion of the standard of review on a motion for summary judgment see *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). **HN2** Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. At the summary judgment stage, the court does not weigh the evidence and determine the truth of the matter. Rather it determines whether or not there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The moving party has the burden of showing there are no genuine issues of material fact, *Gans v. Mundy*, 762 F.2d 338, 340-41 (3d Cir.), cert. denied, 474 U.S. 1010, 88 L. Ed. 2d 467, 106 S. Ct. 537 (1985), and the non-moving party may not rely merely upon bare assertions, conclusory allegations or suspicions. *Fireman's Ins. Co. of Newark v. DeFrense*, 676 F.2d 965, 969 (3d Cir. 1982).

²⁰ The court notes that there is nothing inherently predatory about basing a discount on an advertiser's total volume of business. Each sale increases marginal profitability. See *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 351 (3d Cir. 1981), cert. denied, 455 U.S. 1017, 72 L. Ed. 2d 134, 102 S. Ct. 1711 (1982). Assuming that PNI intended to monopolize the relevant market, this fact alone is not sufficient to establish the dangerous probability of success that is the object of the Sherman Act's section 2 prohibition of attempts. *Pastore*, 1994 WL 189478 at 5.

[**22] Advo has not shown that PNI's 40.1 percent market share establishes monopoly power in the relevant market.²¹ See *Fineman*, 980 F.2d at 201-02 [HN3](#) (a significantly larger market share than 55 percent is required to demonstrate "prima facie monopoly power"). Monopoly power²² [**24] is the power "to force a purchaser to do something that [the purchaser] would not do in a competitive market." *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2080 (1992). The major customers or "base players" in the Advertising Circulars market, such as the supermarkets and discounters, are highly sophisticated buyers who have significant countervailing economic power.²³ Plaintiff is a vibrant and aggressive competitor in the market.²⁴ It controls 31.3 percent of the Advertising Circulars market. It has the [*375] majority (5 out of 6) of the supermarket base players under contract. See Pl.'s Ex. 15, Montgomery Dep. Ex. 15. Moreover, the record demonstrates that when customers in the Advertising Circulars market are unhappy with one supplier they will seek and be able to acquire the services of [**23] a new supplier, even if, as in the case of CBA, this new supplier is not presently competing in the market. See, e.g., Def. Ex. 5, Gasparro Dep. pp. 60-62.

Entry into the Advertising Circulars market is comparatively easy. See Def. Ex. 1, pp. 29, 81; Def. Ex. 18, p. 114;²⁵ Def. Ex. 39, P 7.²⁶ [**27] Ten of PNI's twelve newspaper competitors have entered the market and obtained a 13.3 percent market share. Pl.'s Ex. 8, DiMartino Dep. Ex. 13, pp. 6 and 2-A; Pl.'s Ex. 31, Beyer Report Ex. 12. As

²¹ Although the size of a defendant's market share is a significant determinant of whether a defendant has a dangerous probability of successfully monopolizing the relevant market, it is not the exclusive factor. *Barr Lab. Inc. v. Abbott Lab.*, 978 F.2d 98, 112 (3d Cir. 1992); see also, *Fineman*, 980 F.2d at 201-02. Other factors to be considered include the strength of competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand. *Id.*

Because PNI has conceded for purposes of this motion that it has monopoly power over the ROP market, the court assumes that PNI already charges or can charge ROP advertisers whatever price it believes will maximize its profits.

²² "Market power" is a synonym for "monopoly power." *International Distrib. Ctrs., Inc. v. Walsh Trucking*, 812 F.2d 786, 791 n.3 (2d Cir.), cert. denied, 482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987).

²³ See discussion *supra* I.C.

²⁴ The court notes that when PNI undercut Advo's price, Super Fresh chose to remain an Advo customer, despite Advo's comparatively higher price. See Def. Ex. 20, p. 3. The inelasticity of demand in this market, i.e., relatively low sensitivity to just price as a determining factor in relationships, blunts predatory pricing as a weapon. See *supra* note 19 and pp. 11-12.

²⁵ Joseph P. Durrett, Advo's President and Chief Operating Officer, was asked the following question during his deposition:

So it's your testimony that you think a reasonable time period for someone coming into a market and starting up a new market they should be able to turn a profit within a couple of months?

Mr. Durrett answered: "Yes." Def. Ex. 18, p. 114.

²⁶ In an earlier antitrust action, *Cassidy Distrib. Serv. v. Advo-Systems, Inc.*, 1987 U.S. Dist. LEXIS 13737, Civ. Action No. 84-3464 (E.D. Pa.), Advo's expert concluded that:

Entry into the market is comparatively easy. Little initial capital is required relative to many other businesses. Mailing lists and operational expertise are available from many sources. Indeed, clients of ADVO could individually or in groups easily enter the production of a service much like that of ADVO if ADVO and competitors attempted to charge unreasonable, supracompetitive prices. In fact, entry into the "shared mail" business appears to be proliferating. This takes several forms. For example, third class bulk mailers have started new, directly competitive shared mail programs or have expanded prior programs. Newspapers are using third class mail for total market coverage ("TMC") of advertising inserts as a supplement to their regular subscriber base. And, in addition, many utilities and credit card companies use a form of "shared mail" with their billings.

Def. Ex. 39, P 7.

Although plaintiff claims that this finding is not supported by subsequent developments of the Advertising Circulars market, it points to no such developments which would vitiate the finding.

CBA demonstrated by creating in five months a program that reached two million Philadelphia households,²⁷ the market can successfully be entered in well under a year with the support of a single base player.²⁸ See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 518.3b (1993 Supp.) (one year standard for determining ease of entry into market); **[**25]** cf. *Barr Lab. Inc. v. Abbott Lab.*, 978 F.2d 98, 113 (3d Cir. 1992) (six-month to two-year waiting period to enter pharmaceutical drug market is not significant barrier to entry). Moreover, with annual revenues in excess of \$ 100,000,000, Pl.'s Ex. 31, Beyer Report Ex. 12, CBA's initial three million dollar investment required to enter the Advertising Circulars market is not significant.²⁹ Cf. *International Distrib. Ctrs., Inc. v. Walsh Trucking*, 812 F.2d 786, 792-93 (2d Cir.) (relatively large capital outlays for trucking industry do not constitute significant entry barriers), cert. denied, 482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987). While plaintiff contends there are reputational barriers to entry, the record translates this notion into a lower level of abstraction, i.e., management and selling skills. Pl. Advo, Inc.'s Surreply to Def.'s Reply to Pl.'s Opp'n to Def.'s Mot. for Summ. J., Ex. 1 Matzner Dep. p. 54; Ex. 2 Schiro Dep. pp. 48-61, 73-75. Such competence is a prerequisite to enter any business, not a special or significant entry barrier **[**26]** to this one.

The plaintiff's basic complaint is that PNI engaged in unilateral price competition causing **[*376]** Advo to lose profits. See *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 205 (3d Cir. 1992) **[**28]** **HN4** [↑] (the Sherman Act "does not proscribe anti-competitive unilateral conduct that falls shy of threatened monopolization"), cert. denied, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993). Section 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. *Spectrum Sports*, 113 S. Ct. at 890; *Pastore*, 1994 WL 189478 at 5. The antitrust laws protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). Consumers benefit from unilateral competition. See *Brook Group*, 113 S. Ct. at 2588. "To hold that the antitrust laws protect competitors from the loss of profits due to . . . price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." *Id.*

HN5 [↑] Application of the antitrust laws to price competition requires caution to avoid costly, mistaken inferences. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); **[**29]** *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1403-04 (7th Cir. 1989) ("courts should treat with great skepticism complaints by competitors who are injured by low prices that customers adore, when the customers are content."), cert. denied, 494 U.S. 1019, 108 L. Ed. 2d 501, 110 S. Ct. 1326 (1990).

HN6 [↑] A prerequisite to hold a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a dangerous probability of recouping its investment in below-cost prices. *Brook Group*, 113 S. Ct. at 2588. In other words, a successful monopolist must be able to sustain charging supracompetitive prices. *Matsushita Elec. Indus. Co.*, 475 U.S. at 589 ("It is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits."). Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. *Brook Group*, 113 S. Ct. at 2589. **[**30]** "The success of any predatory scheme depends on maintaining monopoly power long enough to recoup the predator's losses and to harvest some additional gain." *Id.* at 2592.

²⁷ See discussion *supra* p. 11-12.

²⁸ PNI's failure to attract sufficient business in the Advertising Circulars market to make a profit demonstrates the competitive nature of the market.

²⁹ The case at bar is distinguishable from *Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc.*, 845 F.2d 404 (2d Cir. 1988), aff'd 492 U.S. 257, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989). In *Kelco*, the costs of entering a \$ 440,000 market exceeded \$ 300,000. *Id.* at 408. Moreover, the *Kelco* defendants' market share was always greater than 55% and at one time was 100%. *Id.* at 409.

The court notes that CBA's initial three million dollar investment turned into a significant profit when CBA sold this part of its business to Advo for \$ 4.93 million in October, 1992. Stipulated Facts, P 8.

Even if there is a genuine issue of material fact as to whether PNI operated its TMC program at a loss during the relevant time period,³⁰ the nature of the Advertising Circulars market suggests that recoupment is not a dangerous probability.³¹ See *Id. at 2589* ("plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation."); *A.A. Poultry Farms, 881 F.2d at 1401* ("Only if market structures makes recoupment feasible need a court inquire into the relations between price and cost."). Advo did not buy protection against vigorous competition in the market when it acquired CBA, its former competitor.³² See *Spectrum Sports, 122 L. Ed. 2d 247, 113 S. Ct. 884 at 891-92 HN7*[↑] (The Sherman Act "is not to protect businesses from the working of the market; it is to protect the public [**31] from the failure of the [*377] market."); *Brook Group, 113 S. Ct. at 2588* ("That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured.").

[**32] This is not a case of tying abuses by a monopolist. Cf. *Eastman Kodak Co. v. Image Technical Serv., Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least that he will not purchase that product from any other supplier." *Id. at 2079*. While evidence suggests that PNI offered ROP discounts to companies that participated in the TMC program, nothing suggests that PNI required advertisers to purchase ROP advertising in order to participate in its TMC program. Additionally, advertisers who purchased ROP advertising in the Inquirer and Daily News were free to, and did, place their advertising circular business with PNI, Advo, and other competing companies.

The plaintiff cannot maintain this action based upon a monopoly leveraging theory. In order for Advo to prevail upon a theory of monopoly leveraging, Advo must prove more than a mere "competitive advantage" by PNI in the advertising circulars market based on its monopoly position in the ROP market. See *Fineman, 980 F.2d at 204*. [**33] Advo would have to prove threatened or actual monopoly in the leveraged market (i.e., the advertising circulars market) by PNI to prevail.³³ *Fineman, 980 F.2d at 206*; see also *Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 547 (9th Cir. 1991)* (the *Berkey Photo Inc. V. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)*, cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980), monopoly leveraging doctrine rejected as an

³⁰ The court notes that *HN8*[↑] "[a] seller faced with a choice of making a sale at above marginal costs but below total costs, or foregoing the sale, will choose to make the sale. Such a profit maximizing sale cannot be indicative of predatory intent." *O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 351 (3d Cir. 1981)*, cert. denied, *455 U.S. 1017, 72 L. Ed. 2d 134, 102 S. Ct. 1711 (1982)*.

³¹ Any alleged "recoupment" from PNI raising its ROP rates at some later point is irrelevant. The ROP market is a separate and distinct market from the Advertising Circulars market. Because this court assumes that PNI has a monopoly over the ROP market, PNI already has the power to maximize its profits in the ROP market.

³² Advo's Philadelphia Region saw the acquisition of CBA as its "Single Greatest Strategic Accomplishment" for fiscal year 1993, because the acquisition eliminated a competitor. Def. Ex. 13. Advo's Atlantic Division also saw the acquisition of CBA as its "Single Greatest Strategic Accomplishment" for fiscal year 1993, because the acquisition "prevented [a] major pricing war." Def.'s Reply Br., Ex. 3.

³³ The *Fineman* court explicitly rejected the Second Circuit's monopoly leveraging theory articulated in *Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)*, cert. denied, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*. *Fineman, 980 F.2d at 206*.

SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir.), cert. denied, 439 U.S. 838, 58 L. Ed. 2d 134, 99 S. Ct. 123 (1978) is distinguishable from the case at bar. In *SmithKline*, all the drugs in issue were part of a single relevant product market - the cephalosporin market. *575 F.2d at 1065*. Additionally, the defendant controlled from 100% to 89.8% of the cephalosporin market and the barriers to entering the market were substantial (plaintiff's entry required five-year \$ 20,000,000 research and development program). *Id.* In contrast, in the case at bar, the ROP market and the Advertising Circulars market constitute two separate product markets and the defendant only maintains a 57.6 percent market share of the ROP market and a 40.1 percent market share of Advertising Circulars market. Pl.'s Ex. 31, Beyer Report Ex. 12. Additionally, the Advertising Circulars market entry barriers are much less severe.

independent theory of liability under [Section 2](#)). For the reasons enumerated above, there is no dangerous probability that a monopoly will be created by PNI's alleged leveraging conduct.

[**34] C. Count Three

The state law claim for tortious interference is dismissed without prejudice because the court declines to exercise supplemental jurisdiction when the federal claims have been disposed of at this stage.³⁴ See [Growth Horizons, Inc. v. Delaware County](#), 983 F.2d 1277, 1284 (3d Cir. 1993); [28 U.S.C. § 1367\(c\)\(3\)](#).

III. CONCLUSION

The bottom line is that this is a case about price competition. The [antitrust law](#) does not protect competitors against even what may be perceived as unfair, unilateral price cutting below cost designed to drive those competitors out of business, [\[**35\]](#) absent a dangerous probability of achieving monopoly power. Because this result is harsh, a jury might reach a verdict which could not stand, based on sympathy, after an expensive trial. To avoid discouraging competition, courts are skeptical of antitrust claims where consumers and the public benefit from lower prices. Given the history of this market, its competitors and powerful buyers, it would be sheer speculation to posit a dangerous probability [\[*378\]](#) of defendant's achieving monopoly power in the Philadelphia area advertising circular distribution market.

BY THE COURT:

MARVIN KATZ, J.

End of Document

³⁴ The plaintiff's complaint asserts that this court has jurisdiction over the subject matter of this suit pursuant to [15 U.S.C. §§ 15](#) and [26](#) and [28 U.S.C. §§ 1331](#) (federal question jurisdiction), 1337 (commerce and antitrust jurisdiction) and 1367 (supplemental jurisdiction). Compl. P 2.



Breaux Bros. Farms, Inc. v. Teche Sugar Co.

United States Court of Appeals for the Fifth Circuit

June 10, 1994, Decided

No. 92-4968

Reporter

1994 U.S. App. LEXIS 40949 *; 1994 WL 16471176

BREAUX BROTHERS FARMS, INC., Plaintiff-Appellee, TECHE PLANTING CO., INC. and FRANCIS PAT ACCARDO, Plaintiffs-Appellees, Cross-Appellants, versus TECHE SUGAR CO., INC., SOUTH COAST SUGARS, INC., Defendants-Appellants, Cross-Appellees. TECHE PLANTING CO., INC., FRANCIS PAT ACCARDO, Plaintiffs-Appellees, Cross-Appellants, versus TECHE SUGAR CO., INC., SOUTH COAST SUGARS, INC., Defendants-Appellants, Cross-Appellees.

Prior History: [*1] Appeal from the United States District Court for the Western District of Louisiana. (6:90-CV-2536).

[Breaux Bros. Farms v. Teche Sugar Co., 21 F.3d 83, 1994 U.S. App. LEXIS 9596 \(5th Cir. La., 1994\)](#)

Core Terms

district court, expenses, owner of land, lease, tying arrangement, disallowance, negotiations, ambiguity, reimburse, improved, renting, farmer, lessee, repair

Judges: Before WISDOM, HIGGINBOTHAM, and JONES, Circuit Judges.

Opinion

ON PETITION FOR REHEARING

PER CURIAM: *

Breaux Brothers Farms, Teche Planting, and Francis Pat Accardo sought relief from an alleged tying arrangement instituted by Teche Sugar and South Coast Sugars. Breaux Brothers entered the arrangement, and Teche Planting and Accardo refused to do so. We found the tying arrangement, if one existed, not to violate **antitrust law**. We deny rehearing for the reasons stated in our opinion.¹

[*2] Teche Planting and Accardo also seek augmentation of the amounts awarded to them by the district court for work performed before negotiations over renting the land failed. The district court found ambiguous the agreement

* **Local Rule 47.5** provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

¹ *[Breaux Brothers Farms v. Teche Sugar Co., 21 F.3d 83 \(May 4, 1994\)](#)*.

that Teche Sugar would compensate Teche Planting and Accardo for the expenses they incurred during lease negotiations. The court appropriately appealed to the Civil Code for guidance in resolving the ambiguity.² The court compared the agreement to one between an owner of land and a lessee who improves the land, the legal relationship which most closely resembled Teche Sugar's arrangement with Teche Planting and Accardo.³ To determine the value of the expenses allowed according to this approach, the court appropriately did not include overhead expenses and profit.⁴

Teche Planting and Accardo claim that the district court mistook Teche Sugar for the owner of land when [*3] in fact Teche Sugar merely let the land. The court did not, however, make this error. The court merely employed the relationship between land owner as lessor and farmer as lessee as an instructive analogy. The court acted appropriately in doing so.

Teche Planting and Accardo also request reimbursement for costs that the court disallowed. The court estimated the work and material that Teche Planting and Accardo provided in anticipation of the lease and from which they would not benefit. The repairs improved the equipment that Teche Planting and Accardo took with them when they left the farmland. Moreover, the district court's disallowance of the cost of renting equipment finds adequate support in the possibility that the farmers would have possessed the equipment regardless of the expectation of a lease.

We find the legal basis of the court's award sound, and conclude that the court did not make any clearly erroneous factual findings in refusing to require Teche Sugar to reimburse Teche Planting and Accardo for repair work from which they would later benefit or by disallowing rental expenses. The district court award stands in regard to the amount owed Teche Planting and Accardo.

[*4] Petition for panel rehearing is denied.

End of Document

² See [La. Civ. Code art. 2054](#).

³ See [La. Civ. Code Art. 2726](#).

⁴ Cross-appellants acknowledge as much.



Poindexter v. American Bd. of Surgery

United States District Court for the Northern District of Georgia, Atlanta Division

June 10, 1994, Decided ; June 14, 1994, order filed

CIVIL ACTION FILE NO. 1:93-CV-0097-JTC

Reporter

911 F. Supp. 1510 *; 1994 U.S. Dist. LEXIS 20783 **; 1996-1 Trade Cas. (CCH) P71,357

JAMES M. POINDEXTER, JR., M.D., Plaintiff, v. AMERICAN BOARD OF SURGERY, INC., Defendant.

Core Terms

vascular, certification, surgery, accredited, surgeons, fellowship, programs, antitrust, training, conspiracy, summary judgment, motions, parties, conspire, promise, restraint of trade, business relationship, general surgery, residency, surgical, promissory estoppel, material fact, unaccredited, privileges, courts, education requirement, anticompetitive, examinations, nonmoving, specialty

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

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

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

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

HN1 [blue icon] Summary Judgment, Opposing Materials

Fed. R. Civ. P. 56(c) defines the standard for summary judgment. Courts should grant summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The general rule of summary judgment in the Eleventh Circuit states that the moving party must show the court that no genuine issue of material fact should be decided at trial. Unless the movant for summary judgment meets its burden under Rule 56, the obligation of the opposing party does not arise even if no opposing evidentiary material is presented by the party opposing the motion. While all evidence and factual inferences are to be viewed in a light most favorable to the nonmoving party, the mere existence of some alleged factual dispute between the parties will

911 F. Supp. 1510, *1510LÁ1994 U.S. Dist. LEXIS 20783, **20783

not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is merely colorable or is not significantly probative. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case.

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

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

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

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

HN2 **Summary Judgment, Opposing Materials**

Where neither party can prove either the affirmative or the negative of an essential element of a claim, the movant meets its burden on summary judgment by showing that the opposing party will not be able to meet its burden of proof at trial. The moving party must demonstrate that the nonmoving party lacks evidence to support an essential element of its claim. Thus, the movant's burden is discharged by showing, that is, pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. In either situation, only when the movant meets this burden, does the burden shift to the opposing party, who must then present evidence to establish the existence of a material issue of fact. The nonmoving party must go beyond the pleadings and submit evidence in the form of affidavits, depositions, admissions and the like, to demonstrate that a genuine issue of material fact does exist.

Antitrust & Trade Law > Sherman Act > General Overview

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

International Trade Law > General Overview

HN3 **Antitrust & Trade Law, 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.S. § 1](#). Thus, [§ 1](#) requires some form of agreement to restrain trade. Courts generally do not distinguish between the terms "contract," "combination," or "conspiracy," often using the terms interchangeably.

Antitrust & Trade Law > Sherman Act > General Overview

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

Evidence > Types of Evidence > Circumstantial Evidence

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

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

HN4 **Antitrust & Trade Law, Sherman Act**

911 F. Supp. 1510, *1510LÁ994 U.S. Dist. LEXIS 20783, **20783

The elements of a conspiracy to restrain trade under [15 U.S.C.S. § 1](#) include: (1) an agreement to enter a conspiracy; (2) designed to achieve an unlawful objective; and (3) proof of an actual unlawful effect or facts that show a potential for future harm to competition. [15 U.S.C.S. §2](#), [15 U.S.C.S. § 1](#) does not demand proof of a specific intent to restrain trade. A [§ 1](#) plaintiff need not prove an intent on the part of the co-conspirators to restrain trade or to build a monopoly. So long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under [§1](#). However, federal [antitrust law](#) imposes a heightened standard of proof on a plaintiff attempting to demonstrate the existence of an agreement to restrain trade with circumstantial evidence. Plaintiff must introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately.

Antitrust & Trade Law > Sherman Act > General Overview

[HN5](#) Antitrust & Trade Law, Sherman Act

Generally, a corporation and its officers or directors cannot form a [15 U.S.C.S. §1](#) conspiracy. The Eleventh Circuit has determined, however, that an exception to this general rule exists where plaintiff demonstrates that corporate officers have a personal stake in achieving the object of the alleged conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

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

[HN6](#) Antitrust & Trade Law, Sherman Act

A [15 U.S.C.S. §1](#) conspiracy requires a plaintiff to present evidence that tends to exclude the possibility that the alleged co-conspirators acted legitimately. In other words, the joint activity or agreement must be designed to achieve an unlawful objective, rather than enhancing competition or promoting procompetitive conduct.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

[HN7](#) Standing, Injury in Fact

Standing is a question of law. In the antitrust context, standing is a far more complex matter than the usual search for the constitutionally mandated injury in fact. Antitrust standing involves a more comprehensive inquiry, turning on an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws. The analysis requires a court to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. Ultimately, a court must determine whether the alleged injury derives from some form of anticompetitive conduct and is the kind of injury that Congress intended to redress with treble damages. A leading Eleventh Circuit case on standing, defines a two-pronged approach to determine whether a plaintiff is a proper party to bring an antitrust suit: (1) plaintiff must suffer an antitrust injury, and (2) plaintiff must be an efficient enforcer of the antitrust laws. An antitrust injury results from anticompetitive conduct. In the process of evaluating whether plaintiff has suffered an antitrust injury, a court will often resolve one or more elements of the underlying antitrust claim as well.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Interference With Business Relations

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

HN8 [down arrow] Causes of Action, Interference With Business Relations

Georgia law provides a cause of action for interference with business relationships. To establish a claim for tortious interference with business relations, a plaintiff must prove that the defendant: (1) acted improperly and without privilege; (2) purposefully, with malice, and with intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) plaintiff suffered some financial injury as a result.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN9 [down arrow] Consideration, Detrimental Reliance

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." [Ga. Code Ann. § 13-3-44\(a\)](#). Thus, to prevail on a promissory estoppel claim under Georgia law, plaintiff must prove that: (1) defendant made a promise; (2) expecting plaintiff to rely on the promise; and (3) plaintiff did reasonably rely to his detriment. Promissory estoppel cannot be applied unless the promisee reasonably relied on the promise.

Counsel: [**1] For JAMES M. POINDEXTER, M.D., F.A.C.S., plaintiff: Phillip A. Bradley, Carl Wilson Mullis, III, Jan James Johnson, Long Aldridge & Norman, Atlanta, GA. Jeffrey L. Mann, Office of DeKalb County Attorney, Decatur, GA. Paul E. Bateman, phv, Burke Warren & MacKay, Chicago, IL.

For AMERICAN BOARD OF SURGERY, INC., defendant: James B. Hiers, Jr., Susan A. Dewberry, Swift Currie McGhee & Hiers, Atlanta, GA.

Judges: JACK T. CAMP, UNITED STATES DISTRICT JUDGE

Opinion by: JACK T. CAMP

Opinion

[*1514] ORDER OF THE COURT

This action is before the Court on Defendant's Motion for Summary Judgment [# 16], which is **GRANTED**. The Court has also considered the following Plaintiff's motions: Motion for Hearing on Summary Judgment [# 32], which is **DENIED**; Motion for Leave to File Additional Motions [# 42], which is **DENIED** except as to the motion for jury trial; Motion for Jury Trial [# 43], which is **GRANTED**; and Motions for Pretrial Conference [# 47-1], which is **DENIED**; Entry of Scheduling Order [# 47-2], which is **DENIED**; Extension of Discovery Period [# 47-3], which is **DENIED**; Extension of Time to File Pretrial Order [# 47-4], which is **DENIED**; [**2] and Motion for Leave to File Surreply Brief [# 52], which is **DENIED**.

I. BACKGROUND

Plaintiff is a certified general surgeon seeking additional board certification as a vascular surgeon. Defendant American Board of Surgery, Inc. (the "Board") refuses to grant the certification because Dr. Poindexter has not completed a vascular surgery fellowship at an accredited training program. The Complaint, filed January 14, 1993, charges Defendant with antitrust, business tort, and civil rights violations. Plaintiff alleges financial damages in excess of \$ 2 million and seeks injunctive action to force Defendant to administer the certification examination and to award the certificate upon his successful completion of the test.

This case was assigned to an eight-month discovery track, which closed on January 3, 1994. Defendant filed a timely summary judgment motion on January 21, 1994. The Court placed the action on the March trial calendar, but later removed it due to an extension of time to permit Plaintiff to file a summary judgment response. In a joint motion [# 27] filed February 14, Plaintiff asked for an extension through March 7, 1994, stating: "Plaintiff further stipulates [**3] that Plaintiff shall file no motion requesting any additional time to respond, beyond March 7, 1994, nor any other motion." Based on this representation, the Court granted Plaintiff's request with the following provision: "And it is further ordered that no motion by Plaintiff for any further extension of time, nor any other motion by Plaintiff, will be considered."

Plaintiff has now engaged new counsel who proposes to submit a revised pretrial schedule, reopen discovery with Defendant and third parties, designate experts, and amend the Complaint to add at least one additional defendant.

II. PLAINTIFF'S MOTIONS

Plaintiff's motions are **DENIED** on two independent grounds. First, Plaintiff promised Defendant that he would refrain from further motions in exchange for Defendant's consent to an extension of time to respond to Defendant's summary judgment motion. The extension was granted by the Court with the express provision that further motions would not be considered. For that reason, Plaintiff's motions are improper.

Second, the Court has examined each of Plaintiff's motions and Defendant's objections, and finds that Plaintiff's requests would cause unwarranted delay as [**4] well as prejudice to Defendant. Moreover, the matters Plaintiff seeks to address concerning an alleged failure to adequately prepare for trial resulted merely from what is now characterized as the inadvertence of Plaintiff's previous attorney. The Court sees no substantial reason to permit additional delay and expense in concluding this matter. Plaintiff's motions are **DENIED**.

The single exception is Plaintiff's motion for a jury trial [# 43], which is **GRANTED**. Having considered the five factors enumerated in [*Parrott v. Wilson, 707 F.2d 1262, 1267 \(11th Cir. 1983\)*](#), the Court concludes that the general rule should be applied in this case and Plaintiff's belated motion should be granted. Counsel for Defendant

straightforwardly admits that she did not conduct discovery in the expectation of a bench trial and [*1515] argues only that inadvertence is an insufficient excuse for this late request. Although the Court's interest in enforcing its previous Order prohibiting further motions is strong, Plaintiff's "right" to trial by jury is even more compelling.

III. SUMMARY JUDGMENT STANDARD

HN1 [↑] Rule 56(c), Fed. R. Civ. P., defines the standard for summary judgment: Courts should [**5] grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." The general rule of summary judgment in the Eleventh Circuit states that the moving party must show the court that no genuine issue of material fact should be decided at trial. Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). "Unless the movant for summary judgment meets its burden under Rule 56, the obligation of the opposing party does not arise even if no opposing evidentiary material is presented by the party opposing the motion." *Id.*

While all evidence and factual inferences are to be viewed in a light most favorable to the nonmoving party, Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). An issue is not genuine [**6] if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Id. at 250*. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. *Id. at 248*.

HN2 [↑] Where neither party can prove either the affirmative or the negative of an essential element of a claim, the movant meets its burden on summary judgment by showing that the opposing party will not be able to meet its burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In Celotex, the Supreme Court interpreted Rule 56(c) to require the moving party to demonstrate that the nonmoving party lacks evidence to support an essential element of its claim. Thus, the movant's burden is "discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Id.*

In either situation, only when the movant meets this burden, does the burden shift to the opposing party, who must then present evidence to establish the existence of a material issue [**7] of fact. *Id.* The nonmoving party must go beyond the pleadings and submit evidence in the form of affidavits, depositions, admissions and the like, to demonstrate that a genuine issue of material fact does exist. *Id.*

IV. UNDISPUTED FACTS

Based on the pleadings, depositions, answers to interrogatories and admissions and affidavits on file, as well as the parties' statements of undisputed material facts and the responses thereto, and viewing all evidence and factual inferences in a light most favorable to the non-moving party, the following facts emerge as undisputed.

Plaintiff received a medical degree from Washington University in 1980. As early as 1983, prior to completing his general surgery residency, Plaintiff investigated and applied for vascular surgery fellowship programs by interviewing at least eighteen different institutions. Plaintiff was offered positions at two programs, both unaccredited. In 1985, Dr. Poindexter completed his general surgery residency at the University of Connecticut, a graduate medical education program accredited by the Accreditation Counsel of Graduate Medical Education ("Accreditation Counsel"). From July, 1985 through June, 1986, Plaintiff [*8] attended New York Medical College, an unaccredited vascular surgery [*1516] fellowship program.¹ Upon graduation, the school's program director told Dr. Poindexter that Plaintiff's cases would be used to apply for accreditation with the Accreditation Counsel.

¹ Vascular surgery is one of seven primary components of general surgery. In plain terms, vascular surgery involves the blood vessels, excluding those associated with the brain and heart. During the year he trained at New York Medical College, Plaintiff performed and assisted in reconstructive vascular surgery, peripheral bypasses, microscopic vessel surgery, and trauma cases.

New York Medical College did apply, but in 1988 the Accreditation Counsel denied accreditation to the school's vascular fellowship program.

In January, 1987, Plaintiff began his career, as an assistant professor of surgery at Morehouse Medical School in Atlanta. Dr. Poindexter continued as a full-time faculty member until he went into private practice in July, 1989. He began private practice [**9] as a sole proprietorship, doing business as "Midtown Vascular Surgery." Dr. Poindexter is currently the sole shareholder of "Georgia Vascular Surgery," a professional corporation devoted exclusively to vascular surgery services. He and his wife also own "Georgia Vascular Diagnostics, Inc.," a non-invasive vascular laboratory serving two Atlanta area hospitals.² Plaintiff has staff and clinical privileges in vascular surgery at nine hospitals in the metropolitan Atlanta area. He is a "specialty provider" for five managed-care organizations. Plaintiff is a member of the Atlanta Vascular Society, the Peripheral Vascular Society, and the American College of Surgeons. Dr. Poindexter has always limited his medical practice to vascular surgery.

[**10] Defendant American Board of Surgery (the "Board"), established in 1937, is a private, non-profit corporation that conducts examinations and awards certifications to qualified candidates in the practice of surgery. The Board itself does not provide health care services. The Board is a member of the American Board of Medical Specialties ("ABMS"), an umbrella organization for 24 medical specialty boards. ABMS authorizes its member boards to issue various certificates of qualification. The Board awards a certificate in general surgery, often referred to as a "primary certificate," and also awards certificates in certain surgical subspecialties. One is vascular surgery.

The Board is governed by Directors who serve rotating six-year terms. Directors are elected annually from various national and regional surgical specialty organizations. Except for two salaried administrative positions, Directors are not compensated. Directors have sole authority to establish Board policy. Surgeons who have been awarded certificates by the Board, known as "Diplomates," have no authority or control over Board actions or policies.³ The Board's Directors are practicing clinical surgeons and physicians involved [**11] in medical education. Directors act as examiners for certifying examinations and determine standards for awarding primary and specialty certificates.

Prior to 1981, there were a number of vascular surgery "fellowships" available for post-residency training, but there was no accreditation process and no guiding principles or standards for fellowship program directors to follow. In the words of the Board's present Executive Director, the Board "believed there was need for improvement of the vascular component of general surgery residencies, and also need for improvement of the existing vascular fellowship programs and development of more programs which met the essentials for developing competent vascular surgeons." Griffen Affidavit [# 16], P 11. The Board applied to the American Board of Medical Specialties to issue a general vascular surgery certificate.

Although the Accreditation Council is the governing body [**12] for accreditation, the actual program evaluation is performed by the Residency Review Committee ("RRC") for the particular field of medicine involved. For [*1517] example, surgical residency programs are reviewed and evaluated by the Residency Review Committee for Surgery. There are recognized essentials for residency training programs, and "accreditation" indicates that the program is in substantial compliance with the published requirements. The Board believed, in 1981, that if accreditation was available to vascular surgery fellowship programs, program directors would be encouraged to improve educational and training opportunities to prospective vascular surgeons. Also, by offering a certificate tied to accredited fellowships, the Board hoped to prompt students to seek accredited programs in vascular surgery. *Id.* at PP 13, 14. The American Board of Medical Specialties approved the issuance of a vascular surgery certificate in 1982. The Board conducted the first examinations and awarded the first certificates in 1983.

The Board aimed to make satisfactory completion of an accredited fellowship program a non-waivable education requirement for receiving its vascular surgery certificate. [**13] However, when the first certificates were awarded

² As of August, 1993, Georgia Vascular Surgery employed three vascular surgeons, including Plaintiff. In 1992, Georgia Vascular Surgery had a gross profit of over \$ 787,000 on gross income of approximately \$ 851,000. Georgia Vascular Diagnostics had gross receipts of \$ 220,000 and a gross profit of \$ 202,000. Poindexter Depo., pp. 254-55

³ Plaintiff is a diplomate of the Board, having received the Board's general surgery certificate.

in 1983, there were no accredited fellowship programs. The Board therefore implemented a transitional scheme, providing certification options to established vascular surgeons and those who had completed non-accredited training programs. One option permitted graduates from so-called "PEEC" approved vascular surgery training programs to take the examination for a vascular certificate, if they also met other requirements. In 1984, there were 56 PEEC approved programs, each having at least one fellowship position and some more than one. Many of the PEEC programs later gained accreditation by the Accreditation Council. For the educational year July, 1984 to June, 1985, there were 36 fellowship positions in 20 accredited vascular surgery programs. For the year July 1985 to June 1986, there were 61 positions in 40 accredited programs.

Another transition period option for satisfying the Board's education requirement was a "grandfathering" plan intended to accommodate those practicing certified surgeons who did not participate in either a PEEC approved or an accredited vascular fellowship. These surgeons could apply for individual consideration, [**14] if they had at least five years of practice in general or thoracic surgery as of the cut-off date on June 30, 1989. This interim "practice mode" period extended for six years from the date the certification process was first implemented.

Of the total number of surgeons who finished their fifth year of general surgery training in 1985 (hereinafter "Plaintiff's class"), eleven surgeons, including Plaintiff, attended vascular fellowship programs that were neither PEEC approved nor accredited by the Accreditation Council. The Board denied admission to the examination for the vascular surgery certificate to all eleven, based on their failure to meet the education requirement. Eighty-five surgeons in Plaintiff's class were admitted to the examination; 81 had attended accredited fellowship programs and 4 had completed PEEC approved programs.

Plaintiff became Board certified in general surgery in 1988, but the Board refused to permit him to sit for the vascular surgery examination because he did not attend an accredited fellowship program. Plaintiff is not Board certified in vascular surgery today. However, certification is voluntary and a certified general surgeon is permitted to perform [**15] vascular surgery. The Board explains: "While the fact that a surgeon holds a certificate in the subspecialty of General Vascular Surgery is an indication that the surgeon possessed, at the time the certificate was issued, certain qualifications, the lack of a certificate . . . is not necessarily an indication that the surgeon is not as qualified to perform general vascular surgery as one who holds the vascular certificate." Griffen Aff. [# 16], P 35. Although Plaintiff has been denied Board certification, Plaintiff's competence as a vascular surgeon is not an issue in this case.

V. PLAINTIFF'S ANTITRUST CLAIM

A. Conspiracy in Restraint of Trade

Simply put, Plaintiff contends that Board certified vascular surgeons enjoy significant competitive advantages over non-certified [*1518] vascular surgeons. According to the Complaint:

Certification in general vascular surgery is a requirement of many hospitals in the metropolitan Atlanta, Georgia area in the granting of general vascular surgery privileges, by physicians in making referrals of patients' cases, by insurance companies in the setting of malpractice insurance premiums, by managed health care providers and health maintenance [**16] organizations in contracting for services, by courts and other adjudicative panels in determining the expertise of general vascular surgeons whose testimony is offered as expert witnesses, and by aspiring general vascular surgeons choosing a practice to which to affiliate.

Complaint, P 9. Dr. Poindexter illustrates the nature of the alleged competitive disadvantage by providing undisputed evidence that several large Atlanta hospitals will not grant vascular surgery privileges to a surgeon who is not Board certified or eligible to receive such a certificate. See Plaintiff's Statement of Material Facts [# 34], PP 74-79. Moreover, Plaintiff says that his present vascular surgery privileges have been threatened at his primary hospital, whose by-laws also require specialty certification as a condition to vascular surgery privileges. Complaint, P 30; Statement of Facts, P 82.

Count I of the Complaint charges the Board, its Directors, and the American Board of Medical Specialties with conspiring to restrain trade, in violation of Section 1 of the Sherman Act. Complaint, P 34. Plaintiff initially calls this

illegal conduct a "group boycott," referring to an alleged horizontal [**17] agreement among competing surgeons to exclude competition by restricting access to the Board's vascular surgery certificate.⁴

Section 1 of the Sherman Act provides:

HN3[] 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. Thus, Section 1 requires some form of agreement to restrain trade. Courts generally do not distinguish between the terms "contract," "combination," or "conspiracy," often using the terms interchangeably. See, e.g., Bogosian v. Gulf Oil Corp., 561 F.2d 434, 445-46 (3d Cir. 1977) ("we perceive no distinction between the terms combination and conspiracy").

[**18] This circuit has defined **HN4**[] the elements of a conspiracy to restrain trade under Section 1 to include: (1) an agreement to enter a conspiracy; (2) designed to achieve an unlawful objective; and (3) proof of an actual unlawful effect or facts that show a potential for future harm to competition. See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 1001 (11th Cir. 1993). Unlike Section 2, Section 1 does not demand proof of a specific intent to restrain trade. "A section 1 plaintiff . . . need not prove an intent on the part of the co-conspirators 'to restrain trade or to build a monopoly.' So long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under section 1." Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810, 819-20 (11th Cir. 1990) (citations omitted). However, federal antitrust law imposes a heightened standard of proof on a plaintiff attempting to demonstrate the existence of an agreement to restrain trade with circumstantial evidence. Plaintiff must "introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately." U.S. Anchor, 7 F.3d at 1002.

As a threshold matter, [**19] the parties debate whether Defendant Board is legally capable of conspiring with its Directors to restrain trade. **HN5**[] Generally, a corporation and its officers or directors cannot form a Section 1 conspiracy. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 2741-42, 81 L. Ed. 2d 628 (1984). This circuit has determined, however, [*1519] that an exception to this general rule exists where plaintiff demonstrates that corporate officers have a personal stake in achieving the object of the alleged conspiracy. Tiftarea Shopper, Inc. v. Georgia Shopper, Inc., 786 F.2d 1115, 1116 (11th Cir. 1986); see also Bolt, 891 F.2d at 819 (holding that a hospital can conspire with members of its medical staff).

The nonprofit Defendant in this case is a separate legal entity. Its Directors, who set Board policy and administer certification examinations, are at the same time practicing or academic physicians who compete with non-certified doctors in the marketplace. Because Directors might benefit by excluding competition from other providers of surgical services, the general rule that a corporation cannot conspire with its officers does not apply to this case. The Court [**20] finds that Defendant is legally capable of conspiring with its Directors.

The fact that the Directors and the Board are capable of conspiring with each other does not mean that every Board action satisfies the conspiracy requirement of Section 1. The Board by its nature involves collective action by individual competitors. Proof of a conspiracy requires a showing that the conspirators had a rational economic motive for entering into the conspiracy, as well as a conscious commitment to cooperate in a scheme designed to achieve an unlawful objective. Bolt, 891 F.2d at 819.

First, Defendant argues that no legitimate motive exists to conspire because no economic benefit accrues to the individual Directors as a result of their role in setting accreditation standards. The Board itself does not provide health care services and, Defendant says, no Directors practiced surgery in the Atlanta area during the relevant

⁴ The Court refuses to analyze this case as a "group boycott" insofar as Plaintiff may be seeking to invoke a per se determination of illegality. See FTC v. Indiana Federation of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 2018, 90 L. Ed. 2d 445 (1986) ("the category of restraints classed as group boycotts is not to be expanded indiscriminately Moreover, we have been slow to condemn rules adopted by professional associations as unreasonable *per se*").

time period. Thus, no individual Director actually competed with Dr. Poindexter. Defendant concludes that because the parties do not directly compete for surgical patients, no rational economic motive exists for the Directors as a group to conspire to deny Plaintiff a vascular [**21] certificate.

Defendant's analysis overlooks the fact that the Board sets national standards determining which general surgeons qualify for its specialty certification in vascular surgery. The individual Directors practice surgery in various local areas throughout the country. As the *Bolt* court pointed out, "one of the first principles of economics is the inverse relationship of supply to price." *Bolt*, 891 F.2d at 820. If the Directors, acting together, can prevent non-certified surgeons from competing effectively in local areas like Atlanta, then the Board certified physicians can charge a higher price. Therefore, Defendant's ability to control the supply of certified vascular surgeons may give its Directors a rational economic incentive to conspire against applicants such as Plaintiff.

HN6 A Section 1 conspiracy also requires Plaintiff to present evidence that tends to exclude the possibility that the alleged co-conspirators acted legitimately. *U.S. Anchor*, 7 F.3d at 1002. In other words, the joint activity or agreement must be designed to achieve an unlawful objective, rather than enhancing competition or promoting procompetitive conduct. Plaintiff has not met this burden.

[**22] Courts have long recognized that establishing and monitoring product and service standards is a legitimate and beneficial function of trade and professional associations. See, e.g., *Consolidated Metal Prod., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 294 (5th Cir. 1988) ("Even if user reliance gives [Defendant] significant influence over the market, that influence may enhance, not reduce, competition and consumer welfare." *Id. at 296* (footnote omitted)). Although disappointed competitors sometimes file antitrust actions against associations that refuse accreditation or professional certification, "restrictions on access by imposition of educational and training requirements and a degree of self-regulation are definitional aspects of the term 'profession.'" *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n, Inc.*, 654 F. Supp. 716, 722 (N.D. Ga. 1986) (Evans, J.), aff'd 813 F.2d 349 (11th Cir. 1987). Moreover, in evaluating the antitrust implications of a profession's self-imposed restrictions, "the general presumption is that the public interest is served [*1520] by the promotion of enhanced education and training requirements." *Id.*

Plaintiff [**23] fails to rebut the general presumption that the Board's certification standards serve competition and the public interest, complaining only that the Board's refusal to waive its educational requirement does not serve *his* interest in expanding his medical practice. However, there is no direct evidence showing that the Board or its Directors desired to achieve an unlawful objective when they devised the requisite educational qualifications or when they denied Plaintiff a certificate. Nor has Plaintiff introduced circumstantial evidence tending to exclude the possibility that the Board acted legitimately. Instead, the record suggests only that Defendant's policies reflect a sensible concern for the quality of specialized medical training and the standards of surgical practice.

Finally, there is no proof that the Board acted to constrain Plaintiff's ability to compete. Hospitals, patients and insurers voluntarily rely on the Board's certification decision, much like an ordinary consumer might rely on a trade group's seal of approval. After the Board expresses its informed opinion regarding the sufficiency of a surgeon's academic training or credentials, users of that information have [**24] the sole power to determine whether that surgeon is entitled to patronage, surgical privileges, or preferred insurance rates.⁵

As courts are fond of observing, the antitrust laws protect competition, not individual competitors. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962). In this regard, it is important to note that Defendant Board's recommendations do not have the force of law and do not determine whether a qualified surgeon can practice vascular surgery. Plaintiff has not been foreclosed from competition. By all accounts, [**25] Plaintiff is a successful practitioner. The Board's certification procedure was not conceived or applied as an

⁵ Plaintiff's reliance on *American Society of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982), is misplaced. That association's codes, though only advisory, had a "powerful influence: federal regulations have incorporated many of them by reference, as have the laws of most States, the ordinances of major cities, and the laws of all the provinces of Canada." *102 S. Ct. at 1938-39*.

attempt to deny consumers the right to purchase Plaintiff's services, or to require hospitals to exclude Plaintiff from the surgical staff, or to persuade insurance carriers to charge Plaintiff a higher price for malpractice insurance. The Board does not even ask courts to view Plaintiff less favorably as an expert witness. In short, the Board's decision to withhold certification does not restrain Plaintiff from competing as a vascular surgeon and does not impose sanctions on those who use his services. As Judge Easterbrook observed, "there can be no restraint of trade without a restraint." *Schachar v. American Academy of Ophthalmology*, 870 F.2d 397, 397 (7th Cir. 1989). The Court concludes that Defendant's restrictive educational standard and its refusal to award Plaintiff its vascular certification does not constitute an unlawful restraint of trade.

B. Plaintiff's Standing

Defendant contends that Plaintiff does not have standing to bring this antitrust action. Specifically, Defendant says Dr. Poindexter has not suffered an antitrust injury and seeks only to enjoy [**26] the benefits of Defendant's alleged anticompetitive conspiracy.

HN7 Standing is a question of law. *Austin v. Blue Cross & Blue Shield*, 903 F.2d 1385, 1387 (11th Cir. 1990). In the antitrust context, standing is a far more complex matter than the usual search for the constitutionally mandated injury in fact. Antitrust standing involves a more comprehensive inquiry, turning on "an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991) (denying antitrust standing to physician seeking hospital privileges so as to reap the alleged monopoly profits received by staff radiologists). The analysis requires a court to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between [*1521] them." *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 907, 74 L. Ed. 2d 723 (1983). Ultimately, a court must determine whether the alleged injury derives from some form of anticompetitive conduct and is the kind of injury that Congress intended to redress with treble damages.

Todorov, [**27] a leading Eleventh Circuit case on standing, defines a two-pronged approach to determine whether a plaintiff is a proper party to bring an antitrust suit: (1) plaintiff must suffer an "antitrust injury," and (2) plaintiff must be an "efficient enforcer" of the antitrust laws. 921 F.2d at 1449. An antitrust injury results from anticompetitive conduct. In the process of evaluating whether plaintiff has suffered an antitrust injury, a court will often resolve one or more elements of the underlying antitrust claim as well. In this case, the Court concluded that there is no factual evidence of an unlawful objective nor proof of an anticompetitive effect arising from the Board's adverse certification decision. Consequently, there is no need to expressly decide the matter of antitrust standing.

VI. STATE LAW CLAIMS

The Court has original jurisdiction over Plaintiff's state law claims pursuant to *28 U.S.C. § 1332*. The parties agree that Georgia law applies.

A. Tortious Interference

Count II purports to be a claim for "Intentional Interference With Right to Practice Profession," and Count IV alleges "Tortious Interference With Business Relationships." The parties treat the two [**28] counts as the same legal claim.

Plaintiff alleges that "Defendant has intentionally and improperly, without privilege, interfered with Plaintiff's business relationships by inducing third parties not to enter into and continue business relationships with Plaintiff . . ." Complaint, P 35. Plaintiff does not assert that Defendant has actually contacted his existing or prospective patients, hospitals, or other business associates to induce them not to enter into relations with Dr. Poindexter. Instead, the intentional interference alleged concerns the Board's efforts to promote public recognition of certified doctors, as well as the adverse effects of Defendant's refusal to permit Plaintiff to take the certification examination. Plaintiff explains:

ABS's refusal to allow Dr. Poindexter to take the vascular surgery exam [] has interfered with Dr. Poindexter's advancement in academics and business relations with his former employer, Morehouse Medical School, and

with Dr. Poindexter's ability to engage in his business and profession at various hospitals and other health care organizations.

Plaintiff's Response [# 34], p. 21, n.8.

HN8 Georgia law provides a cause of action [**29] for interference with business relationships. To establish a claim for tortious interference with business relations, a plaintiff must prove that the defendant: "(1) acted improperly and without privilege; (2) purposefully, with malice, and with intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) plaintiff suffered some financial injury as a result." *Southern Business Communications, Inc. v. Matsushita Elec. Corp.*, 806 F. Supp. 950, 962 (N.D. Ga. 1992) (Carnes, J.) (citing *DeLong Equip. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1518 (11th Cir. 1989)).

Without deciding whether Defendant's actions have "induced" third parties not to enter into business relations with Plaintiff, the Court concludes from a careful review of the record that there is no evidence that Defendant at any time acted with "malice." Although the consequences to Plaintiff may have been adverse, Defendant's decision to adhere to its educational requirement and its subsequent denial of specialty certification falls far short of the type of malicious and wrongful conduct prohibited by Georgia courts. See generally [**30] *NAACP v. Overstreet*, 221 Ga. 16, 20-22, 142 S.E.2d 816 (1965). Because Plaintiff has produced no evidence that Defendant acted with malice, he cannot recover for tortious interference with business relations.

[*1522] B. Promissory Estoppel

Count III contends that, in a letter sent in 1987, Defendant made an unambiguous promise to Plaintiff that Plaintiff was qualified to apply for the vascular surgery certificate. Dr. Poindexter says he relied on this promise and "reasonably chose not to take certain action that might have otherwise made him eligible to apply for the qualifying examinations." Complaint, PP 33-35.

While in general surgery residency in 1983, Dr. Poindexter learned that the American Board of Surgery was issuing a certificate in vascular surgery. He began to investigate fellowship programs in vascular surgery, having discovered in the Graduate Medical Education Directory (the "Green Book") that there were as yet no accredited programs. By 1984, Plaintiff was seeking an accredited vascular fellowship to satisfy the Board's education requirement to sit for the examination. Plaintiff was accepted by two unaccredited programs, and chose the one he felt had the better prospect [**31] of gaining future accreditation. When he accepted a fellowship position at New York Medical College in December, 1984, he knew that the program was unaccredited and had not yet applied for accreditation, "but they had plans to submit their application to ACGME and felt very confident that they would get approval." Poindexter Depo., p. 93. Plaintiff knew that enrolling in an unaccredited program was risky, but explains that "I took the best risk that I had an opportunity to take at that time." *Id. at p. 95*.

Dr. Poindexter attended the fellowship program at New York Medical College from July, 1985 to June, 1986. In March, 1987, he contacted the Board and requested information regarding its vascular surgery examination. In a letter dated March 30, 1987, the Board enclosed a one page form asking about Plaintiff's medical training. Plaintiff submitted the information in early April, indicating that he had finished general surgery residency in 1985 and completed a vascular fellowship at New York Medical College in 1986. Plaintiff was aware when he returned the preliminary evaluation form that the Board required completion of an accredited fellowship program as a prerequisite to sitting [**32] for the examination. On May 8, 1987, the Board sent Plaintiff a form letter stating: "According to the preliminary information which you have provided us, you May apply for the Certificate of Special Qualifications in General Vascular Surgery." Plaintiff's Exh. D.

The May, 1987, letter was sent in error. The Board discovered the error eleven months later, in April, 1988. The Director spoke with Dr. Poindexter and wrote him on April 8, 1988, informing him that because his fellowship training was taken at an unaccredited school he could not be admitted to the vascular surgery examination. See Plaintiff's Exh. E. When he received the letter acknowledging the Board's error, Plaintiff still anticipated that his unaccredited fellowship program would obtain approval from the accrediting body. Moreover, Plaintiff knew that if New York Medical College's fellowship program subsequently gained accreditation, he would be accepted as a

graduate of an accredited program and become eligible for Board certification. Plaintiff did not learn that his fellowship program had been denied accreditation until after he received the Board's April 8, 1988, letter.

Plaintiff contends that he relied [**33] on the Board's erroneous May, 1987 letter and took no further action to fulfill the education requirement:

If the American Board of Surgery had indicated in May 1987 that Dr. Poindexter was not eligible to apply for the board examination in general vascular surgery, Dr. Poindexter definitely would have taken a different course of action. He would not have waited to see if the New York Medical College received accreditation. He would have gone back to various vascular accredited fellowship programs to see whether there were any last minute openings for July 1987 at those institutions.

Plaintiff's Statement of Material Facts [# 34], P 57. Dr. Poindexter explains his failure to enroll in an accredited program after receiving the Board's corrective letter of April, 1988, by stating that his "personal and professional situations had changed significantly." *Id. at P 64*. He had purchased a home in Atlanta and his wife had begun [*1523] M.B.A. studies at a local university. Thus, "it would have been extremely burdensome and difficult to have attempted to apply for and complete an ACGME accredited vascular fellowship at that time." *Id.*

Plaintiff appealed the Board's decision, [**34] but was denied admission to the examination. He now argues that the equitable doctrine of promissory estoppel should apply to compel Defendant to admit him to the vascular surgery examination.

Georgia has codified the common law doctrine of promissory estoppel as articulated in the Restatement of Torts: **HN9** [↑] "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *O.C.G.A. § 13-3-44(a)*. Thus, to prevail on a promissory estoppel claim under Georgia law, plaintiff must prove that: (1) defendant made a promise; (2) expecting plaintiff to rely on the promise; and (3) plaintiff did reasonably rely to his detriment. See *Doll v. Grand Union Co., 925 F.2d 1363, 1371 (11th Cir. 1991)*.

In this case, Plaintiff's purported reliance was not reasonable. "Promissory estoppel cannot be applied unless the promisee reasonably relied on the promise." *Fidelity & Deposit Co. v. West Point Constr. Co., 178 Ga. App. 578, 580, 344 S.E.2d 268 (1986)*. Defendant's form letter of May, 1987, lacked any indication [**35] that it was intended to relieve Plaintiff of the Board's educational requirements concerning accredited fellowship training. Plaintiff had been aware of the accreditation problem since first applying to vascular programs in 1983. The hope that New York Medical College eventually would gain accreditation was a risk he accepted as his best opportunity of qualifying for the examination. Plaintiff knew when he submitted the preliminary form -- and when he received the erroneous response -- that certification was conditioned on completion of an accredited fellowship. The Court finds that Defendant's promise, assuming it did exist, was so inconsistent with Plaintiff's knowledge of Board policy that reliance would not be reasonable.

Defendant suggests that the more likely explanation for Plaintiff's failure to apply to an accredited program during that eleven month period before the Board corrected its error is simply that Plaintiff was still hoping that his gamble with New York Medical College would pay off and he would not have to interrupt his career to repeat a year of vascular surgery training. Plaintiff responds that the May, 1987, letter "indicated he had already met ABS's training [**36] requirements," and so he made other financial and lifestyle commitments instead of applying to another program. Plaintiff's Response [# 34], p. 16. Because Dr. Poindexter knew without question he had not met Defendant's education requirements, interpreting the Board's letter to say that he had defies reasonable comprehension.

C. Breach of By-Laws; Civil Rights

Count V alleges as a cause of action "Breach of By-Laws and Rules and Regulations." Essentially, Plaintiff contends that Defendant incorporated provisions into its bylaws permitting the Board to consider the merits of individual cases and that the Board has failed to do so in this case. Plaintiff points to language in the "Rules Governing Admissibility to the Examinations" which presumably gives the Board flexibility to dictate different

admission requirements in individual cases. The parties argue at some length over the legal meaning of the term "and/or" as used in Defendant's rules.

Before undertaking the semantic squabble, Plaintiff observes that the Board's alleged failure to follow its own rules should be considered not as a separate cause of action, but as weighing in the equities of the promissory estoppel claim. **[**37]** The Court agrees that this is the best use of Plaintiff's imaginary tort claim and has given the allegations appropriate consideration. The Court's determination that promissory estoppel does not apply remains unaffected.

Count VI, "Violation of the Civil Rights Act of 1870," was dismissed by stipulation of the parties. See Docket [# 19].

[*1524] VII. CONCLUSION

Whether Plaintiff is qualified to become a "certified" vascular surgeon is not a legal question. This Court has not determined whether Defendant's criteria for certification are appropriate or correct, only that those requirements do not constitute an unlawful restraint of trade. In examining the record, the Court found that Plaintiff failed to meet his burden of setting forth specific facts sufficient to show the existence of a genuine, material issue concerning either Defendant's unlawful objective or an actual anticompetitive effect of the certification scheme.

Plaintiff's state law claims also cannot survive summary judgment. The Court found no evidence of malicious conduct to support Plaintiff's claim of intentional interference and no promise or reasonable reliance to justify invoking equitable estoppel under Georgia **[**38]** law.

Accordingly, Defendant's motion for summary judgment is **GRANTED**. The Clerk is **DIRECTED** to enter judgment accordingly.

SO ORDERED, this 10 day of June, 1994.

JACK T. CAMP

UNITED STATES DISTRICT JUDGE

End of Document

Bond v. Cedar Rapids Television Co.

Supreme Court of Iowa

June 22, 1994, Filed

No. 187 / 92-1434

Reporter

518 N.W.2d 352 *; 1994 Iowa Sup. LEXIS 153 **

THOMAS G. BOND, Individually and as the General Partner of Dubuque T.V. Limited Partnership, and WILLIAM MORRIS ABERNATHY, Appellees, v. CEDAR RAPIDS TELEVISION COMPANY, Appellant.

Subsequent History: Rehearing Denied July 25, 1994.

Prior History: [**1] Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan, Judge. Appeal from judgment for plaintiff in suit for tortious interference with a contract.

Disposition: REVERSED ON THE APPEAL; AFFIRMED ON THE CROSS-APPEAL.

Core Terms

sham, affirmative defense, baseless, allegations, station, litigated, preponderance of evidence, abuse of process, cable system, anticompetitive, prerequisite, television, parties

LexisNexis® Headnotes

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

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

HN1[] Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr doctrine provides that civil liability may not be imposed on a party for exercising the right, under the [First Amendment to the United States Constitution](#), to petition for governmental action.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN2[] Defenses, Demurrs & Objections, Affirmative Defenses

Iowa R. Civ. P. 101 provides in part: Any defense which alleges any matter in justification, excuse, release or discharge, or which admits the facts of the adverse pleading but seeks to avoid their legal effect, must be specially pleaded.

[Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > General Overview](#)

[Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview](#)

[Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview](#)

[Civil Procedure > Trials > Judgment as Matter of Law > General Overview](#)

[Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review](#)

[HN3](#) Responses, Defenses, Demurrs & Objections

An affirmative defense is one resting on facts not necessary to support plaintiff's case. Under Iowa R. Civ. P. 101 these matters must be specially pleaded, and a motion for directed verdict or a motion for judgment notwithstanding the verdict do not qualify as special pleadings. Without such a pleading, the question may not be entertained on appeal. Further, mere denials of specific paragraphs in the plaintiff's petition are insufficient to raise affirmative defenses.

[Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview](#)

[Torts > ... > Commercial Interference > Contracts > General Overview](#)

[HN4](#) Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr doctrine provides that the Sherman Act does not prohibit persons from associating together in an attempt to persuade the legislature or the executive branch to take particular action with respect to a law that would produce a restraint or a monopoly. While initially applied only to antitrust actions, the doctrine was later extended to the approach of citizens to administrative agencies and the courts. It also applies to claims of tortious interference with contract.

[Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview](#)

[HN5](#) Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr doctrine is subject to what is called the "sham" exception. Immunity from suit is withheld from those situations where the petitioning activity, extensively directed towards influencing government action, is a mere sham to cover an attempt to interfere directly with the business relationships of the competitor.

[Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview](#)

[HN6](#) Exemptions & Immunities, Noerr-Pennington Doctrine

Conduct does not qualify as a sham under the Noerr doctrine unless it is objectively baseless. The definition of "sham litigation" has two parts. First, the lawsuit must be objectively baseless in the sense that no reasonable

litigant could realistically expect success on the merits. If the litigation is objectively baseless the court should look to the subjective intent and ask whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon. Under this formulation intent is irrelevant where the underlying suit or petition is not itself "objectively baseless."

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN7[] Estoppel, Collateral Estoppel

The doctrine of issue preclusion prevents parties to an action in which a judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action. The four prerequisites to application of the doctrine are:(1) The issue precluded must be identical;(2) The issue must have been raised and litigated in the prior action;(3) The issue must have been material and relevant to the disposition of the prior action; and (4) The determinations made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Administrative Law > Agency Adjudication > General Overview

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN8[] Decisions, Collateral Estoppel

Final determinations of administrative agency acting in a judicial capacity are to be accorded preclusive effect in substantive judicial proceedings.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Evidence > Burdens of Proof > General Overview

Torts > Intentional Torts > Abuse of Process > Elements

HN9[] Formal Adjudicatory Procedure, Hearings

In the absence of a special statute establishing a higher standard, the burden in federal administrative proceedings is a preponderance of evidence.

Counsel: Stephen J. Holtman, Iris E. Muchmore, and Carolyn M. Hinz of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for appellant.

G. Stephen Wiggins of Roberts, Davidson, Wiggins & Crowder, Tuscaloosa, Alabama, and David J. Dutton, Thomas L. Staack, and Bruce L. Braley of Dutton, Braun, Staack, Hellman & Iversen, P.L.C., Waterloo, for appellees.

Judges: Considered by Harris, P.J., and Larson, Neuman, Snell, and Andreasen, JJ.

Opinion by: HARRIS

Opinion

[*353] HARRIS, Justice.

A Dubuque television station recovered a substantial verdict against a Cedar Rapids television station in this tort suit for interfering with a contract. We set aside the recovery because we find as a matter of law that the actions complained of were protected under a principle rooted in the *First Amendment to the United States Constitution*.

Although the plaintiffs vigorously dispute the point, we are convinced the appeal calls for application of the principle of issue preclusion. The application is interesting, though certainly [*2] not unique, because it overcomes the rubric that, on appeal, disputed facts are taken in the light most consistent with the verdict. See Iowa R. App. P. 14(f)(2). In this case the parties presented diametrically opposed versions concerning which parties to the dispute were victims of the other's culpability. By its verdict the jury resolved that conflict (we do not reach the challenges to certain trial rulings that preceded the verdict) in favor of the plaintiffs who would [*354] ordinarily have the advantage of their version of the facts. Under the issue preclusion principle they are denied this advantage, however, because their version of a crucial element had already been considered and rejected by another tribunal in preliminary litigation.

The Dubuque Television Limited Partnership (DTV), a plaintiff, bought an ABC affiliate television station, KDUB-TV, for \$ 3.25 million in 1985. Thomas Bond, a second plaintiff, is DTV's general partner. At the time, the Dubuque cable system was authorized by the federal communications commission (FCC) to provide KDUB with nonduplication protection. This protection allowed the cable system to black out transmissions of other ABC affiliates on the [*3] system when their programming through the national ABC network duplicated that offered by KDUB. Cedar Rapids Television Co. (CRTV), the defendant, owned KCRG-TV, an ABC affiliate on the system that was subject to blackout.

At the time of purchase in 1985, Bond was aware of the FCC-approved protection and thereafter chose not to seek extension of the FCC order when it expired in January of 1986. Even though the order expired, a Dubuque city cable ordinance continued to provide blackout protection. All parties agreed the ordinance was unenforceable, but the cable system retained the protections. CRTL officials vigorously protested the protections, while DTV and the City of Dubuque supported them.

DTV persuaded the cable system to retain the blackout and either remove KCRG from the system or move it to a higher channel. In 1987 the cable system was purchased by TCI Cablevision, which, in March of 1988, announced it would terminate protection. At the same time TCI moved KCRG to a higher channel. Such a move is highly undesirable because viewers are less likely to watch stations at higher channels.

Prior to this announcement DTV entered into an agreement to sell KDUB to Sage Broadcasting [*4] Corporation (Sage) for \$ 4 million. DTV then filed a copy of the agreement with the FCC.

The agreement contained a clause that stated "pursuant to a verbal agreement with the local cable company, the said cable company blacks out station KCRG-TV, Cedar Rapids, Iowa, whenever said station's programming is

identical with that of the station." After obtaining a copy of the agreement and upon seeing this clause, CRTC filed a petition with the FCC to deny DTV's application to transfer its license. This petition was the catalyst for the present litigation. In its petition CRTC alleged the nonduplication "verbal agreement," referenced in the transfer agreement, violated FCC nonduplication rules and antitrust laws. CRTC requested denial of the transfer and a review of DTV's fitness as an FCC licensee.

DTV filed an "opposition" to the petition, following which the video services division, mass media bureau, of the FCC, issued a memorandum opinion and order denying the petition and allowing the transfer. The denial was affirmed on intra-agency appeal to the FCC commission members.

Shortly after the FCC final ruling, DTV countered by filing a petition seeking revocation of CRTC's license. DTV [**5] claimed CRTC was unfit to be a licensee because its petitions, in seeking denial of the transfer, were said to be baseless and filed only to delay or destroy a license transfer. The FCC rejected this abuse of process argument and, in the matter that controls this suit, found that CRTC raised colorable allegations of uncompetitive conduct.

The proposed transfer of KDUB to Sage collapsed in October 1989 after an agreed deadline passed. DTV then filed this action, alleging CRTC tortiously interfered with the transfer contract.

After a lengthy trial the jury awarded \$ 2.1 million on the interference claim and \$ 10,000 to Bond individually for his emotional distress. CRTC appealed and DTV cross-appealed. Because this was a law action we review the district court's determination for error. Iowa R. App. P. 4.

I. The core issue in the case is the applicability of [HN1](#) the *Noerr* doctrine which provides that civil liability may not be imposed on a party for exercising the right, under the [\[*355\] First Amendment to the United States Constitution](#), to petition for governmental action. [*Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138, 81 S. Ct. 523, 5 L. Ed. 2d 464, 471 \(1961\)*](#). [**6] Defendant CRTC contends this doctrine covered its activities before the FCC and immunized it from liability.

CRTC raised the *Noerr* doctrine in its motion for directed verdict, motion for judgment notwithstanding the verdict and motion for new trial. CRTC also objected to the district court's refusal to include a *Noerr*-based jury instruction. CRTC did not however raise the doctrine in its answer or in a motion for summary judgment. In the belief that the doctrine is an affirmative defense, the plaintiffs contend CRTC did not preserve error on the question in accordance with Iowa rule of civil procedure 101. ¹

[HN3](#) We have defined an affirmative defense as "one resting on facts not necessary to support plaintiff's case." [*Erickson v. Wright Welding Supply, Inc., 485 N.W.2d 82, 86 \(Iowa 1992\)*](#); [**7] [*Foods, Inc. v. Leffler, 240 N.W.2d 914, 920 \(Iowa 1976\)*](#). Under Iowa rule of civil procedure 101 these matters must be specially pleaded, and a motion for directed verdict or a motion for judgment notwithstanding the verdict do not qualify as special pleadings. [*Foods, 240 N.W.2d at 920*](#). Without such a pleading, the question may not be entertained on appeal. *Id.* Further, mere denials of specific paragraphs in plaintiffs' petition are insufficient to raise affirmative defenses. ²

Although plaintiffs contend otherwise, we are convinced the [\[*8\]](#) *Noerr* doctrine is not an affirmative defense, but rather an element of plaintiffs' recovery in an action of this kind. [*McGuire Oil Co. v. MAPCO, Inc., 958 F.2d 1552, 1559 n.9 \(11th Cir. 1992\)*](#); [*Hospital Bldg. Co. v. Trustees of Rex Hosp., 791 F.2d 288, 292-93 \(4th Cir. 1986\)*](#); see [*Litton Sys., Inc. v. AT&T Co., 700 F.2d 785, 810 \(2d Cir. 1983\)*](#); [*Defino v. Civic Ctr. Corp., 780 S.W.2d 665, 668*](#)

¹ [HN2](#) Iowa rule of civil procedure 101 provides in pertinent part: "Any defense . . . which alleges any matter in justification, excuse, release or discharge, or which admits the facts of the adverse pleading but seeks to avoid their legal effect, must be specially pleaded."

² Plaintiffs cite *Foods, Inc.* for the proposition that all First Amendment protections must be raised prior to the close of trial. *Foods, Inc.* does not stand for such a broad proposition. It merely holds that, when a First Amendment does constitute an affirmative defense, it must be properly raised under rule 101 in order to preserve error. [*Foods, Inc., 240 N.W.2d at 920-21*](#).

(Mo. App. 1989); Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* § 203.4C, at (1992). The burden is clearly on the plaintiffs to raise and negate *Noerr* immunity. *MAPCO*, 958 F.2d at 1558 n.9 (stating plaintiff has burden to show *Noerr* immunity did not attach to plaintiff's action); *Hospital Bldg. Co.*, 791 F.2d at 292-93 (stating that "complainant in an antitrust case has burden of proving that its competitor's conduct was a sham"); *Defino*, 780 S.W.2d at 668 (*Noerr* doctrine is an essential element in plaintiff's case, not an affirmative defense borne by defendants). [**9] ³

Although we have not previously been called upon to apply the *Noerr* doctrine, the federal authorities holding it to be an affirmative defense, and in placing the burden on the plaintiffs, are consistent with our holding in a somewhat analogous situation. *Erickson*, 485 N.W.2d at 86 (statutory immunity from suit not an affirmative defense, but part of plaintiff's burden to establish strict liability).

We hold the *Noerr* doctrine is not an affirmative defense and find the issue was preserved.

II. As originally stated in 1961, *HN4*⁴ the *Noerr* doctrine provided that "the Sherman Act does not prohibit . . . persons from associating [**10] together in an attempt to persuade the legislature or the executive branch to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr*, 365 U.S. at 136, 81 S. Ct. at , 5 L. Ed. 2d at 470. While initially applied only to antitrust actions, the doctrine was later [*356] extended to "the approach of citizens . . . to administrative agencies . . . and the courts." *California Motor Transp. Co. v. Trucking, Unltd.*, 404 U.S. 508, 510, 92 S. Ct. 609, , 30 L. Ed. 2d 642, 646 (1972).

Since *California Motor Transport*, the federal courts have expanded the doctrine to claims of tortious interference with contract. *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, 1316-17 (8th Cir. 1980), cert. denied, 499 U.S. 842, 66 L. Ed. 2d 49, 101 S. Ct. 122 (1982); *Havoco of Am. Ltd. v. Holloway*, 702 F.2d 643, 649-51 (7th Cir. 1953); *Surgidev Corp. v. Eye Technology, Inc.*, 625 F. Supp. 800, 803 (D. Minn. 1986); see also *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 551 (5th Cir. 1978) [**11] (petitioning activity protected from state law liability as well as federal antitrust liability), cert. denied 444 U.S. 924, 62 L. Ed. 2d 180, 100 S. Ct. 262 (1979). The California Supreme Court has also extended the doctrine. *50 Cal. 3d 1118, , 270 Cal. Rptr. 1, 10-12, 791 P.2d 587, (1990)*. These extensions are not only supported by *Noerr*, but also by the underlying right to petition government under the First Amendment.

Plaintiffs point out that *HN5*⁵ the doctrine is subject to what is called the "sham" exception. Immunity is withheld from those situations where the petitioning activity, "extensively directed towards influencing government action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of the competitor." *Noerr*, 365 U.S. at 144, S. Ct. at , 5 L. Ed. 2d at 475. Until 1993 the standard by which sham analysis proceeded was not clearly defined by the United States Supreme Court, although *Noerr* was thought to be informative.

[**12] Under an opinion filed after trial of this case in district court, it is now clear that *HN6*⁶ conduct does not qualify as a sham unless it is objectively baseless. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, U.S. , , 113 S. Ct. 1920, , 123 L. Ed. 2d 611, (1993). The definition of "sham litigation" is now understood to have two parts. First, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at , St. Ct. at , 123 L. Ed. 2d at . If the litigation is objectively baseless the court should look to the subjective intent and ask "whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor . . . through the use of the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon." *Id.*, St. Ct. at , 123 L. Ed. 2d at . Under this formulation intent is irrelevant where the underlying suit or petition is not itself "objectively baseless." We note that the trial court did [**13] not have advantage of the *Columbia Pictures* opinion in making its challenged trial rulings.

³ Plaintiffs cite only one case they claim to be contra: *North Carolina Elect Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 52 (4th Cir. 1982). Plaintiffs' interpretation of *North Carolina* was however rejected by the 4th circuit in *Hospital Building Co.*, 791 F.2d 288 at 292-93.

III. In applying the sham exception to the present case the question becomes whether CRTC's FCC petitions were objectively baseless. If as a matter of law they were not, the judgment must be reversed. If as a matter of law the petitions were a baseless sham, we must turn to CRTC's other assignments of error.

In denying CRTC's petition, the FCC found that *allegations* of anticompetitive conduct are insufficient to disqualify a licensee, that a prior *adjudication* of anticompetitive practices by another tribunal is required before the FCC will consider anticompetitive activity with respect to character determination (unless circumstances shock the conscience or would evoke universal disapprobation). In denying DTV's subsequent petition against CRTC, the FCC acknowledged that petitions to deny may be filed by interested parties, including competing broadcasters. Significantly, the FCC expressly found that "we cannot say in this case that 'there was an absence of any reasonable basis' for CRTC's allegations. CRTC raised colorable allegations of anticompetitive conduct by DTV which, in [**14] proper circumstances, is an area of legitimate commission concern." [In re Dubuque T.V. Ltd. Partnership, 4 FCC Rcd 1999 \(1989\).](#)

CRTC contends this FCC determination bound the district court through [HN7](#)⁴ the [*357] doctrine of issue preclusion.⁴ The doctrine prevents parties to an action in which a judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action. [Hunter v. City of Des Moines, 300 N.W.2d 121, 123 \(Iowa 1981\)](#). The four prerequisites to application of the doctrine are

- (1) The issue precluded must be identical;
- (2) The issue must have been raised and litigated in the prior action;
- (3) The issue must have been material and relevant to the disposition of the prior action; and
- (4) The determinations made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Id. Only the first element (identical issue) and the second element (previously litigated) are in dispute here.

[**15] The first (identical issue) prerequisite is disputed on the claim that differing standards of proof are implicated. Plaintiffs contend their burden before the agency was greater than a preponderance of evidence, the standard for this litigation in district court. This is a crucial issue because, if the plaintiff did indeed face a higher standard of proof in the prior FCC proceeding than here, the issue is not precluded by the FCC determination.

The FCC determination involved plaintiff DTV's allegations before the FCC that CRTC's actions before that commission constituted an abuse of process warranting sanctions. Authorities make it clear that DTV's burden was to establish its claim only by a preponderance of the evidence. [HN9](#)⁵ In the absence of a special statute establishing a higher standard, the burden in federal administrative proceedings is a preponderance of evidence. [Steadman v. SEC, 450 U.S. 91, 102, 101 S. Ct. 999, , 67 L. Ed. 2d 69, 79 \(1981\); Bender v. Clark, 744 F.2d 1424, 1429 \(10th Cir. 1984\); 2 Am. Jur. 2d Administrative Law § 363](#), at 364 (1994); see also [In re High Sierra Broadcasting, Inc., 96 F.C.C.2d 423 \(1983\)](#). [**16]

Some question might persist on the commonality of issues prerequisite because of language in the FCC ruling. The FCC order refers to a "high burden" on those alleging abuse of process. Plaintiffs cite this language and argue the burden placed on them was higher before the FCC. The quoted language does not indicate the higher standard

⁴ [HN8](#)⁴ Final determinations of administrative agency acting in a judicial capacity are to be accorded preclusive effect in substantive judicial proceedings. [Toomer v. Iowa Dep't of Job Serv., 340 N.W.2d 594, 598 \(Iowa 1983\)](#). Plaintiffs do not object to the general applicability of issue preclusion analysis in this case.

⁵ A higher standard is usually reserved for situations where particularly important constitutional rights, such as deportation, are at stake. When this type of interest is implicated a clear and convincing evidentiary standard is generally utilized. See [Woody v. Immigration & Naturalization Serv., 385 U.S. 276, 286-87, 87 S. Ct. 483, , 17 L. Ed. 2d 362, 369 \(1966\)](#). There is no claim here by any party that such an interest was involved in the proceedings before the FCC.

518 N.W.2d 352, *357A 994 Iowa Sup. LEXIS 153, **16

was employed. The language referred to the nature of the elements making up a showing for an abuse of process before the FCC. It clearly did not refer [**17] to the evidentiary standard required to prove those elements.⁶

The standard of proof in this action in Iowa district court is also, of course, a preponderance of the evidence. Iowa R. App. p. 14(f)(6).

The FCC held that DTV had failed to establish the "absence of any reasonable basis for CRTV's allegations," and that "CRTV raised colorable allegations [in] an area of legitimate commission concern." In order to avoid application of the *Noerr* doctrine under [**18] the sham exception, DTV is required to show [*358] the same thing. Both showings are to be established by a preponderance of the evidence.

We conclude that CRTV has established identity of issues and proceed to the second contested element (whether the issue was previously litigated).

IV. Plaintiffs also contend the second prerequisite for issue preclusion (previously litigated) was not met. Plaintiffs note that the FCC order was a denial of hearing with respect to their abuse of process claim. Because no hearing was held, the plaintiffs argue they could not have "litigated" the issue.

The FCC order was essentially a summary judgment on the pleadings and papers submitted. The plaintiffs did not appeal so the order became a final agency determination. We think the FCC determination on submission of DTV's request for sanction satisfies the second prerequisite. The plaintiffs had a chance to further litigate the question, but declined. They are barred from relitigating this in the same manner as any party subject to summary judgment. *Bascom v. Jos. Schlitz Brewing Co.*, 395 N.W.2d 879, 884 (Iowa 1986); *73 Am. Jur. 2d Summary Judgment § 40*, at 768 (1974).

V. [**19] What we have said renders all other issues moot, including both those on appeal and cross-appeal.⁷ CRTV's motions for directed verdict should have been sustained.

REVERSED ON THE APPEAL; AFFIRMED ON THE CROSS-APPEAL.

End of Document

⁶ In context, the phrase read:

The factors set out above concerning the pleading requirements for strike petition allegations impose a high burden on those seeking to raise a strike petition issue. With regard to the matters DTV has alleged, we reviewed the CRTV pleading individually and cumulatively. Considering all the facts and circumstances of this matter, we cannot find that DTV has presented a substantial question of fact requiring a hearing with respect to abuse of process by CRTV.

Dubuque T.V., 4 FCC Rcd 1999.

⁷ On cross-appeal plaintiff Bond complains he was entitled to prejudgment interest. Under our holding he is not entitled to judgment so the claim for any interest also fails.

Syscomm Int'l Corp. v. Synoptics Communications

United States District Court for the Eastern District of New York

June 28, 1994, Decided

CV 94-2025

Reporter

856 F. Supp. 135 *; 1994 U.S. Dist. LEXIS 8837 **; 1995-1 Trade Cas. (CCH) P70,923

SYSCOMM INTERNATIONAL CORPORATION, Plaintiff, v. SYNOPTICS COMMUNICATIONS, INC., ANIXTER, INC. and WESTCON, INC., Defendants.

Subsequent History: [**1] Counsel Amended July 12, 1994.

Core Terms

arbitration, antitrust claim, domestic, compel arbitration, termination, arbitration proceedings, agreement to arbitrate, arbitration clause, products, anti trust law, transactions, distributor, antitrust, parties

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > General Overview

HN1[] Regulated Practices, Private Actions

Antitrust claims arising from domestic transactions are arbitrable.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Stay Pending Arbitration

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > General Overview

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

HN2[] Federal Arbitration Act, Stay Pending Arbitration

In passing on a [9 U.S.C.S. § 3](#) application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. The court may not refuse to grant a stay under [§ 3](#) based on considerations of judicial economy.

Counsel: For Plaintiff: BLODNICK, ABRAMOWITZ & BLODNICK, ESQS., BY: EDWARD K. BLODNICK, ESQ., Roslyn Heights, New York.

For SYNOPTICS, Defendant: SHEARMAN & STERLING, ESQS., William J.F. Roll, III, Esq., New York, New York. For WESTCON, INC., Defendant: WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, ESQS., BY: FRED N. KNOPF, ESQ., New York, New York.

Judges: WEXLER

Opinion by: LEONARD D. WEXLER

Opinion

[*135] MEMORANDUM AND ORDER

WEXLER, District Judge

Plaintiff Syscomm International Corporation ("Syscomm") brings this action against defendants SynOptics Communications, Inc. ("SynOptics"), Anixter, Inc. ("Anixter") and Westcon, Inc. ("Westcon") for violations of the antitrust laws. Upon commencing this action, Syscomm requested a stay of a certain ongoing arbitration proceeding between Syscomm's assignees and SynOptics. SynOptics opposes the motion and requests that this Court compel arbitration of the antitrust claims against it. For the reasons below, Syscomm's motion for a stay is denied, and SynOptics' request to compel arbitration is granted.

I. BACKGROUND

As alleged in the complaint, Syscomm, through a former wholly-owned subsidiary Romel Technology, Inc. ("Romel"),¹ was a wholesale distributor of computer products. SynOptics is a manufacturer [*2] of computer networking products. Anixter and Westcon sell, install and service computer network systems and related products, and are non-exclusive distributors of SynOptics' products.

On or about June 11, 1991, Romel and SynOptics entered into a distributor agreement, whereby Romel was appointed a nonexclusive authorized distributor of designated [*136] SynOptics' products (the "Agreement"). The Agreement was for a one year term, to renew automatically for a successive one-year period unless terminated by mutual agreement of the parties or in accordance with the terms of the Agreement.

By letter dated November 3, 1993, SynOptics purported to cancel the Agreement effective February 3, 1994 (the "November 3 Termination Notice"). As of November 4, 1993, Romel's sales of SynOptic's products was about \$ 12 million.

On November 15, 1993, by a Demand for Arbitration (the "Demand"), Romel commenced an arbitration [*3] proceeding against SynOptics under the auspices of the American Arbitration Association in San Francisco, California, pursuant to an arbitration clause in the Agreement,² for "breaches of contract, bad faith termination of

¹ Romel did business as Management Systems Group, which was formerly known as Information Technology Distributors, Inc.

² The arbitration clause provides:

K.9 Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration at the office of the American Arbitration Association ("AAA") in Santa Clara or San Francisco County in accordance with the rules of the AAA and judgment upon the award rendered may be entered in any court having jurisdiction. The arbitrator shall not have the authority to change or revise any decisions made by SynOptics where, by the terms of this Agreement SynOptics has been given sole discretion. In the event a dispute is submitted to arbitration, the arbitrator may award costs and reasonable attorney's fees to the prevailing party.

the contract, breach of duty of good faith, failure to honor commitment to pay soft dollars, unfair competition, predatory and anti-competitive conduct" (the "Arbitration Proceeding").

[**4] On or about December 31, 1993, Romel amended its arbitration claim to specify that it sought damages of not less than \$ 1,240,095; the original Demand indicated "Claim or Relief Sought: Total monetary damages are unknown at this time." Affidavit of Edward K. Blodnick ("Blodnick Aff.") PP 5-6. In addition, Syscomm agreed to limit its claim against SynOptics to three areas: (1) failure of SynOptics to pay Syscomm certain "soft dollars" earned prior to termination; (2) damages relating to delivery of product to Syscomm in a timely fashion; and (3) inequitable conduct by SynOptics toward Syscomm including, but not limited to, disclosure of Syscomm's customer lists to other distributors, preferential pricing, training and seminars, for which Syscomm sought reinstatement. Blodnick Aff. P 7.

In the meantime in December 1993, CMS Enhancements, Inc. and CDS Distribution, Inc. (collectively, "CDS") entered into a plan and agreement of merger with Syscomm for Syscomm's wholly-owned subsidiary Romel for certain consideration, including shares of CDS common stock. As Syscomm's President explains further in an affidavit in support of the motion for a stay, as a result of the termination, 100,000 [**5] shares of CDS common stock, part of the consideration for the merger, were placed in escrow, conditioned on Syscomm obtaining a reinstatement of the Agreement between Romel and SynOptics. Affidavit of John Spielberger ("Spielberger Aff.") P 5. Subsequently, CDS, as successor to Romel, assigned to Syscomm all of Romel's right, title and interest in any and all claims, including antitrust claims, against SynOptics, Anixter and Westcon.

Prior to the commencement of this action, the parties exchanged some 6000 pages of documents in the course of the Arbitration Proceeding and completed some four full or partial weeks of hearings, which included 15 days of testimony. In the meantime, by an order dated February 1, 1994, the arbitrator denied a motion by Romel for a preliminary injunction preventing SynOptics, pending the resolution of the Arbitration, from terminating the Agreement on February 3, 1994, pursuant to the November 3 Termination Notice.

Spielberger states that in testimony during the course of the Arbitration Proceeding, Larry Goodwin ("Goodwin"), formerly Vice President for North America for SynOptics, acknowledged discriminatory practices by SynOptics favoring Anixter and [**6] Westcon in regard to certain "key seller programs" and special pricing, purportedly clear violations of the antitrust laws. Spielberger Aff. P 9. Spielberger claims that up until that point, Syscomm suspected that SynOptics may have been violating the antitrust laws by certain [*137] discriminatory conduct, "but never had any hardcore proof" until Goodwin's testimony. *Id.* P 9. Based upon these activities discovered in the Arbitration Proceeding, Syscomm commenced the present action for antitrust violations.

Upon commencing this action, Syscomm requested a stay of the Arbitration Proceeding. Syscomm contends that it will be prejudiced if it is not permitted to pursue its antitrust claims in this action first, and, in any event, Syscomm may not pursue antitrust claims in arbitration as it violates public policy. Moreover, Syscomm contends that it has no agreement to arbitrate antitrust claims with Anixter and Westcon, and it should have the opportunity to pursue its antitrust claims in one forum, this Court, against all defendants.

In a conference call with the Court on June 17, 1994, Syscomm's and SynOptics' attorneys agreed that the language of the arbitration clause in the Agreement [**7] encompassed Syscomm's antitrust claims against SynOptics. As a result, the attorneys further agreed that it was unnecessary for SynOptics to bring a formal motion to compel arbitration of these claims and SynOptics' opposition to the stay motion would be treated as a motion to compel arbitration of the antitrust claims against it. Both parties confirmed this understanding in letters to the Court that same day.

II. DISCUSSION

Because Syscomm and SynOptics agree that the arbitration clause applies to Syscomm's antitrust claims against SynOptics, the issue presented is whether antitrust claims arising from domestic transactions are arbitrable where the parties have agreed to arbitrate them. While, at one time, the answer to this question in the Second Circuit would have been that such claims are nonarbitrable, see American Safety Equipment Corp. v. J.P. Maguire & Co.,

[391 F.2d 821 \(2d Cir. 1968\)](#), this Court believes that the Second Circuit and the Supreme Court, if faced with this issue, would conclude that [HN1](#)[ antitrust claims arising from domestic transactions are arbitrable.

Syscomm argues that the Second Circuit's decision in [American Safety, supra](#), [**8](#) which held that domestic antitrust claims are nonarbitrable, controls the decision in this case. SynOptics, on the other hand, argues that the *American Safety* doctrine has been implicitly overruled by recent Supreme Court decisions upholding the enforceability of agreements to arbitrate international antitrust disputes, see [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 \(1985\)](#), and agreements to arbitrate domestic securities law claims and RICO claims, see [Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 \(1989\)](#) (holding that claims under the Securities Act of 1933 are arbitrable); [Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 96 L. Ed. 2d 185, 107 S. Ct. 2332 \(1987\)](#) (holding that claims under the Securities Act of 1934 and RICO claims are arbitrable). Because this Court agrees that the Second Circuit would no longer adhere to the *American Safety* doctrine, this Court [**9](#) grants SynOptics' request to compel arbitration and denies Syscomm's request for a stay of the pending Arbitration Proceeding.

In *Mitsubishi*, the Supreme Court upheld the enforceability of an agreement to resolve antitrust claims by arbitration when the agreement arises from an international commercial transaction. Although the *Mitsubishi* court found it "unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions," it "confessed to some skepticism of certain aspects of the *American Safety* doctrine." [Mitsubishi, 473 U.S. at 629, 632](#). Upon identifying four ingredients or concerns of the *American Safety* doctrine, *id. at 632*, the Court first rejected as unjustified the concern that there is a "strong possibility that contracts which generate antitrust disputes may be contracts of adhesion." *Id.* Rather, the Court observed that a party resisting arbitration may attack directly the validity of the agreement or make a showing that would warrant setting aside the forum-selection [**10](#) clause. *Id.* The Court then determined that the "potential complexity [of antitrust issues] should [*138](#) not suffice to ward off arbitration," thereby rejecting the concern that antitrust issues are "ill-adapted to the arbitral process." In this respect the Court noted, in particular, that "adaptability and access to expertise are hallmarks of arbitration," and that "even the courts following *American Safety* . . . have agreed that an undertaking to arbitrate antitrust claims entered into after the dispute arises is acceptable." [Id. at 633](#) (emphasis in original). Next, the Court rejected, as another concern of the *American Safety* doctrine, the "proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that *antitrust law* imposes." [Id. at 634](#). Lastly, the Court addressed the ingredient it considered the "core of the *American Safety* doctrine -- the fundamental importance to American democratic capitalism of the regime of the antitrust laws." *Id.* After noting that the private cause [**11](#) of action, designed to afford compensation to injured competitors and to pose a deterrent to potential violators, plays a central role in enforcing this regime, and finding no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism, the Court concluded that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." [Id. at 636-37](#). Thus, the Court found none of the four ingredients or concerns of the *American Safety* doctrine justified denying enforcement of an agreement to arbitrate antitrust claims arising from an international commercial transaction.

Syscomm contends that the *American Safety* doctrine is "still good law and has not been overturned by the United States Supreme Court or any other decision." In support of its position, Syscomm relies on [Stendig International, Inc. v. B & B Italia, S.p.A., 633 F. Supp. 27 \(S.D.N.Y. 1986\)](#), a 1986 district court decision, which held that because *Mitsubishi* [**12](#) did not overrule *American Safety*, *American Safety* was still binding on the court. The *Stendig* court therefore refused to compel arbitration of an antitrust claim arising from a domestic transaction. See [id. at 28](#). However, *Stendig* was decided prior to the Supreme Court's decisions in *Rodriguez de Quijas* and *McMahon*, and more recent lower court cases have held that *American Safety* would no longer be followed by the Second Circuit, see, e.g., [Hough v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 757 F. Supp. 283, 286 \(S.D.N.Y.\), aff'd without opinion, 946 F.2d 883 \(2d Cir. 1991\); Gemco Latinoamerica, Inc. v. Seiko Time Corp., 671 F. Supp. 972, 978-80 \(S.D.N.Y. 1987\), adhered to in part and dismissed in part on reconsideration, 685 F. Supp. 400 \(S.D.N.Y. 1988\);](#) see also [GKG Caribe, Inc. v. Nokia-Mobira, Inc., 725 F. Supp. 109, 111-13 \(D.P.R. 1989\)](#) (concluding that the Supreme Court "would most certainly discard [the *American Safety*] doctrine").

Plaintiff also relies on a 1987 [**13] Second Circuit decision in *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840 (2d Cir. 1987), which Plaintiff misconstrues. Plaintiff contends that in *Genesco* the Second Circuit "ruled that agreements containing arbitration clauses involving international commerce permitted antitrust claims to be arbitrated while domestic commerce antitrust claims despite having broad arbitration clauses in their agreements was [sic] not arbitrable." Plaintiff's Reply Memorandum of Law, at 3. The Second Circuit held no such thing. Contrary to Syscomm's contention, the Second Circuit, although presented with the issue, did not rule in *Genesco* that domestic antitrust claims are not arbitrable. Rather, the Second Circuit recognized that the Supreme Court in *McMahon* would "decide the continued applicability of the *American Safety* doctrine to domestic commercial transactions," and remanded the issue to the district court with the suggestion that the district court not go forward with trial until the Supreme Court decided *McMahon*. *Genesco*, 815 F.2d at 854. Indeed, a more recent Second Circuit decision than *Genesco* is [**14] indicative of the continued expansion of the types of federal statutory claims that may be arbitrated. See *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 118-22 (2d Cir.), cert. denied, 501 U.S. 1251, 115 L. Ed. 2d 1056, 111 S. Ct. 2891 (1991). In *Bird*, the Second Circuit held that an agreement to arbitrate [*139] statutory ERISA claims is enforceable. *Id. at 118-22*.

While *American Safety* has not been explicitly overruled, this Court believes that in light of the federal policy favoring arbitration agreements that has fueled the expansion of the types of federal statutory claims that may be arbitrated, the Second Circuit would now hold that the principle of *Mitsubishi* is not limited to antitrust claims arising in international transactions, and that domestic antitrust claims are arbitrable. See *Hough*, 757 F. Supp. at 286; see also *Gemco*, 671 F. Supp. at 980 ("We find that none of the justifications for the *American Safety* doctrine retain their vigor and that our Court of Appeals would now hold that domestic antitrust [**15] claims are subject to arbitration."); cf. *Bird*, 926 F.2d at 118-22 (agreement to arbitrate statutory ERISA claims held enforceable).

Because Syscomm's antitrust claims fall within the Agreement's arbitration clause, and because those claims are arbitrable, SynOptics' request to compel arbitration is granted and Syscomm's motion for a stay of the pending Arbitration Proceeding is denied. Consequently, Syscomm must submit its antitrust claims against SynOptics to arbitration in accordance with the Agreement.³

Syscomm's claim of prejudice if it is not permitted to pursue its antitrust claims in this action first is unavailing as a basis for refusing to compel arbitration and denying a stay of this action. See *Seguros Banvenez, S.A. v. S/S Oliver Drescher*, 761 F.2d 855, 862 (2d Cir. 1985). [**16] In rejecting a district court's view that *section 3* of the Federal Arbitration Act, *9 U.S.C. § 3*, grants a federal court plenary discretion over the proceedings, the Second Circuit cautioned in *Seguros Banvenez*:

Contrary to the [district] court's view, that section does not grant a court plenary discretion over the proceedings. Rather, *HN2*⁴ "in passing on a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." The court may not refuse to grant a stay under *section 3* based on considerations of judicial economy.

Seguros Banvenez, 761 F.2d at 862 (quoting *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 404, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967)). In addition, the fact that Syscomm does not have agreements with Anixter or Westcon to arbitrate antitrust claims between them does not justify denying the motion to compel or require one trial in this court, rather than sending only one of the three defendants, i.e., SynOptics, to arbitration. [**17] See *Seguros Banvenez*, 761 F.2d at 862; see, e.g., *Steinberg & Lyman v. Takacs*, 774 F. Supp. 885, 888 (S.D.N.Y. 1991) (holding that plaintiff's claim that notions of judicial economy favored court trying action at one time, rather than sending only two out of a number of defendants to arbitration, does not withstand mandate of *9 U.S.C. § 3*).⁴

³ Syscomm also requested a stay of the Arbitration Proceeding in the event this Court determined that its antitrust claims are nonarbitrable. Based on the determination that Syscomm's antitrust claims are arbitrable, this Court need not reach this issue.

⁴ As neither Anixter nor Westcon has answered or moved in response to the complaint as of this date, this Order does not stay this action as against them.

CONCLUSION

For the reasons above, plaintiff Syscomm's motion for a stay of a certain pending arbitration proceeding is denied, and defendant SynOptics' request to compel arbitration is granted. Based on this determination, this action is stayed as against SynOptics pending arbitration.

SO ORDERED.

LEONARD D. WEXLER

UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York

June 28, 1994

End of Document



Tice v. Hoff

United States Court of Appeals for the Ninth Circuit

November 1, 1993, Argued and Submission deferred; June 3, 1993, Submitted, Honolulu, Hawaii ; June 28, 1994, Filed

No. 92-15786

Reporter

1994 U.S. App. LEXIS 16407 *

THORNTON TICE, doing business as Kama'aina News, Plaintiff-Appellant, v. DAVID HOFF; MAUI PUBLISHING CO., publishers of Maui News, Defendants-Appellees.

Notice: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

Subsequent History: Reported in Table Case Format at: 29 F.3d 634, 1994 U.S. App. LEXIS 26137.

Prior History: Appeal from the United States District Court for the District of Hawaii. D.C. No. CV-91-00323-HMF. Harold M. Fong, Chief District Judge, Presiding

Disposition: AFFIRMED

Core Terms

interstate commerce, Sherman Act, advertised, instrumentalities, insubstantial, summary judgment, district court, local activity, identification, exclusionary, allegations, conclusory, antitrust, merits

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

[HN1](#) [] Sherman Act, Jurisdiction

Actions founded on federal [antitrust law](#) must allege certain facts in order to establish that the federal courts have jurisdiction under the Sherman Act.

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

HN2 **Monopolies & Monopolization, Attempts to Monopolize**

Section 2 of the Sherman act makes it illegal to monopolize any part of the trade or commerce among the several states. [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

HN3 **Sherman Act, Jurisdiction**

Jurisdiction may not be invoked under the Sherman Act unless the relevant aspect of interstate commerce is identified; 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. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings.

Antitrust & Trade Law > Sherman Act > General Overview

HN4 **Antitrust & Trade Law, Sherman Act**

Plaintiff must show as a matter of practical economics that the defendant's activities, taken as a whole, have a not insubstantial effect on the interstate commerce involved.

Antitrust & Trade Law > Sherman Act > General Overview

HN5 **Antitrust & Trade Law, Sherman Act**

The competitive significance of plaintiff's exclusion from the market must be measured, not just by a particularized evaluation of his own business, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

HN6 **Sherman Act, Jurisdiction**

Conclusory allegations are not sufficient to bring an action within the scope of the Sherman Act.

Judges: Before: POOLE, WIGGINS, T.G. NELSON, Circuit Judges

Opinion

MEMORANDUM *

Appellant Thornton Tice, doing business as the *Kama'aina News* ("Appellant"), appeals the district court's entry of summary judgment against him in his antitrust action against the *Maui News* and its editor, David Hoff ("Appellees"). We affirm.

HN1[] Actions founded on federal ***antitrust law*** must allege certain facts in order to establish that the federal courts have jurisdiction under the Sherman Act. **HN2**[] ***Section 2*** of the Sherman act makes it illegal to monopolize "any part of the trade or commerce among [*2] the several States. . . ." [15 U.S.C. § 2](#). The Supreme Court has stated that:

HN3[] jurisdiction may not be invoked under [the Sherman Act] unless the relevant aspect of interstate commerce is identified; 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. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings . . .

[*McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 242, 62 L. Ed. 2d 441, 100 S. Ct. 502 \(1980\)](#). The Ninth Circuit has interpreted *McLain* to require that the **HN4**[] plaintiff show "as a matter of practical economics" that the defendant's activities, taken as a whole, "have a not insubstantial effect on the interstate commerce involved." [*Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1291 \(9th Cir. 1981\)](#). More recently, the test was liberalized somewhat by [*Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 \(1991\)](#)[*3] aff'g [*Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024 \(9th Cir. 1989\)](#). The majority there held that "**HN5**[] the competitive significance of [plaintiff's] exclusion from the market must be measured, not just by a particularized evaluation of his own [business,] but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded." 500 U.S. at , 111 S. Ct. at 1848.

Appellant's complaint contains only one reference to interstate commerce. It alleges that defendant Hoff caused *Maui News* to publish his editorial "for general distribution and via instrumentalities of interstate commerce." That statement does not suffice as identification of the aspect of interstate commerce affected, both because of its vagueness and because the local activity from which Appellant is allegedly being excluded has no apparent connection to distribution by instrumentalities of interstate commerce. Appellant, who denies any competition for potential subscribers, distributes his paper for free, though he does aspire to sell it once he can afford boxes for vending the publication. Appellant [*4] has not indicated how his alleged exclusion from the market would affect any distribution by the "instrumentalities of interstate commerce."

Indeed, Appellant maintains that the relevant market is for advertising targeted narrowly at the residents of the island of Maui. In addition, the specific exclusionary behavior alleged--denial of access to the only printing facilities on Maui and inducing a secondary boycott by readers on Maui--is also limited by its own terms to a locale that is only a fraction of the state of Hawaii. Though that market is decidedly local in nature, it does not prohibit Appellant from establishing that it somehow *affects* interstate commerce. [*Palmer*, 651 F.2d at 1291](#). Nor must Appellant prove an actual effect on interstate commerce. [*Summit Health*, 500 U.S. at , 111 S. Ct. at 1848](#). He must only show a potential, but "not insubstantial," impact if the complained-of actions succeed. [*McLain*, 444 U.S. at 246](#).

However, Appellant has not suggested any such impact. Our own inquiry reveals that the only evidence in the record pertinent to the market from which Appellant [*5] claims he was excluded is a list of those who have advertised in the *Kama'aina News*. Out of approximately 150 advertisers, only four have addresses outside Hawaii. This evidence only indirectly addresses the effect of Appellee's allegedly exclusionary tactics, the focus of the jurisdictional inquiry, and is therefore of questionable value. Moreover, it fails to establish any substantial impact on interstate commerce. Four customers, fewer than three percent of those who have ever advertised with Appellant,

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by [*9th Cir. R. 36-3*](#).

and perhaps a smaller proportion by dollar value,¹ is an "insubstantial" impact on interstate commerce if there ever was one.

When given the opportunity, after argument, to brief the issue of Sherman Act jurisdiction, Appellant failed once again to allege any connection to interstate commerce other than a [*6] conclusory assertion that the Maui News was "a business in interstate commerce." Appellant chose not to file a reply brief even after Appellees cited case law holding that such HNC[[↑]] conclusory allegations are not sufficient to bring the action within the scope of the Sherman Act. See Thornhill Publishing Co. v. General Tel. & Elec., 594 F.2d 730, 738 (9th Cir. 1979).

Though we are loath to resolve an action on such grounds, we must conclude that Appellant cannot present any facts establishing that the actions of which he complains fall within the scope of the Sherman Act. The district court and this court are therefore without jurisdiction to consider the merits of either the claims raised under that statute or the pendent claims. The district court originally entered summary judgment against Appellant on the merits, but such a disposition is also appropriate for a failure to establish jurisdictional facts under the Sherman Act, see Thornhill Publishing, 594 F.2d at 739, and this court may affirm on any ground fairly presented by the record. Rano v. Sipa Press, Inc., 987 F.2d 580, 584 (9th Cir. 1993). [*7] We therefore conclude that Appellant stated no claim upon which relief could be granted and AFFIRM the judgment entered against the Appellant.

AFFIRMED

End of Document

¹ We note that two of the four out-of-state advertisers are non-profit advocacy groups. There is no evidence to suggest that these out-of-state advertisers were repeat customers for Appellant's services.



Diskin v. Daily Racing Form

United States District Court for the Southern District of New York

July 7, 1994, Decided ; July 7, 1994, Filed

92 Civ. 6374 (MBM)

Reporter

1994 U.S. Dist. LEXIS 9129 *; 1994-1 Trade Cas. (CCH) P70,649

ROBERT DISKIN, individually and on behalf of all others similarly situated, Plaintiff, v. DAILY RACING FORM, INC. and K-III INFORMATION COMPANY, INC., Defendants.

Core Terms

purchaser, distributors, retailers, Sherman Act, retail price, overcharge, prices, direct-purchaser, producer, indirect, racetracks, wholesalers, monopolize, customers, papers, cases, Clayton Act, chain, sales, monopoly power, circulation, competitors, antitrust, organizer, resale, block

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN1 [down arrow] Standing, Clayton Act

"Indirect purchasers" have no standing to sue manufacturers and distributors under § 4 of the Clayton Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > ... > Establishment > Elements > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN2 Vertical Restraints, Resale Price Maintenance

A manufacturer is permitted to set resale prices so long as a distributor is not an independent entrepreneur, but rather is merely a broker, agent or employee. The United States Court of Appeals for the Second Circuit has formulated a generally applicable test for determining whether two actors constitute distinct economic entities for purposes of the Sherman Act. In the context of the principal/agent relationship this analysis requires consideration of a number of elements which include: whether the agent performs a function on behalf of his principal other than securing an offer from a buyer for the principal's product; the degree to which the agent is authorized to exercise his discretion concerning the price and terms under which the principal's product is to be sold; and finally whether use of the agent constitutes a separate step in the vertical distribution of the principal's product.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN3 Antitrust & Trade Law, Sherman Act

For purposes of the Sherman Act, a producer's setting of a retail price does not, by itself, determine whether the producer and a retailer are distinct economic entities. Resale price maintenance cases take as a starting point the allegation that a manufacturer is attempting to fix the price at which its distributors resell its products, and thus turn on other indicia of entrepreneurial independence.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN4 Amendment of Pleadings, Leave of Court

Fed. R. Civ. P. 15(a) provides leave to amend a complaint shall be freely given when justice so requires.

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

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

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Sherman Act > General Overview

HN5 Monopolies & Monopolization, Attempts to Monopolize

Certain Sherman Act [§ 2](#) claims that do not involve passed-on monopoly overcharges are outside the scope of Illinois Brick's holding that "indirect purchasers" have no standing to sue.

Counsel: [*1] For Plaintiff: Paul D. Wexler, Esq., Raymond A. Bragar, Esq., BRAGAR & WEXLER, P.C., New York, New York.

For Defendants: LLoyd Constantine, Esq., Mitchell C. Shapiro, Esq., McDermott, WILL & EMERY, New York, New York.

Judges: Mukasey

Opinion by: MICHAEL B. MUKASEY

Opinion

OPINION AND ORDER

MICHAEL B. MUKASEY, U.S.D.J.

Plaintiff brought this action pursuant to Section 4 of the Clayton Act, [15 U.S.C. § 15](#), alleging that defendants violated [Sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1](#) and [2](#), and [Section 7](#) of the Clayton Act, [15 U.S.C. § 18](#), in connection with their purchase of assets from a competitor newspaper. Defendants move for summary judgment, and plaintiffs cross-move for leave to amend the complaint.¹ For the reasons set forth below, both motions are denied.

[*2] I.

The following facts are uncontested. Plaintiff Robert Diskin has attended racetracks in New York, California, Florida and New Jersey, among other states, an average of at least 50 times a year for approximately 30 years. (Diskin Aff. P 2) On the vast majority of the days that Diskin attended the racetrack, he purchased a copy of *The Daily Racing Form* (the "DRF"). (Diskin Aff. P 3) Diskin has always paid the stated cover price for the DRF, except in Florida where he paid the cover price plus sales tax. (Diskin Aff. P 3) He has never seen the DRF offered for retail sale at any price other than the cover price plus applicable sales tax. (Diskin Aff. P 4)

In February 1992, defendant The Daily Racing Form, Inc. ("DRF") -- publisher of the DRF -- purchased certain assets of The Racing Times, Inc. -- the former publisher of a daily racing newspaper called *The Racing Times*. (Dow Aff. PP 1-2) Thereafter, DRF increased the suggested retail price of the DRF. (Dow Aff. P 2)

Approximately 92% of the circulation of the DRF is, and at all relevant times has been, sold to independent distributors, racetracks, or organizations representing racetracks. (Dow Aff. P [*3] 3) About 7% of circulation consists of sales by union drivers employed by DRF to independent retailers such as newsstands. (Dow Aff. P 3; Brooks Dep. at 37) The remaining 1% consists of sales direct to consumers through mail subscriptions and sales at DRF's offices. (Dow Aff. P 3; Brooks Dep. at 37) All of Diskin's purchases of the DRF occurred at racetracks and newsstands. (Diskin Aff. P 3; Pl. 10/20/92 Adm.)

Defendants do not own, operate, or control any wholesalers, racetracks, or newsstands. (Dow Aff. PP 5-6; Brooks Dep. at 34; Dow Rep. Aff. P 3) These entities are separate and distinct from defendants. (Dow Rep. Aff. P 3) DRF sells copies of the DRF to wholesalers and retailers. (Wexler 12/13/93 Aff. Exh. D; Dow Aff. P 7; Dow Rep. Aff. PP

¹ In his memorandum replying to defendants' arguments against granting his motion, plaintiff also sur-replied to defendants' reply memorandum supporting their motion. Because my rules of practice generally prohibit sur-replies, and because plaintiff did not request permission to sur-reply, this portion of plaintiff's memorandum has been disregarded.

3-6, 10) The terms of these sales allow for the return for full credit of all unsold papers. (Wexler 12/13/93 Aff. Exh. D; Brooks Dep. at 45, 64; Dow Rep. Aff. PP 10-11) Under this arrangement, wholesalers and retailers bear the risk of loss between the time they purchase the papers and the time they return any papers to DRF. (Dow Rep. Aff. P 12) The price per copy that DRF bills the wholesalers varies. (Wexler 12/13/93 Aff. Exh. D; [*4] Dow Rep. Dep. P 4)

The New York Racing Association ("NYRA") -- the organization that operates the Aqueduct, Belmont, and Saratoga racetracks -- is one example of a *DRF* distributor. (Dow Rep. Aff. P 3) NYRA's employees sell the *DRF* to the public at stands located at NYRA's racetracks. (Wexler 12/13/93 Aff. Exh. E) NYRA charges retail customers the printed cover price for a copy of the *DRF*. (Brooks Dep. at 52-53) Like other distributors, NYRA bears the risk of loss between the time it purchases the papers and the time it returns any unsold papers to DRF. (Brooks Dep. at 45-46; Dow Rep. Aff. P 12) NYRA sells also its own competing publications. (Dow Rep. Aff. P 7)

Further, the evidence before me, when viewed in the light most favorable to Diskin, see *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962), raises two issues of disputed fact: whether defendants control the price at which retailers sell the *DRF*, and whether NYRA sells the *DRF* on a commission basis.

With respect to the first issue, DRF's Chief Executive Officer ("CEO"), and its circulation manager both deny that [*5] defendants control the *DRF*'s retail price, with the CEO stating that distributors "are free to make their own decisions regarding the resale and pricing of the paper after it is sold to them" by DRF. (Dow Aff. P 7; Brooks Dep. at 79; Dow Rep. Aff. P 3) Defendants supplement this evidence with a list of retail prices charged by 37 Las Vegas casinos. (Dow Rep. Aff. Exh. A) These prices are highly idiosyncratic, including both unadorned prices ranging from \$ 1.00 to \$ 2.85 per copy, as well as more complicated pricing arrangements. Under these arrangements, the Sahara, for example, charges a \$ 1.00 deposit that is refundable if the paper is returned at the end of the day, and the Sands generally charges \$ 3.00 but gives a free copy to players who wager \$ 300 or more. (Dow Rep. Aff. Exh. A) While defendants concede sending "ambiguously worded" letters discussing retail prices (Def. Rep. Mem. at 6 n.6), they explain that the letters refer to "suggested retail prices." (Dow Rep. Aff. P 5)

In response, plaintiff has proffered three letters from DRF to wholesalers (Wexler 12/13/93 Aff. P 5) that suggest defendants may control the retail price. (Wexler 12/13/93 Aff. Exh. D) The first letter [*6] is from a DRF circulation director in New Jersey, stating that the *DRF*'s "single copy price . . . will increase to \$ 2.85 per copy effective with the issue of Monday, April 6, 1992" and asking its recipients to "make sure all drivers are notified of this price change." The second letter is a March 24, 1992 "inter-office communication" (original all in capitals) from DRF's Los Angeles office. This letter states:

Effective with the issue of Monday, April 6, 1992, the retail price for ALL editions of *THE DAILY RACING FORM* will be increased to \$ 2.85 per copy. Our rate to you will be \$ 1.50 per copy. It is important that you notify your dealers of this change so that their customers do not pay the old price.

(emphasis and paragraph break omitted) The third letter is from a DRF circulation director in Chicago, providing:
Please be advised that, effective with issue [sic] dated Monday, April 6, 1992, the price structure of DAILY RACING FORM will be changed as follows:

PRICE TO PUBLIC:	\$ 2.85
PRICE TO RETAILERS:	2.46
PRICE TO YOU:	2.41

Please make certain this new price schedule is put into effect.

The revised price structure is designed to increase [*7] your income as well as our income while maintaining the relative gross profit margins each as [sic] traditionally enjoyed.

As proof that NYRA sells the *DRF* on commission, plaintiff has proffered an April 10, 1992 letter from the President of NYRA, to the President and CEO of DRF. In this letter, NYRA's president states that "NYRA presently earns a \$ 0.35 distributor's commission for each [copy of the *DRF*] sold at its racetracks." (Wexler 12/13/93 Aff. Exh. E) Defendant counters this evidence with an affidavit suggesting that NYRA's President "was simply mistaken in his

choice of words, or perhaps was attempting to revise the distribution arrangement between NYRA and DRF." (Dow Rep. Aff. P 8)

II.

Defendants contend that plaintiff is an "indirect purchaser" of the *DRF* and that, therefore, he is barred by the rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977), from seeking antitrust damages from them. Plaintiff responds that *Illinois Brick* is no obstacle to this action because the distributors of the *DRF* are merely sales agents of DRF and, therefore, he purchased [*8] the *DRF* direct from defendants. Moreover, plaintiff contends that even if *Illinois Brick*'s direct-purchaser rule bars his Sherman Act § 1 claim, it does not bar his Sherman Act § 2 claim.

In *Illinois Brick*, purchasers of concrete block brought an action under § 4 of the Clayton Act against manufacturers and distributors of the concrete block. 431 U.S. at 726. These purchasers did not buy the concrete block direct from the defendants, however. *Id.* Rather, they bought the concrete block from general contractors, who bought it from masonry contractors, who in turn bought it from the defendants. *Id.* The *Illinois Brick* Court held that as [HN1](#) "indirect purchasers," the plaintiffs had no standing to sue the defendants under § 4 of the Clayton Act.

This holding has two rationales. First, the bar on suits by indirect purchasers shields defendants from multiple recoveries. In an earlier case, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968), the Court invalidated the so-called "pass on" defense [*9] which previously had relieved antitrust defendants from liability for monopoly overcharges that plaintiffs, as intermediaries, had passed on to their customers further down the chain of distribution. In abolishing this defense, *Hanover Shoe* made antitrust defendants liable to those to whom they sold directly for the entire amount of the antitrust overcharge. *Illinois Brick*, 431 U.S. at 730-31. Therefore, allowing indirect purchasers to recover for overcharges would expose antitrust defendants, already faced with liability for trebled damages, to multiple recoveries from purchasers all along the distribution chain. *Id.*

Second, precluding suits by indirect purchasers obviates the need to trace the effect of a monopoly overcharge throughout the distribution chain. Analyzing the indirect effect of a monopoly overcharge would require a court to reconstruct the pricing decisions of intermediate purchasers at each step in the distribution chain, an enterprise fraught with "evidentiary complexities and uncertainties." *Id. at 732*. The Court reasoned that "however [*10] appealing [an] attempt to allocate the overcharge [among direct purchasers, middlemen, and ultimate customers] might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id. at 737*.

The *Illinois Brick* Court anticipated two exceptions to the prohibition against suits by indirect purchasers. The first is where there is a "pre-existing cost-plus contract" that insulates the direct purchaser "from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price." *Id. at 736*. The second exception is where "the direct purchaser is owned or controlled by its customer." *Id. at 736 n.16*. Other courts have added to these exceptions situations in which the direct purchaser buys from a seller owned or controlled by the defendant, see *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 239 (5th Cir. 1982), [*11] or from a co-conspirator of the defendant. See *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1211-15 (9th Cir. 1984), cert. denied, 469 U.S. 1197, 83 L. Ed. 2d 982, 105 S. Ct. 980 (1985).

Plaintiff does not argue that his claims fall within an exception to the rule of *Illinois Brick*. Rather, plaintiff contends that the distributors of the *DRF* are nothing more than sales "agents or subagents," and therefore he purchases copies of the *DRF* direct from defendants.² (Pl. Opp. Mem. at 3, 7-14) Nonetheless, it bears mention that the Supreme Court has repeatedly refused to "carve out exceptions to the [direct purchaser] rule for particular types of markets" because the "possibility of allowing an exception, even in rather meritorious circumstances, would

² Plaintiff makes no attempt to reconcile this argument with his argument that Sierra News Co., allegedly one of the nation's largest wholesalers of the *DRF*, has standing as a direct purchaser from DRF. (See *infra* pp. 9-10) Presumably, these are alternative arguments.

undermine the rule." *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 110 S. Ct. 2807, 2817, 111 L. Ed. 2d 169 (1990) (quoting *Illinois Brick*, 431 U.S. at 744). Too readily concluding that a particular industry [*12] structure constitutes a principal-agent arrangement outside the direct-purchaser rule would also undermine the rule.

To support his contention that *DRF* distributors are merely agents, plaintiff relies on resale price maintenance cases in which distributors claim that producers are illegally attempting to control resale prices. Under these cases, [HN2](#) [↑] a manufacturer is permitted to set resale prices so long as the distributor is not an independent entrepreneur, see *Simpson v. Union Oil Co.*, 377 U.S. 13, 20-21, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964), but rather is merely a broker, agent or employee. See *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1029, 1031 n.5 [*13] (2d Cir.), cert. denied, 444 U.S. 917, 62 L. Ed. 2d 172, 100 S. Ct. 232 (1979); *Bowen v. New York News, Inc.*, 522 F.2d 1242, 1252-53 (2d Cir. 1975), cert. denied, 425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1667 (1976); *North Am. Produce Corp. v. Nick Penachio Co.*, 705 F. Supp. 746, 750 (E.D.N.Y. 1988). In one of these cases, the Second Circuit formulated a more generally applicable test for determining whether "two actors constitute distinct economic entities for purposes of the Sherman Act":

In the context of the principal/agent relationship this analysis requires consideration of a number of elements which include: whether the agent performs a function on behalf of his principal other than securing an offer from a buyer for the principal's product; the degree to which the agent is authorized to exercise his discretion concerning the price and terms under which the principal's product is to be sold; and finally whether use of the agent constitutes a separate step in the vertical distribution [*14] of the principal's product.

602 F.2d at 1031 n.5.

At the outset, it bears emphasis that [HN3](#) [↑] a producer's setting of the retail price does not, by itself, determine whether the producer and the retailer are distinct economic entities. Resale price maintenance cases take as a starting point the allegation that a manufacturer is attempting to fix the price at which its distributors resell its products, and thus turn on other indicia of entrepreneurial independence. Therefore, the dispute over whether defendants fix the retail price of the *DRF* does not in itself preclude summary judgment.

However, the undisputed fact that *DRF* distributors have the right to return unsold papers to *DRF* at cost favors the conclusion that the distributors do not function as independent entrepreneurs. In *Bowen*, the Second Circuit viewed as "significant[]" to its determination that newspaper distributors were not agents of the publisher the fact that the distributors did not have the right to return unsold papers at cost, because this arrangement "was intended to cast some risk, although relatively slight, on the franchise dealer." [522 F.2d at 1252](#) & n.8. [*15] Even the "slight" risk sustained by the distributors in *Bowen* is greater than the risk borne by the distributors here. Like the distributors in this case, the *Bowen* distributors presumably faced the risk of loss and theft. In addition, the *Bowen* distributors had a less favorable right of return, and, unlike the distributors here, they bore the risk of non-payment by home delivery customers. [Id. at 1252](#). Although *Bowen* does not compel the conclusion that *DRF* distributors are merely agents of *DRF*, it suggests that *DRF*'s return policy is an important factor weighing in favor of a finding of mere agency.

The return policy alone, like the assumed fact of retail price setting, is not dispositive proof of entrepreneurial insignificance. However, both of these facts, together with evidence that NYRA may sell the *DRF* on a commission basis, reasonably could give rise to the inference that *DRF* retailers do not constitute a distinct entrepreneurial link in the chain of distribution. Accordingly, defendants' motion for summary judgment must be denied. See *Diebold*, 369 U.S. at 655. [*16]

III.

Plaintiff moves to amend his complaint principally by adding a former distributor, Sierra News Co., as a plaintiff. [Federal Rule of Civil Procedure 15\(a\)](#) [HN4](#) [↑] provides leave to amend a complaint "shall be freely given when justice so requires." Plaintiff argues that Sierra, as an alleged direct purchaser from defendants, would not be barred from suing defendants by *Illinois Brick*'s direct-purchaser rule. Therefore, plaintiff contends, granting the motion "will cure any procedural issues and, in large part, moot defendants' motion to dismiss for lack of standing." (Pl. Opp. Mem. at 18)

But there is a contradiction between Diskin's argument that he, as a retail purchaser of the *DRF*, is a direct purchaser, and his argument that Sierra, as a distributor, is a direct purchaser. Accordingly, if Diskin has standing as a direct purchaser, Sierra does not. Diskin, however, argues that he may pursue his Sherman Act § 2 claim as an indirect purchaser, leaving open the possibility, if Diskin is correct, that Sierra could have standing as a direct purchaser for the purposes of the Sherman Act § 1 claim while Diskin has standing on the Sherman Act § 2 claim.

Plaintiff argues that *Illinois Brick* [*17] "does not apply to a monopolization count under § 2 of the Sherman Act." (Pl. Opp. Mem. at 15-17) However, the Supreme Court's direct-purchaser rule cases attach no significance to which section of the Sherman Act is alleged to have been violated in Clayton Act § 4 claims, which undermines plaintiff's argument. The case in which the direct-purchaser rule is ultimately rooted, *Hanover Shoe*, involved a claim based in Sherman Act § 2. [392 U.S. at 483](#). Although *Illinois Brick* itself involved a claim based in § 1, the Court attributed no significance to the fact that *Hanover Shoe* involved § 2, rather than § 1. Indeed, *Illinois Brick* relied on *Hanover Shoe* in reasoning that the direct-purchaser rule avoids multiple liability. 430 U.S. at 730-31. Likewise, *Utilicorp* treated *Hanover Shoe* and *Illinois Brick* as a single line of cases, notwithstanding that the cases involved different sections of the Sherman Act. 110 S. Ct. at 2812. Against this backdrop, it cannot be contended seriously that [*18] the applicability of the direct-purchaser rule depends, as a general matter, upon whether a Clayton Act § 4 claim alleges violations of Sherman Act § 1 or Sherman Act § 2.³

However, [HN5](#) certain Sherman Act § 2 claims that do not involve passed-on monopoly overcharges are outside the scope of *Illinois Brick*. In *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290 (2d Cir. 1983), the organizer of a trade show alleged that the defendants harmed it by organizing a boycott of the show in an attempt to monopolize the cable television industry. [724 F.2d at 293-94](#). [*19] The Second Circuit held that this claim was not barred by *Illinois Brick*'s direct-purchaser rule because there was "no danger of double recovery." [Id. at 293](#). The alleged boycott may have harmed persons other than the organizer of the show, namely, the potential participants in the trade show -- cable television producers and stations -- who were allegedly denied the opportunity to negotiate directly prices more favorable to each. [Id. at 294](#). However, this harm was "distinct and different" from the harm allegedly suffered by the organizer of the show, which included the expenditures on the failed show and loss of reasonably anticipated profits. [Id. at 293-94](#).

In *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091, 1101-02 (D. Md. 1979), the Court held that the direct-purchaser rule did not block a claim that the defendant overcharged plaintiff as a result of its monopoly power, where the overcharge was not passed on by an intermediary. Specifically, the claim was that

defendant permits certain of plaintiff's competitors on the retail level to [*20] purchase directly from defendant, while it does not afford plaintiff the same opportunity. Thus plaintiff has access to defendant's products only by purchasing them from intermediaries, i.e., wholesale distributors. Plaintiff claims that its exclusion from this wholesale distribution level results in discrimination in prices and services which it receives and in the availability of particular lines of merchandise which plaintiff and its competitors sell in the retail market.

[480 F. Supp. at 1096 n.7](#) Thus, the defendant's monopolization allowed it to engage in price discrimination that resulted in the plaintiff paying a higher price than others for defendants' goods. [480 F. Supp. at 1101](#). The *Dart Drug* Court reasoned that proof of the damages caused by this price discrimination "would not involve proof of the amount of the overcharge which was passed down the chain of distribution, but instead simply a comparison of the relative prices paid by plaintiff and its competitors" who benefited from the price discrimination. *Id.* In addition, the court noted that "no one else has standing to claim that plaintiff was injured [*21] by defendant's alleged abuse of monopoly power." *Id.*

In a similar case from this District, *Chatham Brass Co. v. Honeywell, Inc.*, 512 F. Supp. 108 (S.D.N.Y. 1981), the Court held that an indirect purchaser had a Sherman Act § 2 claim where it alleged that a producer, as part of an

³ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979), does not dictate a contrary conclusion. The Sonotone Court explicitly stated that it was not deciding the issue of whether the plaintiff's claim was barred by *Illinois Brick*'s direct-purchaser rule. [442 U.S. at 338 n.3](#).

attempt at monopolization, charged other companies, including that plaintiff's competitors, a lower price than it was willing to charge that plaintiff, forcing that plaintiff to purchase from some of these other companies. *Id. at 110-11*. Here, plaintiff's Sherman Act § 2 claim -- that he was injured by "an increased price to a retail consumer based upon the monopoly power that defendants were able to exercise over the relevant product in the relevant market" (Pl. Opp. Mem. at 16-17) -- does not, on its face, raise the issue of price discrimination. On the contrary, plaintiff contends that the retail price of the DRF is fixed at a uniform price. Moreover, plaintiff does not allege that DRF refused to sell to him directly, or that DRF offered to sell to him only on terms that forced him to purchase through an intermediary. Therefore, [*22] plaintiff's § 2 claim is not taken outside *Illinois Brick* by either *Dart Drug* or *Chatham*.

Nonetheless, plaintiff seizes on general language in *Chatham* that, on its face, would appear to save his claim from the direct-purchaser rule:

Illinois Brick does not bar a damages claim . . . since [plaintiff] is complaining, not of injury resulting from the passing on of a price-fixing overcharge by a middleman, but rather of direct injury from [defendant's] alleged success in creating sufficient monopoly power to raise prices; the proof required does not raise the difficulties foreseen in *Illinois Brick* of separating out passed-on overcharges from legitimate price increases imposed by a middleman, but rather is limited to a comparison of the prices [plaintiff] actually paid for goods to the prices it would have paid if [defendant] had not attempted to monopolize this market.

[512 F. Supp. 116](#) (citing *Dart Drug*). This language could be taken to imply that where a producer's attempt to monopolize is a direct cause of a retail price above the competitive price -- as where, as alleged here, the producer uses its market power to coerce [*23] retailers into charging a supra-competitive retail price -- there is no need to apportion the overcharge between the producer and the retailer, because the producer can be deemed liable for the entire overcharge.

Reading *Chatham* that broadly would establish a rule incompatible with *Illinois Brick* in any case where the producer exercises its monopoly power to increase also its price to retailers. In such a case, retailers also will have a Sherman Act § 2 claim against the producer, exposing the producer to double liability under the rule of *Hanover Shoe*. A similar incompatibility was recognized in *Dart Drug*:

To the extent that plaintiff will seek to prove injury incurred by reason of prices generally set above the competitive market level, the rule announced in *Illinois Brick* applies. Plaintiff does not purchase directly from defendant, and could therefore only be injured by such an overcharge if it was passed on to plaintiff.

[480 F. Supp. at 1102](#) (footnote omitted). Because a producer would have no incentive to monopolize a market and fix retail prices unless it also increases its price to retailers, it will be the rare case in [*24] which a broad reading of *Chatham* is compatible with *Illinois Brick*.

Regardless, this is not such a case. Assuming *arguendo* that defendants controlled the retail price of the DRF, as opposed to merely setting a suggested retail price, the evidence before me on the issue of whether defendants increased the price they charge distributors simultaneously with an increase in the retail price shows that the two prices increased together. (Wexler 12/13/93 Aff. Exh. D) On this record, the direct-purchaser rule bars plaintiff from bringing a Sherman Act § 2 claim as an indirect purchaser.

Therefore, Diskin's claims and Sierra's claims are mutually exclusive: if Diskin, as a retail purchaser of the DRF has standing as a direct purchaser, Sierra, as a distributor, cannot have standing as a direct purchaser, and vice versa. Accordingly, plaintiff is in no position to move for Sierra's joinder. If Sierra wants to intervene in this case -- and there is nothing before me to prove that it does -- it is free to move for intervention pursuant to [Federal Rule of Civil Procedure 24](#).

SO ORDERED:

Michael B. Mukasey,

U.S. District Judge

Dated: New York, New York

July 7, **[*25]** 1994

End of Document



Reiman v. Garcia

United States Court of Appeals for the Ninth Circuit

June 16, 1994, ** Submitted, San Francisco, California; July 12, 1994, Filed

No. 92-17118

Reporter

1994 U.S. App. LEXIS 17195 *

JUDY A. REIMAN; JOHN K. REIMAN, Plaintiffs-Appellants, v. H. F. GARCIA; TODD S. STOLP, et al., Defendants-Appellees.

Notice: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

Subsequent History: Reported in Table Case Format at: 29 F.3d 634, 1994 U.S. App. LEXIS 26139.

Prior History: Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-92-00341-EJG. Edward J. Garcia, District Judge, Presiding

Disposition: AFFIRMED.

Core Terms

res judicata, contends, subject matter jurisdiction, substantially identical, first action, grounds, first complaint, anti trust law, allegations, conspiracy, immunity, military

LexisNexis® Headnotes

Governments > Courts > Judges

Torts > Public Entity Liability > Immunities > Judicial Immunity

[HN1](#) [down arrow] Courts, Judges

Judges are immune from damage actions for judicial acts taken within the jurisdiction of their courts.

Governments > Federal Government > Claims By & Against

[HN2](#) [down arrow] Federal Government, Claims By & Against

** The panel unanimously found this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Members of the armed services cannot sue the government for injuries that arise out of or are in the course of activity incident to service. Further, enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations.

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

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3 **Standards of Review, Clearly Erroneous Review**

The existence of subject matter jurisdiction is a question of law which the appellate court reviews de novo. The district court's factual findings on jurisdictional issues must be accepted unless clearly erroneous.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Torts > ... > Types of Damages > Property Damages > Measurements

Torts > ... > Types of Damages > Property Damages > General Overview

HN4 **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

To recover under the RICO statute, [18 U.S.C.S. § 1961](#), a plaintiff must show proof of concrete financial loss, and not merely injury to a valuable intangible property interest.

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

International Law > Authority to Regulate > Anticompetitive Activities

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

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN5 **Conspiracy to Monopolize, Sherman Act**

To support a claim under [§ 1](#) of the Sherman Antitrust Act, the plaintiff must allege a contract, combination, or conspiracy among the several states or with foreign nations. [15 U.S.C.S. § 1](#). To support a claim under § 2 of the Sherman Antitrust Act, a plaintiff must allege an objective to monopolize or attempt to monopolize any part of the trade or commerce among the several states or with foreign nations.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN6 Standards of Review, De Novo Review

A dismissal for failure to state a claim pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) is a ruling on a question of law and as such is reviewed de novo. Review is limited to the contents of the complaint. All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Denial of Allegations

Civil Procedure > Parties > Pro Se Litigants > General Overview

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

HN7 Defenses, Demurrsers & Objections, Denial of Allegations

The allegations in a pro se complaint will be construed liberally. Pro se plaintiffs are not entitled to the benefit of every conceivable doubt. Rather, a court is required to draw every reasonable or warranted factual inference in the plaintiff's favor. And, even under the more liberal standard applied to pro se plaintiffs, a court must use common sense in interpreting their frequently diffuse pleadings.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN8 Defenses, Demurrsers & Objections, Motions to Dismiss

A district court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where the claims against such defendants are integrally related.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN9 Standards of Review, De Novo Review

A district court's dismissal on res judicata grounds is subject to de novo review. The doctrine of res judicata or claim preclusion insures the finality of decisions, conserves judicial resources and protects litigants from multiple lawsuits. Res judicata operates to bar all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties, or their privies, on the same cause of action, if the prior suit concluded in a final judgment on the merits rendered by a court of competent jurisdiction.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN10[] Motions to Dismiss, Failure to State Claim

A dismissal for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#) is a judgment on the merits.

Constitutional Law > ... > Immunities > Qualified Immunity > Executive Branch Officials

HN11[] Qualified Immunity, Executive Branch Officials

A former president of the United States is entitled to absolute immunity from damages liability predicated on his official acts.

Judges: Before: GOODWIN, PREGERSON, and RYMER, Circuit Judges.

Opinion

MEMORANDUM *

OVERVIEW

Dr. John Karl Reiman ¹ appeals from the Eastern District Court's order dismissing Reiman's second action brought in the Ninth Circuit against Dr. Todd Stolp, other officials associated with Tuolumne County General Hospital, and various United States government officials. Reiman contends that Appellees conspired to deny him due process and equal protection in violation of federal law and the United States Constitution, violated antitrust laws, obstructed justice, violated the RICO [*2] statute, and violated the Employment Discrimination Act. We have jurisdiction under [28 U.S.C. § 1291](#). We affirm.

BACKGROUND

On August 13, 1990, Appellant, Dr. John Karl Reiman, filed his first action in the United States District Court for the Central District of California against Dr. Todd S. Stolp, other officials associated with Tuolumne County General Hospital, United States Federal Judge H. F. Garcia, and various United States government officials, the majority of which were military officers. Reiman's first complaint alleged a global conspiracy involving the United States government, the United States military, and private individuals, in retaliation for Reiman's whistleblowing activities while Reiman served as a military doctor in the United States Air Force in Europe.² Specifically, Reiman's first complaint alleged that the defendants: (1) conspired to deny him due [*3] process and equal protection of the law in violation of federal law and the United States Constitution; (2) violated antitrust laws; and (3) violated the RICO statute, [18 U.S.C. § 1961](#). On January 22, 1991, the District Court dismissed Reiman's first action because Reiman lacked standing and because the Court lacked subject matter jurisdiction. Reiman appealed.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by [9th Cir. R. 36-3](#).

¹ The Appellants include Dr. Reiman's wife, Judy Andrea Reiman, and Dr. Reiman's stepson, Kevin Beckley.

² Reiman's allegations included, but were not limited to, charges of narcotics trafficking aboard United States military aircraft and at United States bases in Europe, malpractice at a United States military hospital in Europe, and a conspiracy to prevent Reiman's efforts to attain world peace.

On August 10, 1992, we affirmed the District Court's dismissal as to Judge Garcia on grounds of judicial immunity,³ and as to all United States government and military defendants under the *Feres* doctrine.⁴ Further, we affirmed the District Court's dismissal of Reiman's claims against Stolp and the other civilian defendants. [*4] As the District Court correctly determined, Reiman failed to establish a federal claim against Stolp and the other civilian defendants under either the RICO statute [18 U.S.C. § 1961](#), or *antitrust law*.⁵

[*5] While Reiman's appeal in his first action in the Central District was pending, Reiman filed a second action in the Northern District of California. This second complaint was substantially identical to Reiman's first complaint, and named virtually the identical parties, including Stolp.⁶ The Northern District transferred the matter to the Eastern District. In his order transferring the case, Judge Legge noted the striking similarity between Reiman's first and second actions, and ordered that further proceedings be consistent with and conform to the pending decision in Reiman's first appeal to this Court.

On November 16, 1992, the Eastern District Court dismissed Reiman's second action on several grounds: (1) pursuant to Stolp's motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(1\)](#) for lack of subject matter jurisdiction; (2) pursuant to Stolp's [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss Reiman's action for failure to state [*6] a claim upon which relief could be granted; (3) the District Court dismissed, *sua sponte*, the action as to all remaining defendants who had not answered Reiman's complaint because the complaint was found to be inadequate as a matter of law; (4) the District Court noted that Reiman's second complaint was substantially similar to Reiman's first complaint, the dismissal of which had been affirmed by this Court; (5) a substantially identical action which Reiman had filed in the Western District of Texas had been dismissed;⁷ (6) as to President George Bush, the action was dismissed on grounds of absolute presidential immunity from civil suits. In addition, the District Court dismissed the suit as to Reiman's wife, Judy Andrea Reiman and Reiman's stepson, Kevin Beckley, because their claims were derivative of Reiman's claims and therefore lacked an independent basis for relief.

[*7] ANALYSIS

1. Lack of Subject Matter Jurisdiction

Reiman contends that the District Court erroneously dismissed his complaint because subject matter jurisdiction exists via his federal claims against Stolp and the other named defendants. Specifically, Reiman first asserts that the actions of Appellees violated the RICO statute, [18 U.S.C. § 1961](#).

HN3 [↑] The existence of subject matter jurisdiction is a question of law which we review de novo. [Reebok Int'l Ltd. v. Marnatech Enterprises, Inc., 970 F.2d 552, 554 \(9th Cir. 1992\)](#). The district court's factual findings on jurisdictional issues must be accepted unless clearly erroneous. [Id. at 554](#).

³ **HN1** [↑] Judges are immune from damage actions for judicial acts taken within the jurisdiction of their courts." [Ashelman v. Pope, 793 F.2d 1072, 1075 \(9th Cir. 1988\)](#).

⁴ In [Feres v. United States, 340 U.S. 135, 95 L. Ed. 152, 71 S. Ct. 153 \(1950\)](#), the Supreme Court held that **HN2** [↑] members of the armed services could not sue the government for injuries that "arise out of or are in the course of activity incident to service." Further, "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." [Chappell v. Wallace, 462 U.S. 296, 305, 76 L. Ed. 2d 586, 103 S. Ct. 2362 \(1983\)](#).

⁵ Reiman's primary claim against Stolp and the other civilian defendants appeared to be a state law claim of defamation. We found that because the District Court properly dismissed Reiman's federal claims before trial, this pendent state law claim was also properly dismissed. See [Cook, Perkiss & Liehe v. Northern Cal. Collection Serv., 911 F.2d 242, 247 \(9th Cir. 1990\)](#).

⁶ Reiman's second complaint did, however, add one additional defendant -- President George Bush.

⁷ The Western District of Texas, Judge Edward C. Prado, ruled that its dismissal of Reiman's action with prejudice would have a res judicata effect on similar cases filed by Reiman throughout the United States.

Our review of the record convinces us that the District Court did not err in dismissing Reiman's current action for lack of subject matter jurisdiction. As we stated in our dismissal of Reiman's first appeal, Reiman's alleged personal injuries are not compensable under RICO. [Oscar v. University Students Co-Op. Ass'n, 965 F.2d 783, 785-6 \(9th Cir. 1992\)](#), cert. denied, 121 L. Ed. 2d 581, U.S. , 113 S. Ct. 655 (1992). [*8] [HN4](#) To recover under RICO, a plaintiff must show proof of concrete financial loss, and not merely injury to a valuable intangible property interest. [Id. at 785](#). Reiman has not alleged any financial loss as a direct or indirect result of racketeering activity by Appellees. Reiman merely claims he has suffered damages in the billions of dollars. "RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff." [Id. at 786](#). Therefore, Reiman's RICO claim fails.

Reiman also contends that subject matter jurisdiction exists because the Appellees violated federal antitrust laws. We disagree. [HN5](#) To support a claim under [section 1](#) of the Sherman Antitrust Act, the plaintiff must allege a contract, combination, or conspiracy among the several states or with foreign nations. [15 U.S.C. § 1; Western Concrete Structures Co. v. Mitsui & Co., 760 F.2d 1013, 1016](#) (9th Cir.), cert. denied, 474 U.S. 903, 88 L. Ed. 2d 229, 106 S. Ct. 230 (1985). To support a [*9] claim under section 2 of the Sherman Antitrust Act, a plaintiff must allege an objective to monopolize or attempt to monopolize any part of the trade or commerce among the several states or with foreign nations. [Id. at 1017-18](#).

Here, Reiman has not alleged a conspiracy that would support a claim under [section 1](#) of the Sherman Antitrust Act. In addition, Reiman has not alleged facts amounting to anti-competitive conduct by the Appellees. Specifically, Reiman has failed to allege intentional predatory or anticompetitive conduct by the Appellees. [Id. at 1017-18](#). Therefore, the District Court's dismissal of Reiman's antitrust claim was proper.

2. Failure to State a Claim

Reiman contends that the District Court erred in granting Stolp's [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion because valid claims existed upon which relief could be granted.

[HN6](#) A dismissal for failure to state a claim pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) is a ruling on a question of law and as such is reviewed de novo. [Oscar v. University Students Co-Op. Ass'n, 965 F.2d 783](#) (9th Cir.) (en banc), cert. denied, 121 L. Ed. 2d 581, U.S. , 113 S. Ct. 655 (1992). [*10] Review is limited to the contents of the complaint. [Buckey v. Los Angeles, 968 F.2d. 791, 794](#) (9th Cir.) cert. denied, U.S. , 113 S. Ct. 599 (1992). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. [Love v. United States, 915 F.2d 1242, 1245 \(9th Cir. 1989\)](#). A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. [Id. at 1245](#).

We note that [HN7](#) the allegations in a pro se complaint will be construed liberally. [King v. California, 784 F.2d 910, 912 \(9th Cir. 1986\)](#), cert. denied, 484 U.S. 802, 98 L. Ed. 2d 11, 108 S. Ct. 47 (1987). Pro se plaintiffs are not entitled to the benefit of every conceivable doubt. Rather, a court is required to draw every reasonable or warranted factual inference in the plaintiff's favor. [McKinney v. De Bord, 507 F.2d 501, 504 \(9th Cir. 1974\)](#). [*11] And, even under the more liberal standard applied to pro se plaintiffs, a court must use common sense in interpreting their frequently diffuse pleadings. [Id. at 504](#). Here, Reiman's pleadings include allegations of a conspiracy to publicize that Reiman suffered a delusional disorder, allegations of incarceration, nonconsensual spinal taps, mental abuse, and the attempt to destroy his efforts to bring about world peace. Reiman's present action is replete with the same irrelevant legal sources and specious legal arguments that existed in his first action.⁸ Further, as the District Court noted, Reiman's second complaint was "convoluted and prolix and difficult to understand." Therefore, we affirm the District Court's dismissal of Reiman's action on Stolp's [Rule 12\(b\)\(6\)](#) motion.

3. Sua Sponte Dismissal

⁸ For example, Reiman apparently contends that both the Preamble and [Ninth Amendment to the United States Constitution](#) provide a basis for subject matter jurisdiction.

Reiman contends that [*12] the District Court erred in dismissing, sua sponte, his claims against all remaining defendants who failed to answer his complaint. We reject this contention. The District Court properly dismissed Reiman's complaint as to all remaining defendants because the complaint was inadequate as a matter of law. "[HN8](#)[ A District Court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where the claims against such defendants are integrally related." *Silverton v. Department of Treasury Etc.*, 644 F.2d 1341 (9th Cir.) cert. denied, 454 U.S. 895, 70 L. Ed. 2d 210, 102 S. Ct. 393 (1981). Reiman's claims are integrally related because Reiman alleges that the Appellees were involved in a conspiracy. Thus, the District Court's sua sponte dismissal was proper.

4. Substantially Identical Actions

Reiman also contends that the District Court erred in dismissing as res judicata his action because the District Court found the claims to be substantially identical to those in his first action. Additionally, [*13] Reiman contends that res judicata cannot apply because his first suit did not result in a trial on the merits. We disagree.

[HN9](#)[ A district court's dismissal on res judicata grounds is subject to de novo review. *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 363 (9th Cir. 1993).

The doctrine of res judicata or claim preclusion "insures the finality of decisions, conserves judicial resources and protects litigants from multiple lawsuits." [*McClain v. Apodaca*, 793 F.2d 1031, 1032-33 \(9th Cir. 1986\)](#). Res judicata "operates to bar all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties (or their privies) on the same cause of action, if the prior suit concluded in a final judgment on the merits rendered by a court of competent jurisdiction." [*Ross v. International Bhd. of Elec. Workers*, 634 F.2d 453, 457 \(9th Cir. 1980\)](#).

In both his first and second actions, Reiman sought redress for alleged wrongs he suffered in retaliation for his whistleblowing activities while in the United States military. In effect, what Reiman [*14] seeks is a renewal of his first action with essentially the same theories in search of basically the same remedies. See, e.g. *Moore's Federal Practice* § 405[1]-[11]. (2nd ed. 1993). Thus, it is consistent with the principles of res judicata that Reiman's second action is barred.

Moreover, it is well established that [HN10](#)[ a dismissal for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)* is a judgment on the merits. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n. 3, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981); *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030, 1035 (9th Cir. 1985) cert. denied, 476 U.S. 1183, 91 L. Ed. 2d 547, 106 S. Ct. 2919 (1986). Therefore, Reiman is not entitled to a trial before res judicata can attach.

5. The Texas Dismissal

Reiman contends that the District Court erred in finding that the dismissal of a substantially identical action filed by Reiman in the Western District of Texas was res judicata on Reiman's current action in the Ninth Circuit. Reiman asserts that res judicata does not attach [*15] because his current action was filed before his lawsuit in the Western District of Texas was dismissed. We disagree.

As we noted above, the doctrine of res judicata prevents parties who have contested an issue from relitigating the results of that contest. The Western District Court in Texas dismissed Reiman's complaint with prejudice, stating that the doctrine of res judicata would bar Reiman from further litigation of substantially identical actions. Despite the different filing dates of Reiman's Texas lawsuit and the present case, a finding of res judicata by the Western District of Texas bars a second suit on the same cause of action. We uphold the Eastern District Court's finding that Reiman's Texas action was virtually identical to Reiman's second action in the Eastern District of California. The Texas Court had competent jurisdiction and rendered a final judgment on the merits. Therefore, we affirm the District Court's decision that the dismissal of Reiman's complaint by the Western District Court in Texas serves as res judicata, and bars Reiman's current action.

6. President George Bush

Reiman next contends that the Eastern District Court erred in dismissing his claim against [*16] President George Bush on grounds of absolute presidential immunity. Reiman apparently asserts that United States presidents should not be immune from civil suits. We find Reiman's argument to be meritless. As the United States Supreme Court has made clear, [HN11](#) a former president of the United States is entitled to absolute immunity from damages liability predicated on his official acts. [*Nixon v. Fitzgerald, 457 U.S. 731, 749, 73 L. Ed. 2d 349, 102 S. Ct. 2690 \(1982\)*](#). Therefore, the District Court properly dismissed Reiman's claim against President George Bush.

7. Derivative Claims

Finally, Reiman contends that the District Court erred in dismissing the claims of his wife, Judy Andrea Reiman, and his stepson, Kevin Beckley, because the District Court found their claims to be derivative of Reiman's claims. We disagree. All of Judy Reiman's and Kevin Beckley's claims against the Appellees emanate from Dr. Reiman's claims.⁹ For example, Judy Reiman and Kevin Beckley contend the Appellees violated the RICO statute, violated antitrust laws, and conspired to deny them their due process and equal protection rights. As we noted above, [*17] to the extent that any new claims or parties are involved in Appellant's second complaint, these could have been raised or added in the first complaint because identical allegations form the basis of Reiman's two complaints.

CONCLUSION

We affirm the dismissal of the Reimans' action on all grounds delineated by the District Court. As the District Court noted, this is Reiman's seventh or eighth attempt to obtain relief in the federal courts for the same alleged wrongs. So far, he has managed to avoid both the imposition of sanctions and the label of a vexatious litigant. He is likely to receive one or both penalties if he continues to litigate this action. AFFIRMED.

End of Document

⁹ Judy Reiman and Kevin Beckley were parties to John Reiman's first action in the Central District of California. But, Judy Reiman and Kevin Beckley were not parties to Reiman's appeal to this Court. However, failure to appeal does not change the fact that their claims were derivative of John Reiman's.



National Basketball Ass'n v. Williams

United States District Court for the Southern District of New York

July 18, 1994, Decided ; July 18, 1994, Filed

94 Civ. 4488 (KTD)

Reporter

857 F. Supp. 1069 *; 1994 U.S. Dist. LEXIS 9759 **; 129 Lab. Cas. (CCH) P11,267; 1994-2 Trade Cas. (CCH) P70,671

NATIONAL BASKETBALL ASSOCIATION, ATLANTA HAWKS, L.P., CAPITAL BULLETS BASKETBALL CLUB, INC., BOSTON CELTICS LIMITED PARTNERSHIP, CHARLOTTE NBA LIMITED PARTNERSHIP, CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP, DALLAS BASKETBALL LIMITED, THE DENVER NUGGETS LIMITED PARTNERSHIP, DETROIT PISTONS BASKETBALL COMPANY, GOLDEN STATE WARRIORS, ROCKET BALL, LTD., JAZZ BASKETBALL INVESTORS, INC., LAC BASKETBALL CLUB, INC., THE LOS ANGELES LAKERS, INC., MADISON SQUARE GARDEN CORPORATION, MEADOWLANDS BASKETBALL ASSOCIATES, THE MIAMI HEAT LIMITED PARTNERSHIP, MILWAUKEE BUCKS, INC., MINNESOTA PROFESSIONAL BASKETBALL LIMITED PARTNERSHIP, GUND BUSINESS ENTERPRISES, INC., ORLANDO MAGIC, LTD., PACERS BASKETBALL CORPORATION, THE PHILADELPHIA 76ERS BASKETBALL CLUB, INC., PHOENIX SUNS LIMITED PARTNERSHIP, SACRAMENTO KINGS LIMITED PARTNERSHIP, L.P., SAN ANTONIO SPURS, LTD., ACKERLY COMMUNICATIONS, INC., and TRIAL BLAZERS, INC., Plaintiffs, v. CHARLES L. WILLIAMS, CHARLES D. SMITH, DANIEL R. MANNING, ROLANDO A. BLACKMAN, MARK E. EATON, LAFAYETTE LEVER, HERBERT L. WILLIAMS, JAMES A. JACKSON, DIKEMBE MUTOMBO, GLENN A. RIVERS, DAVID M. ROBINSON, REGGIE WILLIAMS, ERIC ANDERSON, MARTY CONLON, CHRISTIAN LAETTNER, ADRIAN AUTRY, ERIC MOBLEY, TREVOR RUFFIN and SHAWNELLE SCOTT, on behalf of themselves and all persons similarly situated, Defendants. DOMINIQUE WILKINS, HORACE GRANT, BRIAN SHAW, DALE DAVIS, TERRELL BRANDON, DONYELL MARSHALL, CHARLES L. WILLIAMS, CHARLES D. SMITH, DANIEL R. MANNING, ROLANDO A. BLACKMAN, MARK E. EATON, LAFAYETTE LEVER, HERBERT L. WILLIAMS, JAMES A. JACKSON, DIKEMBE MUTOMBO, GLENN A. RIVERS, DAVID M. ROBINSON, REGGIE WILLIAMS, ERIC ANDERSON, MARTY CONLON, CHRISTIAN LAETTNER, ADRIAN AUTRY, SHAWNELLE SCOTT, on behalf of themselves and all persons similarly situated, and the NATIONAL BASKETBALL PLAYERS ASSOCIATION, Counterclaim-plaintiffs, v. NATIONAL BASKETBALL ASSOCIATION, ATLANTA HAWKS, L.P., CAPITAL BULLETS BASKETBALL CLUB, INC., BOSTON CELTICS LIMITED PARTNERSHIP, CHARLOTTE NBA LIMITED PARTNERSHIP, CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP, DALLAS BASKETBALL LIMITED, THE DENVER NUGGETS LIMITED PARTNERSHIP, DETROIT PISTONS BASKETBALL COMPANY, GOLDEN STATE WARRIORS, ROCKET BALL, LTD., JAZZ BASKETBALL INVESTORS, INC., LAC BASKETBALL CLUB, INC., THE LOS ANGELES LAKERS, INC., MADISON SQUARE GARDEN CORPORATION, MEADOWLANDS BASKETBALL ASSOCIATES, THE MIAMI HEAT LIMITED PARTNERSHIP, MILWAUKEE BUCKS, INC., MINNESOTA PROFESSIONAL BASKETBALL LIMITED PARTNERSHIP, GUND BUSINESS ENTERPRISES, INC., ORLANDO MAGIC, LTD., PACERS BASKETBALL CORPORATION, THE PHILADELPHIA 76ERS BASKETBALL CLUB, INC., PHOENIX SUNS LIMITED PARTNERSHIP, SACRAMENTO KINGS LIMITED PARTNERSHIP, L.P., SAN ANTONIO SPURS, LTD., ACKERLY COMMUNICATIONS, INC., and TRIAL BLAZERS, INC., Counterclaim-defendants.

Core Terms

Players, collective bargaining agreement, team, exemption, expiration, antitrust, collective bargaining, anti trust law, salary cap, bargaining, parties, negotiations, right of first refusal, policies, nonstatutory, disputes, federal labor,

immunity, settlement agreement, antitrust immunity, labor law, practices, Football, season, preliminary injunction, district court, labor market, manufacturers, conditions, continues

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Antitrust & Trade Law > Regulated Industries > Sports > Football

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN1 [down] Higher Education & Professional Associations, Colleges & Universities

Federal labor law applies to the disputes that arise between collective bargaining parties.

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

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 > Nonstatutory Exemptions

Antitrust & Trade Law > Sherman Act > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

HN2 [down] Regulated Practices, Price Fixing & Restraints of Trade

There is a three pronged test for application of the nonstatutory labor exemption to antitrust laws. First, the restraint on trade must primarily affect only the parties to the collective bargaining relationship. Second, the agreement must concern mandatory subjects of collective bargaining. Finally, the agreement seeking to be exempted is the product of bona fide arms-length bargaining.

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

857 F. Supp. 1069, *1069L^A994 U.S. Dist. LEXIS 9759, **9759

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

Antitrust & Trade Law > Sherman Act > General Overview

HN3 Regulated Practices, Price Fixing & Restraints of Trade

Antitrust immunity exists as long as a collective bargaining relationship exists and labor law remedies are available.

Antitrust & Trade Law > Sherman Act > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

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

HN4 Antitrust & Trade Law, Sherman Act

Where a dispute implicates the labor market, antitrust actions are not be allowed to subvert federal labor law policies.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

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 > Sherman Act

HN5 Antitrust & Trade Law, Sherman Act

It is recognized that any contract between an employer and employee is a restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN6 Antitrust & Trade Law, Sherman Act

The rule of reason considers whether challenged contracts or acts are unreasonably restrictive of competitive conditions. Unreasonableness under the test is based either (1) on the nature or character of the conduct or (2) on surrounding circumstances giving rise to the inference or presumption that it is intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

Counsel: **[**1]** Attorneys for Plaintiffs and Counterclaim-defendants: PROSKAUER ROSE GOETZ & MENDELSOHN, 1585 Broadway, New York, NY 10036, Of Counsel: Howard L. Ganz, Esq.. SKADDEN, ARPS,

857 F. Supp. 1069, *1069A 1994 U.S. Dist. LEXIS 9759, **1

SLATE, MEAGHER & FLOM, 919 Third Avenue, New York, NY 10022, Of Counsel: Frank Rothman, Esq., Shepard Goldfein, Esq.. Jeffrey A. Mishkin, Senior Vice-President, Legal and Business Affairs, NATIONAL BASKETBALL ASSOCIATION, 645 Fifth Avenue, New York, NY 10022.

Attorneys for Defendants and Counterclaim-plaintiffs: CRAVATH, SWAINE & MOORE, Worldwide Plaza, 825 Eighth Avenue, New York, NY 10019, Of Counsel: Frederick A.O. Schwartz, Jr., Esq., Robert S. Rifkind, Esq., Rowan D. Wilson, Esq., Michelle K. Jacobs, Esq., Sara M. Dareshori, Esq.. BREDHOFF & KAISER, 1000 Connecticut Avenue, N.W., Washington, DC 20036, Of Counsel: George H. Cohen, Esq., Robert M. Weinberg, Esq., Andrew D. Roth, Esq..

Attorneys for Counterclaim-Plaintiff National Basketball Players Association: Simon P. Gourdine, Esq., General Counsel, NATIONAL BASKETBALL PLAYERS ASSOCIATION, 1775 Broadway, Suite 2401, New York, NY 10019, Of Counsel: Ronald Klempner, Esq..

Of counsel for Counterclaim-Plaintiff Donyell Marshall: LESTER BRYANT SOLANO & GANZ, [**2] P.C., 119 North Robinson, Oklahoma City, OK 73102, Of Counsel: James S. Bryant, Esq., Robinson Renaissance, Esq..

Attorneys for Counterclaim-defendant Chicago Professional Sports Limited Partnership: KATTEN MUCHIN & ZAVIS, 525 West Monroe Street, Suite 1600, Chicago, IL 60661-3693, Of Counsel: Stephen D. Libowsky, Esq., Joel G. Chefitz, Esq.. KATTEN MUCHIN & ZAVIS, 40 Broad Street, Suite 2000, New York, NY 10004-2382, Of Counsel: John N. Romans, Esq..

Judges: DUFFY

Opinion by: KEVIN THOMAS DUFFY

Opinion

[*1071] OPINION

KEVIN THOMAS DUFFY, D.J.:

The National Basketball Association (the "NBA") and the 27 teams (the "NBA Teams" or "Teams") that compete in the NBA commenced a declaratory action on June 17, 1994 against a class of NBA players as well as prospective NBA players, pursuant to [28 U.S.C. § 2201](#). In particular, the NBA and the Teams seek a declaration that continued implementation of: (1) the college draft; (2) the right of first refusal; and (3) the salary cap does not violate federal antitrust laws. (Am. Compl. P 105). Alternatively, the NBA contends that these measures are not unreasonable restraints of trade and therefore do not violate the antitrust laws. (Am. Compl. [**3] P 113).

The same class of players who are defendants in the declaratory judgment claim, along with the National Basketball Players Association (the "NBPA") (collectively the "Players"), brought counterclaims alleging, in effect, that continuation of these policies are unreasonable restraints of trade not exempt from antitrust law and thereby violate the Sherman Act. (Counterclaims PP 43, 47, & 51). Shortly after initiating the counterclaims, the Players moved for a temporary restraining order and a preliminary injunction: (1) to enjoin the Teams from entering into player contracts with current or prospective professional basketball players, and (2) schedule an expedited trial on the merits. On June 28, 1994, the Honorable John F. Keenan granted the temporary restraining order and set a hearing date for the preliminary injunction motion. On July 1, 1994, I was assigned this case, and a hearing was conducted on July 8, 1994. At the hearing, I informed the parties that the preliminary injunction hearing would be consolidated with the trial on the merits, pursuant [Rule 65\(a\)\(2\) of the Federal Rules of Civil Procedure](#). A consolidated factual hearing was conducted on July 12, 1994.¹

¹ Counsel for the NBA objected to the shortness of the trial as well as its expedited nature. The Federal Rules of Civil Procedure authorize me to order a speedy hearing for a declaratory judgment action. [Fed. R. Civ. P. 57](#). Thus, they cannot be heard to

[**4] BACKGROUND

This case is the fourth lawsuit initiated by either of the parties as a result of disputes that have arisen during collective bargaining negotiations. Indeed, I am convinced that this is a case where neither party cares about this litigation or the result thereof. Both are simply using the court as a bargaining chip in the collective bargaining process. Each is truly guilty of this practice.² A recitation of the history of these lawsuits demonstrates this and puts this litigation in its proper context, i.e., a labor dispute that does not belong in litigation.

In 1970, the Players commenced a class action suit against the NBA in the federal district court for the Southern District of New York, challenging certain NBA imposed player restrictions on antitrust grounds. [*1072] The [**5] NBA moved for summary judgment, arguing that the practices were shielded from antitrust laws by a labor exemption. The district court denied the NBA's motion on the ground that the exemption only shields unions and not employers. *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 884-89 (S.D.N.Y. 1975).

In 1976, the parties in *Robertson* entered, and the district court approved, a settlement agreement. This agreement effected a number of changes in the operation of the NBA, including modification of the college draft and institution of the right of first refusal. (Am. Compl. PP 63-64). The settlement agreement provided that it would expire at the end of the 1986-1987 NBA season. In addition, it expressly provided that the Players had not waived their right to challenge in court any unilateral imposition of any rule, policy, practice or agreement by the NBA. When the *Robertson* settlement agreement was adopted in 1976, the Players and the NBA also entered into a multi-year collective bargaining agreement incorporating the substantive terms of the settlement agreement. The 1976 Collective Bargaining Agreement expired on June 1, 1979, and on [**6] October 10, 1980, the parties again entered into a multi-year collective bargaining agreement that expressly incorporated the terms of the *Robertson* settlement agreement, including the college draft and the right of first refusal. (Granik Decl., July 6, 1994, PP 12-15).

The 1980 agreement expired on June 1, 1982. (1980 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 2, Art. XXVI). In 1983, the NBA sought for the first time to introduce the salary cap. The NBA contended that such a restriction was necessary because the majority of NBA teams were losing money, due in part, to rising player salaries and benefits. (See Grantham Trial Decl., July 11, 1994, PP 3, 13). The players responded by filing a lawsuit challenging the legality of the salary cap. *Lanier v. National Basketball Ass'n*, 82 Civ. 4935 (S.D.N.Y.). A special master appointed to hear disputes under the *Robertson* settlement agreement determined that the salary cap would violate the terms of the settlement agreement and, therefore, could not be imposed without a modification of that agreement. (Granik Decl., July 6, 1994, PP 17-19). The Players and the NBA entered into a Memorandum of Understanding [**7] that modified the expired 1980 Collective Bargaining Agreement to include a salary cap, and it continued in force through the end of the 1986-1987 season. (Granik Decl., July 6, 1994, Ex. 3).

On June 8, 1987, the NBA and the Players entered into a Moratorium Agreement to facilitate negotiations, whereby the challenged practices would remain in effect but no new contracts would be signed. The Moratorium Agreement expired on October 1, 1987. (Grantham Decl. 31 & Ex. A). The day the Moratorium Agreement expired, the Players commenced an action in the District of New Jersey, seeking a ruling that the college draft, the right of first refusal,

complain about the expedited nature of a case they initiated. In addition, several other reasons exist for speeding this case along. First, the Teams and the Players use this period to sign contracts and prepare for the upcoming season. It would be unfair to allow this litigation to create a legal cloud over contract negotiations. (See Trial Testimony of David J. Stern, July 12, 1994, at 155-60 (hereinafter "Tr.")). Moreover, the raw facts that underlie this action are not in dispute. The dispute centers on the applicable legal standard. Therefore, the parties simply needed an opportunity to put the facts on the record. The parties had ample time to do so before, during, and after trial. Finally, I received the parties' papers on July 5, 1994. In such a complicated case that must be resolved quickly, only a judge unwilling to have an open mind would attempt to rule prior to a detailed factual hearing. Therefore, I ordered a trial on the merits for July 11, 1994.

² The initiation of the declaratory judgment action cannot be said to violate *Rule 11 of the Federal Rules of Civil Procedure*. It does, however, constitute sharp and shady practices of the type that most ethical lawyers shun.

and the salary cap violated the antitrust laws. *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 961 (D.N.J. 1987). The Players represented to the court that they would never agree to these restrictive practices. (Granik Decl., July 6, 1994, Ex. 4). After a ruling on the labor exemption issue, discussed more fully below, the parties reached an agreement in principle, the final terms of which were memorialized in the 1988 Collective Bargaining Agreement. (Granik Decl., July 6, 1994, PP 29). The 1988 Collective [**8] Bargaining Agreement continued the college draft, the right of first refusal and the salary cap. (1988 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 5, Arts. IV, V, & VII).

The 1988 Collective Bargaining Agreement formally expired on June 23, 1994, the day following the last playoff game of the 1993-1994 NBA playing season. (Grantham Decl., June 26, 1994, P 4). At a formal bargaining session, held in New York on April 7, 1994, the Players demanded that the three disputed employment practices be eliminated. (Grantham Decl., June 26, 1994, PP 39-40). In a position paper delivered to the NBA at that meeting, the Players expressly stated their view that the college draft, right of first refusal and the salary cap would "be subject to successful challenge under the antitrust laws." This position was reiterated at a second [*1073] formal bargaining session, held on May 4, 1994. (Granik Decl., July 6, 1994, P 33).

On June 15, 1994, in a letter addressed to the NBA, the Players, while asserting that further negotiations would be futile, said that the Players would attend another meeting, but only in late June or mid-July. In that letter, the NBPA again threatened that the NBA's [**9] continuation of the employment conditions at issue would be "subject to scrutiny under the antitrust laws and . . . are clearly in violation of those laws." (Granik Decl., July 6, 1994, P 33). At the preliminary injunction hearing on July 8, 1994, I informed the parties of my belief that this litigation was simply being used as a bargaining chip in the collective bargaining negotiations, and I advised them that the best course of action would be to resolve the dispute through negotiations. (Transcript of Preliminary Injunction Hearing, July 8, 1994, at 8-9). Apparently, the parties did attempt to negotiate, but such efforts were unsuccessful. (Stern Testimony, Tr. at 153).

The Challenged Measures

The College Draft

The college draft is held annually shortly after the NBA season concludes. It is a mechanism in which each team is allotted two selections. A team may exercise its selections or trade them to another team. The order of selection is generally determined by the records of the 27 Teams for the season immediately preceding the draft, i.e., the weaker teams select earlier. In the end, 54 prospective players are selected by the Teams. A player who is selected by a [**10] particular team may only negotiate with that team. Any team that negotiates with a player it did not select is severely penalized. Prospective players who are not drafted are free to negotiate with any NBA team. (1988 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 5, Art. IV).

The Right of First Refusal

Under the 1988 Collective Bargaining Agreement, the Teams maintain a right of first refusal over players who have played fewer than four seasons or who have not completed at least two contracts. When a player's contract expires, he is able to negotiate a new contract with any team. If a team has a right of first refusal over that player, however, it may match any offer another team makes. If there is a matching offer, the player may not sign with the new team, and his services are retained by his current team. (1988 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 5, Art. V).

The Salary Cap

The salary cap is part of a complex player/owner revenue sharing arrangement in which the Players are guaranteed a percentage of the defined gross revenue of the team. This arrangement also operates as a ceiling on the total amount a team may spend on salaries [**11] for its players. As part of this arrangement, each team is also required to pay a minimum amount of salaries to its players (1988 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 5, Art. VII, Pt. A, [Sec. 1\(e\)-\(f\)](#)). The salary cap may be exceeded by a team that wishes to pay a veteran player it currently employs. A team may, however, not exceed the salary cap to acquire a new player. (1988 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 5, Art. VII, Pt. F).

DISCUSSION

(1) *The Nonstatutory Labor Exemption*

As a threshold matter, the NBA argues that **antitrust law** does not apply in this case because a collective bargaining relationship currently exists between the players and the NBA.³ In particular, the NBA contends [*1074] that the nonstatutory labor exemption applies, and therefore, any antitrust claim the Players may seek must fail.

[**12] The parties do not dispute that prior to the formal expiration of the Collective Bargaining Agreement on June 23, 1994, the NBA as well as the Players were immune from antitrust claims. [Wood v. National Basketball Ass'n, 809 F.2d 954, 963 \(2d Cir. 1987\)](#). In *Wood*, the Second Circuit specifically held that an antitrust challenge to the NBA's salary cap and college draft, *inter alia*, failed because antitrust laws may not "be used to subvert fundamental principles of our federal labor policy . . ." [Id. at 959](#). Thus, the law in this Circuit appears to be where a collective bargaining relationship exists, [HN1](#) [↑] federal labor law applies to the disputes that arise between the bargaining parties. *Id.*

In a 1976 case involving player restraints in the National Football League (the "NFL"), the Court of Appeals for the Eighth Circuit analyzed the nonstatutory exemption as it applies to the market for player services and established a [HN2](#) [↑] three pronged test for application of the exemption. [Mackey v. National Football League, 543 F.2d 606, 615 \(8th Cir. 1976\)](#), cert. dismissed, 434 U.S. 801 (1977). [**13] First, the restraint on trade must primarily affect only the parties to the collective bargaining relationship. Second, the agreement must concern mandatory subjects of collective bargaining. Finally, the agreement sought to be exempted is the product of bona fide arms-length bargaining. *Id.* *Mackey* reasoned that these tests are necessary to ensure that the exemption is applied only when it is clear that federal labor policies trump antitrust concerns. *Id.* Thus, *Mackey* also depends on a resolution of the conflicting labor and antitrust policy concerns.

The dispute here arises because the 1988 Collective Bargaining Agreement has formally expired. The issue is whether antitrust immunity that existed while the Collective Bargaining Agreement was in effect continues after its formal expiration, and if so, for what length of time. I can find only four non-binding decisions addressing this precise issue. Unfortunately, each decision fashioned a different standard to apply.

The first case to address this issue was [Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 \(D.N.J. 1987\)](#). As noted in the factual summary *supra*, in *Bridgeman*, the [**14] Players alleged that the continued effect of the college draft, the right of first refusal and the salary cap after the formal expiration of the 1983 Collective Bargaining Agreement violated federal antitrust laws. [Id. at 961](#). The NBA moved for summary judgment contending that the

³ In addition to the objection outlined in the text, the NBA objected to the July 11, 1994 trial, contending that jurisdiction did not exist because of the Norris-LaGuardia Act's prohibition against injunctions involving labor disputes. See [29 U.S.C. § 101 et seq.](#) Putting aside the merits of this dubious proposition, *but see Jackson v. National Football League, 802 F. Supp. 226, 233 (D.Minn. 1992); Cordova v. Bache & Co., 321 F. Supp. 600, 606 (S.D.N.Y. 1970)*, the trial was necessary to elicit the facts of the claims set forth in the NBA's declaratory judgment action. It astounds me to no end that the NBA initiated this action, and then attempted to hinder the court from taking the necessary steps to decide this matter quickly. See [Fed. R. Civ. P. 57](#). But, it may be merely the continuation of the practices referred to in footnote 2.

857 F. Supp. 1069, *1074-1994 U.S. Dist. LEXIS 9759, **14

nonstatutory exemption immunized them from suit even though the 1983 Collective Bargaining Agreement had formally expired. Thus, the issue before the *Bridgeman* court was identical to the issue here.

The court refused to accept the Players' contention that antitrust immunity ends at the moment the collective bargaining agreement formally expires. *Id. at 965*. The court noted that such a result would not be consistent with the National Labor Relations Act, [29 U.S.C. § 151 et seq.](#) (the "NLRA"). *Id.* Under the NLRA, the owners have an obligation, even after the collective bargaining agreement expires, to bargain fully and in good faith before altering a term or condition of employment that is a mandatory subject of collective bargaining. One can easily imagine the howls to be heard from the Players if the [\[**15\]](#) Teams unilaterally terminated medical coverage for them and their families at the formal expiration of the Collective Bargaining Agreement. It is for the good of our entire society that such is not the law. See [29 U.S.C. § 158\(a\)\(5\)](#). The *Bridgeman* court determined that the practical effect of this duty on employers is that the "terms and conditions of employment that are the subject of mandatory bargaining survive expiration of collective bargaining agreement." *Bridgeman*, [675 F. Supp. at 965](#).

The *Bridgeman* court also found the NBA's contention that antitrust immunity lasts indefinitely equally unavailing. *Id. at 966*. In particular, the court reasoned that such a rule would discourage unions from entering into agreements, for fear of forever [\[*1075\]](#) binding themselves with restraints that they could not subsequently attack in the courtroom. *Id.* After considering the elements of the *Mackey* test, the issue turned on whether the disputed terms will likely become part of a subsequent collective bargaining agreement. Thus, the test that *Bridgeman* established was that antitrust [\[**16\]](#) immunity survives only as long as the employer continues to impose the restrictions unchanged, and reasonably believes that the challenged practice or a close variant of it will be incorporated in the next collective bargaining agreement. *Id. at 967*.

In [Powell v. National Football League](#), [678 F. Supp. 777 \(D.Minn. 1988\)](#), Judge Doty of the District Court of Minnesota addressed whether the NFL could continue to restrict player movement after the formal expiration of a collective bargaining agreement. Judge Doty agreed with *Bridgeman* to the extent that immunity does not cease with the formal expiration of the collective bargaining agreement. Nor does it continue indefinitely. *Id. at 786-88*. Judge Doty, however, held that the *Bridgeman* standard did not give proper regard for federal labor policy because it could encourage unions to be uncompromising while bargaining. *Id. at 787*. Rather, Judge Doty adopted the so-called impasse standard to be the appropriate standard. *Id. at 788*. Impasse was then defined as the point at which [\[*17\]](#) "there appears no realistic possibility that continuing discussions concerning the provision at issue would be fruitful." *Powell*, [678 F. Supp. at 788](#). Thus, by "allowing a labor exemption to survive only until impasse, the law will not insulate a practice from antitrust liability, but will only delay enforcement of the substantive law until continued negotiations over the challenged provision become pointless." *Id. at 789*.

Powell was reversed by the Court of Appeals for the Eighth Circuit in [Powell v. National Football League](#), [930 F.2d 1293, 1304 \(8th Cir. 1989\)](#), cert. denied, 498 U.S. 1040, 112 L. Ed. 2d 700, 111 S. Ct. 711 (1991) ("*Powell II*"). Specifically, *Powell II* held that the nonstatutory labor exemption extends beyond a mere impasse in negotiations and for as long as the labor relationship continues. *Id. at 1303-04*. The Eight Circuit reasoned that once a collective bargaining relationship is established, federal labor policies become pre-eminent. As such, labor laws provide [\[**18\]](#) the opposing parties with sufficient tools to settle a dispute. For instance, employees may strike, employers may lock players out, and both parties may petition the National Labor Relations Board to prohibit unfair labor practices. Therefore, to provide the union with the ability to sue for treble damages under [antitrust law](#) "would . . . improperly upset the careful balance established by Congress through the labor law." *Id. at 1302*.

The essence of *Powell II* is that once a collective bargaining arrangement is established, and a valid and bona fide collective bargaining agreement is formed, federal labor law and its policies control. In other words, the disputes that arise from collective bargaining arrangements are labor disputes, and Congress has enacted laws that provide various remedies to these disputes. *Id. at 1302-03*. As the Eighth Circuit stated:

The labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this "level playing field" as the basis for their often tempestuous relationship, [\[*19\]](#) and we believe that there is substantial justification for

requiring the parties to continue to fight on it, so that bargaining and the exertion of economic force may be used to bring about legitimate compromise. *Id. at 1303.*

In sum, *Powell II* effectively held that [HN3](#)⁴ antitrust immunity exists as long as a collective bargaining relationship exists and labor law remedies are available. *Id. at 1303-04.*⁴

[*1076] In *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991), [**20] the District Court for the District of Columbia set forth yet another approach to this issue. There, the court held that the continuing implementation of a collective bargaining agreement's salary provisions by the NFL after the agreement had expired was not shielded by the nonstatutory labor exemption. Instead, the exemption ended with expiration of the agreement. *Id. at 130.* The court reasoned that the purpose of the exemption was to foster a non-coercive environment conducive to the serious negotiation of a new agreement. If an employer was satisfied with the terms of the previous agreement, the extension of the exemption beyond contracted expiration date would discourage serious negotiation on its part. *Id. at 131.* In addition, the court reasoned that the extension of the exemption would deprive labor of an important bargaining chip -- the threat of treble damages under the antitrust laws. *Id. at 133.* As such, immunity from [antitrust law](#) does not extend past the formal expiration of the collective bargaining agreement. *Id. at 131.*⁵

[**21] This review of the case law establishes that, if nothing else, opinions vary a great deal on this issue. See, e.g., Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 Colum. L. Rev. 1045, 1071 (1994) (favoring a standard based on union consent); Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. 339, 400 (favoring ending the exemption at the formal expiration of the collective bargaining agreement). Obviously, this issue stems from the underlying conflict between antitrust and labor law policies. The issue, at its most basic level, is what role, if any, does antitrust policy play when a valid collective bargaining relationship exists. To find an answer to this question, I believe it is necessary to review the origin of the nonstatutory exemption.

The nonstatutory exemption was created by the Supreme Court to reconcile the conflicting policies between antitrust and labor laws.

We have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; [**22] the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.

[Allen Bradley Co. v. Local Union No. 3, IBEW](#), 325 U.S. 797, 806, 89 L. Ed. 1939, 65 S. Ct. 1533 (1945). See also [Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100](#), 421 U.S. 616, 622, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975).

The genesis of the labor exemption is *Allen Bradley*. In *Allen Bradley*, a group of New York City electrical equipment manufacturers and contractors -- in furtherance of a broad industry-wide conspiracy to prevent electrical equipment manufacturers located outside of New York from selling their products within the City -- entered into various collective bargaining agreements with a New York City union. In the agreements, the contractors agreed to purchase equipment only from local manufacturers, who had entered into closed-shop agreements with the union.

[**23] In return, the manufacturers agreed to confine their New York City sales to contractors employing the union's members. Several equipment manufacturers located outside New York City brought an antitrust suit against

⁴ Senior Judge Heaney dissented in *Powell II* and Chief Judge Lay, along with Judge McMillian, dissented from a denial of a rehearing en banc. These dissents argue that *Powell II* will discourage collective bargaining, fails to consider that in order for the exemption to apply union consent is necessary, and encourages union decertification. *Powell II*, 930 F.2d at 1304-10 (dissenting opinions). Both dissents favor application of the impasse standard enunciated by the district court. *Id.*

⁵ *Brown* alternatively held that the exemption does not extend past the point of impasse. *Brown*, 782 F. Supp. at 137.

the union. [325 U.S. at 799-800](#). The Court concluded that the union's participation in the employers' conspiracy in restraint of trade was not sufficient to immunize the parties' agreement from antitrust liability. [Id. at 808](#).

The Supreme Court rendered a similar conclusion in [United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#). In *Pennington*, a group of large coal companies -- in furtherance of a conspiracy with the United Mine Workers to drive smaller companies out of [*1077] the coal industry -- entered into a multi-employer collective bargaining agreement with the union that provided for increased wages and royalty payments into union pension and welfare fund. In return for those benefits, the union agreed that it would seek to impose the benefit provision of the multi-employer agreement on all industry employers without regard to their ability to pay. [Id. at 660](#). [**24] Two smaller companies that had been pressured into paying the higher benefits brought an antitrust suit. The Court noted that a union may conclude a wage agreement that is shielded from antitrust laws, but it forfeits such immunity when it conspires with the employers "to eliminate competitors from the industry." [Id. at 665-66](#).

In [Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co., 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 \(1965\)](#), a group of food store owners entered into a multi-employer collective bargaining agreement with a union to limit the hours and days of operation of the stores' meat departments. When a competing food store refused the union's demand that it agree to this same limitation, the union struck the employer to obtain that limitation. The competing food store sued the union and the employers who were party to the multi-employer agreement for antitrust violations. [Id. at 679-81](#). A three member plurality ruled that the union was shielded [**25] from antitrust liability because it obtained these provisions "through bona fide, arm's length bargaining in pursuit of [its] own labor union policies, and not at the behest of or in combination with nonlabor groups." [Id. at 689-90](#).⁶

In the case at bar, the Players cite these cases for the proposition that union consent, while not always sufficient, is necessary for the labor exemption to apply. Indeed, Mackey's third element, that the agreement be the product of bona fide arm's-length bargaining, is derived from the view that [**26] *Allen-Bradley*, *Pennington*, and *Jewel Tea* stand for this proposition. [Mackey, 543 F.2d at 611-14](#). See also [Powell, 678 F. Supp. at 784-85](#); [Bridgeman, 675 F. Supp. at 964-65](#) (adopting similar approach). Thus, the Players argue that absent union consent to the challenged measures through a valid collective bargaining agreement, the exemption no longer applies. Moreover, they contend that union consent ended on June 23, 1994, with the formal expiration of the 1988 Collective Bargaining Agreement.

The Players' reading of these Supreme Court cases is, however, fundamentally flawed. These decisions involve "injuries to employers who asserted that they were being excluded from competition in the product market." [Wood, 809 F.2d at 963](#) (emphasis in original). The fact is that no Supreme Court decision has addressed whether a dispute between collective bargaining parties, duly authorized under the labor laws to represent either the employers or employees at the bargaining table, are immune from antitrust liability.

From *Allen-Bradley* to *Pennington*, [**27] the majority of the Court has insisted that one factor be present before the Sherman Act applies to arrangements arrived at through collective bargaining: one group of employers must conspire to use the union to hurt their competitors. The line the Court has consistently sought to draw, therefore, is the line between the product market and the labor market.

Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L. J. 1, 26 (1971). Thus, to apply the exemption as enunciated in *Allen Bradley*, *Pennington*, and *Jewel Tea* to disputes between employees and employers in a collective bargaining relationship does not fully

⁶ On behalf of a concurring panel of three, Justice Goldberg urged a holding that "a union acting as a union, in the interests of its members, and not acting to fix prices or allocate markets in aid of an employer conspiracy to accomplish these objects . . . is not subject to challenge under the antitrust laws." [Jewel Tea, 381 U.S. at 710](#) (Goldberg, J., concurring).

857 F. Supp. 1069, *1077-1994 U.S. Dist. LEXIS 9759, **27

account for the policies underlying federal labor law. Moreover, such a ruling would exaggerate federal antitrust concerns. See [Wood, 809 F.2d at 959-63](#).

[*1078] Collective bargaining seeks to order labor markets through a system of countervailing power. Thus it is often referred to by economists as bilateral monopoly. If such a structure is to be protected by law, then logically the antitrust claims between employers and employees **[**28]** must be extinguished.

Jacobs & Winter, *Antitrust Principles*, 81 Yale L. J. at 22. Indeed, Wood noted this distinction between the product and labor markets and, by implication, concluded that [HN4](#) where a dispute implicates the labor market, antitrust actions should not be allowed to subvert federal labor law policies. [Wood, 809 F.2d at 963](#). In this case, labor market disputes are the central concern. As such, this dispute is one to be resolved by federal labor law.

This reasoning mandates that the appropriate standard to apply is the *Powell II* standard. Antitrust immunity exists as long as a collective bargaining relationship exists. [Powell II, 930 F.2d at 1303-04](#). Accordingly, the NBA is granted the declaration it seeks -- the continued implementation of these challenged measures by the NBA do not violate the antitrust laws as long as the collective bargaining relationship exists.

This does not mean that the Players are "stuck" with these provisions forever. Certainly, they can attempt to bargain these provisions away -- including exerting economic pressure by means of a strike. Or, **[**29]** the Players may request decertification of the NBPA as a collective bargaining agent. I do not mean by this ruling to encourage the Players to decertify their union so that they may bring an antitrust claim. But, decertification is certainly an option the Players have. In fact, this is exactly what the National Football League Players Union did following *Powell II*. See [Powell and McNeil v. National Football League, 764 F. Supp. 1351, 1356 \(D.Minn. 1991\)](#). Decertification, however, brings with it other consequences, namely the elimination of many federal labor remedies. In other words, the NBPA is a private actor with a variety of available choices. It is up to the Players to weigh the risks of all their actions. While I am not unconcerned that this decision may affect their decision to decertify, I simply note that the Players may not have it both ways. They may not avail themselves to the benefits of federal labor and antitrust law at the same time.

(2) Antitrust Analysis

It appears that even if the nonstatutory exemption did not apply, the Players' charge of a *per se* violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), **[**30]** is insufficient to carry the day. [HN5](#) It has often been recognized that any contract between an employer and employee is a restraint of trade. [Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 \(1918\)](#). Therefore,

Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anti-competitive that each is illegal *per se* without inquiry into the harm it has actually caused. Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.

[Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#) (citations omitted). See also [Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-51, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). **[**31]** Professional athletic associations are more generally, and appropriately, characterized as joint ventures. [North American Soccer League v. National Football League, 670 F.2d 1249, 1251 \(2d Cir. 1982\)](#). As the Court of Appeals for the District of Columbia put it, describing the National Football League:

The NFL clubs which have "combined" to implement the draft are not *competitors* in any economic sense. The clubs operate basically as a joint venture in producing an entertainment product -- football games and telecasts. No NFL club can produce this product without agreements and joint action with every other team. To this end, the League not only determines franchise **[*1079]** locations, playing schedules, and broadcast terms, but also ensures that the clubs receive equal shares of telecast and ticket revenues. These economic joint

venturers "compete" on the playing field, to be sure, but here as well cooperation is essential if the entertainment product is to attain a high quality: only if the teams are "competitively balanced" will spectator interest be maintained at a high pitch. No NFL team, in short, is interested in driving another team out of business, [**32] whether in the counting-house or on the football field, for if the League fails, no one team can survive.

Smith v. Pro Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173, 1178-79 (D.C. Cir. 1978) (emphasis in original). See also *Mackey, 543 F.2d at 619* ("Although businessmen cannot wholly evade the antitrust laws by characterizing their operation as a joint venture, we conclude that the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules here, fashioned in a different context."). As the College Draft, Right of First Refusal, and Salary Cap do not meet stringent per se conditions, (*North American Soccer League, 670 F.2d at 1258*), the legitimacy of these restraints depends upon their reasonableness.

HN6 [↑] The rule of reason, as set forth in *National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*, considers whether the challenged contracts or acts "were unreasonably restrictive of competitive [**33] conditions." *Id. at 690* (quoting *Standard Oil Co. v. United States, 221 U.S. 1, 58, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*).

Unreasonableness under that test could be based either (1) on the nature or character of the [conduct] or (2) on surrounding circumstances giving rise to the inference or presumption that [it was] intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

Id. (citations omitted)

Even under a rule of reason analysis, however, it appears that the Players have failed to show that the alleged restraints of trade are on balance unreasonably anti-competitive. The pro-competitive effects of these practices, in particular the maintenance of competitive balance, may outweigh their restrictive consequences. Indeed, the Salary Cap seems to operate as a mechanism to distribute 53 per cent defined gross revenue to the Players. (Tr. at 108-09). See *Mackey, 543 F.2d at 623* ("It may be that some reasonable restrictions [**34] relating to player transfers are necessary for the successful operation of the NFL. The protection of mutual interests of both the players and the clubs may indeed require this.").

CONCLUSION

For the foregoing reasons, the NBA and Teams' continued implementation of the college draft, right of first refusal, and the salary cap is hereby declared not to violate antitrust laws. This ruling mandates that the Players' counterclaims be denied. Parties are once again urged to pursue the only rational course for the resolution of their disputes; that is, a course of collective bargaining pursued by both sides in good faith. No court, no matter how highly situated, can replace this time honored manner of labor dispute resolution. Rather than clogging the courts with unnecessary litigation, the parties should pursue this course.

DATED: New York, New York

July 18, 1994

KEVIN THOMAS DUFFY, U.S.D.J.



Morgenstern v. Wilson

United States Court of Appeals for the Eighth Circuit

March 14, 1994, Submitted ; July 20, 1994, Filed

No. 93-2446

Reporter

29 F.3d 1291 *; 1994 U.S. App. LEXIS 17768 **; 1994-1 Trade Cas. (CCH) P70,645

Dan A. Morgenstern, M.D., Plaintiff - Appellee, v. Charles S. Wilson, M.D.; Deepak Gangahar, M.D.; Herbert E. Reese, M.D.; Walt F. Weaver, M.D.; Christopher C. Caudill, M.D.; Joseph R. Gard, M.D.; Sabyasachi Mahapatra, M.D.; Robert J. Buchman, M.D.; Michael A. Breiner, M.D.; Alan D. Forker, M.D.; Stephen W. Carveth, M.D., Defendants - Appellants. Cardiovascular & Thoracic Surgery, P.C.; Cardiology Consultants, P.C., Defendants. Nebraska Heart Institute, P.C., Defendant - Appellant.

Subsequent History: [**1] Certiorari Denied February 21, 1995, Reported at: [1995 U.S. LEXIS 1048](#).

Prior History: Appeal from the United States District Court for the District of Nebraska. District No. CV 90-L-34. Honorable Warren K. Urbom, District Judge.

Disposition: Reversed

Core Terms

cardiac, geographic, district court, surgery, patients, surgeons, cardiologists, monopolization, injunction, injunctive relief, interlocutory, defendants', jury's verdict, Antitrust, programs

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1[] Relief From Judgments, Altering & Amending Judgments

[28 U.S.C.S. § 1292\(a\)](#) provides, in pertinent part, that the courts of appeal shall have jurisdiction of appeals from interlocutory orders of the district courts granting, continuing, modifying, refusing or dissolving injunctions. Thus, by the plain language of [28 U.S.C.S. § 1292\(a\)](#), interlocutory orders granting "injunctions" are appealable.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN2[] Appellate Jurisdiction, Interlocutory Orders

[28 U.S.C.S. § 1292\(a\)](#) invokes two separate avenues of analysis. [28 U.S.C.S. § 1292\(a\)\(1\)](#) provides appellate jurisdiction for orders that grant or deny injunctions as well as those orders that merely have the practical effect of granting or denying injunctions and have serious, perhaps irreparable, consequence. Thus, the first question that must be addressed is whether the order appealed from specifically granted or denied an injunction or merely had the practical effect of doing so. If an interlocutory order expressly grants or denies a request for injunctive relief, the Carson requirements need not be met and the order is immediately appealable as of right under [28 U.S.C.S. § 1292\(a\)\(1\)](#). By contrast, if an order merely has the practical effect of granting or denying an injunction, the Carson irreparable injury test must be satisfied.

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

[HN3](#) Judgments, Relief From Judgments

In determining whether the district court acted specifically to grant injunctive relief for purposes of the appealability of an interlocutory order, the court examines, the language of the order, the grounds on which it rests, and the circumstances in which it was entered.

Antitrust & Trade Law > Sherman Act > General Overview

[HN4](#) Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 26](#).

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 > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

[HN5](#) Relevant Market, Geographic Market Definition

To establish that defendants have the market power required for monopolization liability, plaintiff has to establish that defendants have a dominant market share in a well-defined relevant market. The "relevant market" is defined in terms of both product market and geographic market. An actual monopolization claim often succeeds or fails strictly on the definition of the product or geographic market. The geographic market encompasses the geographic area to which consumers can practicably turn for alternative sources of the product and in which the antitrust defendants face competition. The burden of establishing that a specified area constitutes a relevant geographic market in a particular case rests with the plaintiff.

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

[HN6](#) Monopolies & Monopolization, Actual Monopolization

The relevant geographic area is the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.

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

[**HN7**](#) **Monopolies & Monopolization, Actual Monopolization**

An 80 percent market share is within the permissible range from which an inference of monopoly power can be drawn. As a matter of law, absent other relevant factors, a 30 percent market share will not prove the existence of monopoly power.

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

[**HN8**](#) **Monopolies & Monopolization, Actual Monopolization**

Distance and its counterpart convenience are important in determining the relevant geographic market.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > General Overview

[**HN9**](#) **Admissibility, Expert Witnesses**

When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.

Counsel: Counsel who presented argument on behalf of the appellant was Joe Sims, Washington, D.C. Additional attorneys appearing on the brief were Kathryn M. Fenton and James D. Wareham.

Counsel who presented argument on behalf of the appellee was Daniel Klaus, Lincoln, NE.

Judges: Before McMILLIAN and WOLLMAN, Circuit Judges, and VIETOR,^{*} District Judge.

Opinion by: McMILLIAN

Opinion

[*1293] McMILLIAN, Circuit Judge.

Charles S. Wilson, M.D., and others, (hereinafter referred to as defendants), appeal from an interlocutory order entered in the United States District Court for the District of Nebraska compelling either the dissolution or the restructuring of the Nebraska Heart Institute (NHI). *Morgenstern v. Wilson*, Civ. No. 90-L-34 (D. Neb. Apr. 26, 1993). For reversal, defendants argue the district court erred in granting an injunction because (1) several legal theories of anti-competitive conduct that were presented to the jury were erroneous as a matter of law, and (2) there was insufficient evidence to support the jury's verdict that Wilson, along with the associated cardiac surgeons, thoracic and vascular surgeons, and cardiologists who comprised NHI, violated [S2](#) of the Sherman Antitrust Act, [15](#)

* The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa, sitting by designation.

U.S.C. § 2. Appellee Dan A. Morgenstern, **[**2]** M.D., filed a motion to dismiss the appeal for lack of appellate jurisdiction. For the reasons discussed below, we reverse the judgment of the district court.

I.

In 1987, NHI, a professional corporation, was formed in Lincoln, Nebraska, to provide administrative, clinical and marketing services to its members. The members of NHI were Cardiology Consultants, P.C. (CCPC), a group cardiology practice consisting of six cardiologists, and Cardiovascular & Thoracic Surgery, P.C. (CVTS), a cardiac surgical group practice comprised of three cardiac surgeons and two thoracic and vascular surgeons. The cardiologists of CCPC referred their patients in need of open-heart surgery, angioplasty, and other cardiac surgical procedures to the surgeons of CVTS.

In July 1987 CVTS employed Morgenstern as a cardiac surgeon. After practicing one year with CVTS, CVTS informed Morgenstern that he would not be made a partner with the group. However, at Morgenstern's request, his employment contract with CVTS was extended for a second year during which he continued to perform cardiac surgical procedures on patients referred to CVTS by CCPC. While associated with NHI as a member of CVTS, Morgenstern performed **[**3]** approximately 180 cardiac surgeries.

Upon leaving CVTS in 1989, Morgenstern opened his own cardiac surgery practice in Lincoln. Although the thoracic and vascular aspects of Morgenstern's practice thrived, Morgenstern's cardiac surgery practice failed. During the nine months he practiced cardiac surgery after leaving CVTS, he performed **[*1294]** only six surgeries. None of the six patients was referred to Morgenstern by CCPC.

Morgenstern filed suit in federal district court against NHI, CCPC, CVTS, and the individual cardiologists and surgeons affiliated with those groups, alleging numerous violations of the Sherman Antitrust Act. After abandoning his conspiracy to monopolize claim under § 1 of the Sherman Antitrust Act, and attempted monopolization and conspiracy to monopolize claims under § 2 of the Sherman Antitrust Act, Morgenstern proceeded to trial solely on a claim of actual monopolization of cardiac surgery pursuant to § 2. The jury failed to reach a verdict, and the district court ordered a new trial on the actual monopolization claim. The district court denied defendants' motion for judgment as a matter of law.

Following the second trial, the jury exonerated CCPC and CVTS of liability, **[**4]** but found the individual physicians and NHI liable for monopolizing the "adult cardiac surgery market." The jury found that Morgenstern had suffered \$ 1,467,000 in damages as a result of the formation of NHI and the failure of the cardiologists to refer patients to Morgenstern, or their referral of patients only to the surgeons associated with NHI. The district court, denying defendants' renewed motion for judgment as a matter of law, upheld the jury's verdict on a theory of "monopolization by combination of individuals and corporations, acting in concert." However, the district court found insufficient evidence to support the jury's award of damages and granted a new trial on that issue. The district court, implementing the jury's verdict on liability, granted injunctive relief to Morgenstern pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, and ordered defendants to dissolve or restructure NHI to eliminate common ownership by cardiologists and surgeons and to prevent joint marketing on behalf of CCPC and CVTS. This appeal by defendants followed. Morgenstern filed a motion to dismiss the appeal for lack of appellate jurisdiction.

II.

We consider **[**5]** first our appellate jurisdiction. Morgenstern argues that the injunction in question, implementing the jury's verdict, is not an appealable interlocutory decision within the provisions of 28 U.S.C. § 1292(a)(1). We disagree.

Section 1292(a) provides, in pertinent part, that HN1 "the courts of appeal shall have jurisdiction of appeals from: (1) interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions." Thus, by the plain language of § 1292(a), interlocutory orders granting "injunctions" are appealable. Nevertheless, Morgenstern argues that, under Carson v. American Brands, Inc., 450 U.S. 79, 67 L. Ed. 2d 59, 101 S. Ct. 993 (1981) (*Carson*), unless a litigant is able to show that an interlocutory order of the district court (1) will have serious, perhaps irreparable, consequences, and (2) the order can be effectually challenged only by

immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal. Morgenstern contends that, because the order at issue in the present case does not [**6] require defendants to take any action until sixty days "following completion of the appellate process," it fails both prongs of the *Carson* test. We believe Morgenstern misunderstands the law developed on [§ 1292\(a\)](#) appeals. [Section 1292\(a\) HN2](#)[¹] invokes two separate avenues of analysis. The United States Supreme Court has stated that [§ 1292\(a\)\(1\)](#) provides appellate jurisdiction for "orders that grant or deny injunctions" as well as those "orders that merely have the practical effect of granting or denying injunctions and have 'serious, perhaps irreparable, consequence.'" [Gulfstream Aerospace Corp. v. Mayacamas Corp.](#), 485 U.S. 271, 287-88, 99 L. Ed. 2d 296, 108 S. Ct. 1133 (1988), quoting [Carson](#), 450 U.S. at 84. Thus, the first question that must be addressed "is whether the order appealed from specifically [granted or] denied an injunction or merely had the practical effect of doing so." [Kausler v. Campey](#), 989 F.2d 296, 298 (8th Cir. 1993) (*Kausler*). We are in accord with the majority of circuits which have held that, if an interlocutory [**7] order expressly grants or denies a request for injunctive [[*1295](#)] relief, the *Carson* requirements need not be met and the order is immediately appealable as of right under [§ 1292\(a\)\(1\)](#). See, e.g., [MAI Basi c Four, Inc. v. Basis, Inc.](#), 962 F.2d 978, 982 (10th Cir. 1992); [Sherri A.D. v. Kirby](#), 975 F.2d 193, 203 (5th Cir. 1992); [United States v. Bayshore Assocs.](#), 934 F.2d 1391, 1395-96 (6th Cir. 1991); [Cohen v. Board of Trustees](#), 867 F.2d 1455, 1466 (3d Cir. 1989); [International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines, Inc.](#), 270 U.S. App. D.C. 352, 849 F.2d 1481, 1486 n.11 (D.C. Cir. 1988); [Donovan v. Robbins](#), 752 F.2d 1170, 1173-74 (7th Cir. 1985); [Cable Holdings of Battlefield, Inc. v. Cooke](#), 764 F.2d 1466, 1471 (11th Cir. 1985). By contrast, if an order merely has the practical effect of granting or denying an injunction, the *Carson* irreparable injury test must be satisfied. [Kausler](#), 989 F.2d at 298. [**8]

[HN3](#)[¹] In determining whether the district court acted specifically to grant injunctive relief, we examine "the language of the order, the grounds on which it rests, [and] the circumstances in which it was entered." [Kausler](#), 989 F.2d at 299. An examination of the district court's order reveals that the district court explicitly granted Morgenstern injunctive relief, and, thus, *Carson* is inapposite. The district court order, styled as "Order for Injunctive Relief," expressly granted the specific injunctive relief prayed for in Morgenstern's complaint. The district court stated that, in accordance with its "equitable powers" under [15 U.S.C. § 26](#),¹ defendants "are permanently enjoined as follows: within sixty days after this order becomes final following completion of the appellate process," (1) NHI shall be dissolved, or (2) restructured to eliminate common ownership by cardiologists and surgeons and to prevent joint marketing on behalf of CCPC and CTS. The district court imposed upon defendants an affirmative obligation, and then stayed that obligation pending appellate review. The district court specifically granted [**9] Morgenstern the injunctive relief he requested, and, therefore, we conclude that we have jurisdiction over the present appeal as one coming within the parameters of [§ 1292\(a\)\(1\)](#). Accordingly, we deny Morgenstern's motion to dismiss the appeal.

III.

We now turn to the merits of defendants' appeal. For reversal, defendants argue that several of the legal theories of anti-competitive conduct that were presented to the jury were erroneous as a matter of law, and that there was insufficient evidence to support the jury's verdict that NHI, and the individual physicians who comprise NHI, violated [§ 2](#) of the Sherman Antitrust Act, [15 U.S.C. § 2](#). Because we conclude [**10] that Morgenstern produced insufficient evidence of defendants' anti-competitive power within a well-defined relevant geographic market, we reverse the judgment of the district court.²

¹ [15 U.S.C. § 26](#) provides, in pertinent part, that any [HN4](#)[¹] "person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws."

² Our resolution of the issue of the relevant geographic market has made it unnecessary for us to reach all of the issues presented on appeal. Defendants raise several challenges to the theories of liability upon which the present case was submitted to the jury. Defendants first argue that, as a matter of law, a medical referral from one specialist to another is an act of medical judgment and cannot support antitrust liability. Defendants also argue that an actual monopolization claim must be predicated on the market domination of a single defendant or single economic entity and cannot be established by combining the market power of multiple defendants. There is a split in authority on this question. See generally Julian O. von Kalinowski, *Antitrust Laws and*

[**11] [HN5](#) To establish that defendants have the market power required for monopolization [[*1296](#)] liability, Morgenstern had to establish that defendants have "a dominant market share in a well-defined relevant market." [Flegel v. Christian Hosp., Northeast-Northwest](#), 4 F.3d 682, 689 (8th Cir. 1993) (quoting [Assam Drug Co. v. Miller Brewing Co.](#), 798 F.2d 311, 318 (8th Cir. 1986)). The "relevant market" is defined in terms of both product market (here, adult cardiac surgery) and geographic market. An actual monopolization claim often succeeds or fails strictly on the definition of the product or geographic market. [Alexander v. National Farmers Organization](#), 687 F.2d 1173, 1181 (8th Cir. 1982) (citing Julian O. von Kalinowski, Antitrust Laws and Trade Regulation, §§ 8.02[3]c, 9.01[3] (1982) (collecting cases)), cert. denied, 461 U.S. 937, 77 L. Ed. 2d 313, 103 S. Ct. 2108 (1983). The geographic market encompasses the geographic area to which consumers can practicably turn for alternative sources of the product and in which the antitrust defendants face [**12] competition. [Baxley-DeLamar Monuments, Inc., v. American Cemetery Ass'n](#), 938 F.2d 846, 850 (8th Cir. 1991). The burden of establishing that a specified area constitutes a relevant geographic market in a particular case rests with the plaintiff. [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).

In the present case, Morgenstern proposed a relevant market of patients of adult cardiac surgery to include Lincoln and twenty-six surrounding Nebraska counties extending in certain directions over 200 miles beyond Lincoln. However, Morgenstern's relevant geographic market excluded the heart programs in Omaha and all other regional and national heart programs. Defendants' relevant geographic market included, at a minimum, Omaha. The question before this Court is whether Morgenstern provided sufficient evidence from which the jury could reasonably have found that defendants possessed market power within the relevant geographic market.³ A close examination of the record reveals that Morgenstern's [**13] evidence regarding the relevant geographic market failed to address a critical legal question: where could consumers of the product (adult cardiac surgery) *practicably turn for alternative sources of the product*. See [Tampa Electric Co. v. Nashville Coal Co.](#), 365 U.S. 320, 331-32, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961) (defining [HN6](#) the relevant geographic area as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies"). The evidence provided by Morgenstern to support his geographic market definition consisted primarily of expert testimony regarding the residences of the cardiac surgery patients in the Lincoln and Omaha heart surgery programs, and the Nebraska counties that supplied the largest number of patients to each program. Morgenstern's proposed geographic market was also based upon evidence that cardiologists in Lincoln seldom refer their patients to cardiac surgeons in Omaha. Joint Appendix Vol. IV at 1692, 1791. Morgenstern's expert focused upon where Lincoln and Omaha residents *actually went*, as opposed to where they *could* practicably go, for their cardiac [**14] surgery services, and specifically presented insufficient evidence regarding whether or not CVTS patients could practicably turn for alternative sources of the product to Omaha or other more distant heart programs. Morgenstern's [[*1297](#)] expert

Trade Regulation §§ 17.01[2], 19.06 (1993); II E. Kinter, Federal **Antitrust Law**, § 16.2, at 482 (1980) (indicating that several firms acting in concert can be guilty of actual monopolization). Defendants further contend that, if this Court recognizes such a joint monopolization claim, it should treat such a claim as a conspiracy to monopolize claim, and, thus, require an agreement among defendants to commit an anti-competitive act. The jury in the present case was not instructed regarding the finding of an agreement. We are cognizant that no circuit has squarely addressed these questions. Even were we to rule in Morgenstern's favor on these issues, defendants would still be entitled to judgment in their favor. We consequently leave resolution of these issues for an appropriate case.

³ Within the relevant geographic market found by the jury (Lincoln and twenty-six surrounding counties, but not including Omaha), defendants possessed close to eighty percent of the market share of the patients. [HN7](#) An eighty percent market share is within the permissible range from which an inference of monopoly power can be drawn. If, as defendants contend, the relevant geographic market includes Omaha, then defendants have only a thirty percent market share. As a matter of law, absent other relevant factors, a thirty percent market share will not prove the existence of monopoly power. See, e.g., [Fineman v. Armstrong World Indus., Inc.](#), 980 F.2d 171, 201 (3d Cir. 1992) (fifty-five percent market share is insufficient to constitute monopoly power), cert. denied, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993); [Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.](#), 732 F.2d 480, 489 (5th Cir. 1984) (ninety percent is enough, sixty percent is not likely to suffice, and thirty-three is insufficient) (citations omitted); [Lektro-Vend Corp. v. Vendo Co.](#), 660 F.2d 255 (7th Cir. 1981) (thirty percent market share insufficient), cert. denied, 455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982); [United States v. Empire Gas Corp.](#), 537 F.2d 296 (8th Cir. 1976) (forty-seven to fifty percent share in liquid propane gas market held insufficient), cert. denied, 429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977).

concluded that Lincoln and Omaha must be in different geographic markets "because patients overwhelmingly went to the closest hospital." Brief for Appellee at 20. Morgenstern further provided no evidence that patients viewed Lincoln as a market separate from Omaha, located only fifty-eight miles from Lincoln.

[**15] The evidence produced in the present case falls far short of establishing Lincoln and surrounding counties, to the exclusion of Omaha, as the relevant geographic market. By contrast, the record shows that Omaha should have been included in the relevant geographic market definition. The Supreme Court has recognized the importance of HN8[↑] distance and its counterpart convenience in determining the relevant geographic market. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 358, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963). Defendants' evidence showed that Lincoln residents need travel only fifty-eight miles by main highway to receive cardiac surgical care in Omaha. Morgenstern himself traveled from Lincoln to Omaha on more than thirty occasions in a single year to assist in performing cardiac surgery. The defendants also provided testimony from health care providers in various professions throughout Nebraska who uniformly confirmed the existence of vigorous competition between Lincoln and Omaha. Lincoln cardiologists and cardiac surgeons testified to strong competition between them and the six Omaha heart programs. Joint [**16] Appendix Vol. II at 810-18, 904, 979-80; Vol. III at 1174-76, 1215-17, 1466-68. Omaha cardiac surgeons and hospital administrators testified to strong competition from CVTS and the cardiologists of CCPC. Moreover, the evidence showed that, throughout Nebraska, primary care physicians considered both Lincoln and Omaha as feasible sources of healthcare when making recommendations to their patients in need of cardiac surgery services. Joint Appendix Vol. II at 766-72, 775, 935; Vol. III at 1079-83, 1227-28. In Lincoln itself, physicians would refer patients to Omaha if, in their medical judgment, better treatment was available there. Joint Appendix Vol. II at 777-80. Defendants' expert provided further corroborative evidence consisting of three distinct economic studies designed to determine reasonable, practicable substitutes for Lincoln's residents in need of cardiac surgery services. Each analysis concluded that the relevant geographic market consisted of, at a minimum, Lincoln and Omaha.

Morgenstern argues that market determination, including the relevant geographic market, is necessarily a factual question for the jury, and emphasizes that the jury evidently credited the testimony [**17] of Morgenstern's expert and found the relevant geographic market to exclude Omaha. However, HN9[↑] "when an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group v. Brown & Williamson Tobacco Co.*, 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2598 (1993). Morgenstern has failed to overcome the overwhelming evidence that cardiac surgery programs in Lincoln and Omaha occupy the same relevant geographic market. As discussed above in footnote three, within the properly defined relevant geographic market, no permissible inference of monopoly power can be drawn. Absent monopoly power, Morgenstern's monopoly claim must fail.

Accordingly, we reverse the judgment of the district court.



USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council

United States Court of Appeals for the Ninth Circuit

August 12, 1993, Argued, Submitted, San Francisco, California ; July 26, 1994, Filed

No. 92-15497

Reporter

31 F.3d 800 *; 1994 U.S. App. LEXIS 18725 **; 146 L.R.R.M. 2961; 128 Lab. Cas. (CCH) P11,147; 1994-1 Trade Cas. (CCH) P70,647; 94 Cal. Daily Op. Service 5703; 94 Daily Journal DAR 10458

USS-POSCO INDUSTRIES, a California general partnership, Plaintiff, and BE&K CONSTRUCTION COMPANY, a Delaware corporation, Plaintiff-Appellant, v. CONTRA COSTA COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, a voluntary, unincorporated association; STEAMFITTERS LOCAL UNION NO. 342 OF THE UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, Defendants-Appellees.

Subsequent History: Related proceeding at [BE & K Constr. Co., 329 N.L.R.B. 717, 1999 NLRB LEXIS 735 \(Sept. 30, 1999\)](#)

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Northern District of California. D.C. No. CV-87-04829-DLJ. D. Lowell Jensen, District Judge, Presiding.

[USS-Posco Industries v. Contra Costa Bldg. & Constr. Trades Council, 1990 U.S. Dist. LEXIS 11360 \(N.D. Cal., June 8, 1990\)](#)

Core Terms

non-labor, exemption, antitrust, district court, combine, anti trust law, sham, summary judgment, lawsuits, discovery, entities, amended complaint, self-interest, antitrust liability, contractors, petitioning, proceedings, merits, cases, statutory exemption, labor union, allegations, bargaining, competitor, sanctions, unionized, baseless, lobbying, protests, purposes

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > Sherman Act > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN1 [] Antitrust & Trade Law, Clayton Act

The interlacing Sherman Act, [15 U.S.C.S. § 1 et seq.](#); Clayton Act, [15 U.S.C.S. § 12 et seq.](#); and Norris-LaGuardia Act give unions a statutory exemption to the antitrust laws. So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit 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.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN2 [] Exemptions & Immunities, Labor

There is a two-prong test for the statutory labor exemption: (1) Did the union combine with a non-labor group? (2) Did the union act in its legitimate self-interest?

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN3 [] Labor, Statutory Exemptions

When a labor union combines with an entity that is competing in the plaintiff's market, this normally is deemed to be a combination with a non-labor group, stripping the union of the statutory labor exemption. Thus, in most statutory labor exemption cases, the focus has been on whether the union combined with a competitor of the targeted employer.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

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

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN4 [] Labor, Statutory Exemptions

Labor unions carrying out their normal functions must be free to hire law firms, contract for lease space and negotiate with other business entities, without risking antitrust liability. Even though many of the entities that unions deal with on a daily basis cannot fairly be described as labor groups, they are not deemed non-labor groups for purposes of the statutory labor exemption.

31 F.3d 800, *800LÁ994 U.S. App. LEXIS 18725, **1

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN5 **Labor, Statutory Exemptions**

The definition of non-labor group must not stray too far from the paradigm of the union combining with the employer's competitors. To constitute a non-labor group for purposes of the statutory labor exemption, therefore, the entity in question must operate in the same market as the plaintiff to a sufficient degree that it would be capable of committing an antitrust violation against the plaintiff, quite independent of the union's involvement. A competitor of the plaintiff clearly falls within that definition, as would a supplier or purchaser of the plaintiff's goods or services. When the union combines with such an entity, it loses the protections of the antitrust exemption.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN6 **Exemptions & Immunities, Labor**

A union that combines only with other labor groups may nonetheless lose the statutory exemption.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN7 **Exemptions & Immunities, Labor**

A union may violate the antitrust laws - in other words, that it may lose the benefit of the labor exemption - even when it does not combine with a non-labor group.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN8 **Exemptions & Immunities, Labor**

A union must act in pursuit of its legitimate self-interest. Whether the interest in question is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN9[] Scope, Exemptions

The means employed by the union bear on the degree of scrutiny the court will cast on the legitimacy of the union's interest. Thus, where a union engages in activities normally associated with labor disputes, these will be presumed to be in pursuit of the union's legitimate interest absent a very strong showing to the contrary. Where the union's activities are farther afield, the scrutiny is more searching.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN10[] Labor, Statutory Exemptions

Encouraging the use of unionized labor is an objective well within the legitimate interests of labor unions and, so long as this end is pursued by activities normally associated with labor disputes, there's a strong presumption that the unions are protected from antitrust liability by the statutory labor exemption.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN11[] Exemptions & Immunities, Labor

The question with regard to the statutory labor exemption is whether the non-traditional means are appropriate - in other words, whether the non-traditional means are not only lawful, but necessary because the goals could not be achieved through traditional tactics. And the burden to show this lies with the unions.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Governments > State & Territorial Governments > Claims By & Against

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

HN12[] Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine provides broad antitrust protection for those who petition the government for a redress of grievances. This protection extends to lobbying of government officials, and petitioning of administrative agencies and courts. In those contexts, immunity from antitrust liability is lost only if a party engages in "sham" petitioning.

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

[**HN13**](#) [+] Exemptions & Immunities, Noerr-Pennington Doctrine

There is a two-part test for sham litigation: First, the suit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits; second, the baseless lawsuit must conceal an attempt to interfere directly with the business relationships of a competitor. The two parts of the test operate in succession: Only if the suit is found to be objectively baseless does the court proceed to examine the litigant's subjective intent.

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

[**HN14**](#) [+] Exemptions & Immunities, Noerr-Pennington Doctrine

If the suit turns out to have objective merit, the plaintiff can't proceed to inquire into subjective purposes, and the action is perforce not a sham.

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

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

[**HN15**](#) [+] Exemptions & Immunities, Noerr-Pennington Doctrine

The filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action, and can serve as a very effective restraint on trade. When dealing with a series of lawsuits, the question is not whether any one of them has merit - some may turn out to, just as a matter of chance - but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. The inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Waiver & Preservation of Defenses

[**HN16**](#) [+] Pleadings, Amendment of Pleadings

A plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint.

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Waiver & Preservation of Defenses

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN17 [blue icon] Appellate Review, Appealability

The London rule only applies to amended complaints that follow upon dismissal with leave to amend, and not to those that follow summary judgment.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN18 [blue icon] Exemptions & Immunities, Labor

Unions can forfeit the statutory labor exemption even without combining with non-labor groups if the union acts outside this legitimate self-interest.

Counsel: James G. Gilliland, Jr., Ann Julius, Khourie, Crew & Jaeger, San Francisco, California, June D. Beltran, Townsend and Townsend and Crew, San Francisco, California, for plaintiff-appellant BE&K Construction Co.

Peter D. Nussbaum, Fred H. Altshuler, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California, for defendant-appellee Steamfitters Local Union No. 342 of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industries of the United States and Canada, AFL-CIO.

Sandra Rae Benson, Victor J. Van Bourg, Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, California, for defendant-appellee Contra Costa County Building & Construction Trades Council, AFL-CIO.

Judges: Before: Alex Kozinski, David R. Thompson and Thomas G. Nelson, Circuit Judges. Opinion by Judge Kozinski.

Opinion by: KOZINSKI

Opinion

[*803] OPINION

KOZINSKI, Circuit Judge.

We explore the nether reaches of two areas of antitrust law: the statutory labor exemption and the *Noerr-Pennington* doctrine.

[*804] /

USS-POSCO Industries (UPI) is a joint venture [**2] between USX Corporation (formerly U.S. Steel) and Pohang Iron and Steel Co. of South Korea, formed to modernize and operate an old steel facility in Pittsburg, California (PITCAL). Interested unions allegedly attempted to coerce UPI into awarding the general contract to a unionized contractor. After bidding, UPI nevertheless awarded the \$ 350 million construction contract - involving over 800 jobs - to appellant BE&K, a merit-shop contractor. See Henry Weinstein, *Workers Are Steeling Themselves to Fight Non-Union Upgrading of Pittsburg Plant*, L.A. Times, Mar. 16, 1987, at 3.

BE&K alleges the unions then began a campaign to eliminate non-union construction in Northern California by making an example of PITCAL. Although none of the unions had a collective bargaining agreement with BE&K, defendants allegedly filed automatic protests to BE&K's permits in order to cause it gratuitous expense and delay;

lobbied for a local toxic waste disposal ordinance that would require BE&K to obtain more permits; sued to enforce the ordinance at the PITCAL site; encouraged BE&K's subcontractors to protest nonexistent safety violations; brought suit against BE&K for allegedly violating environmental [**3] laws (the *Piledrivers* suit); and brought numerous grievances, arbitrations and enforcement proceedings against BE&K's partner, Eichleay Constructors, Inc. (the *Eichleay* actions). According to BE&K, the unions' purpose was not to organize BE&K's employees, but to cause such delay and expense that future project owners would only hire unionized contractors and subcontractors.

UPI and BE&K originally brought suit alleging unfair labor practices under the LMRA, and the unions defended on the ground that their lobbying efforts, the *Piledrivers* suit and the *Eichleay* actions were immunized from LMRA liability under the *Noerr-Pennington* doctrine. See [*Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 76 L. Ed. 2d 277, 103 S. Ct. 2161 \(1983\)](#) (applying *Noerr-Pennington* to labor context); see also [*Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#) (legitimate petitioning of government immunized from antitrust laws). Rejecting BE&K's argument that the suits fell within [**4] the sham exception to *Noerr-Pennington*, the district court found that the lobbying of state and local bodies and the *Eichleay* actions were valid attempts to petition the government. After discovery, the court granted partial summary judgment for the unions. ER 199.

BE&K filed an amended complaint which realleged the above-described conduct, this time claiming that it violated the Sherman and Clayton Antitrust Acts.¹ The court granted the unions' subsequent motion to dismiss on the ground that the amended complaint was foreclosed by the prior partial summary judgment. BE&K then filed its second amended complaint, basing it in part on the same activities the district court had ruled were protected by *Noerr-Pennington*. The court granted the unions' motion to strike those portions of the complaint dealing with the toxic waste ordinance, the *Piledrivers* suit and the *Eichleay* grievances. It also imposed Rule 11 sanctions on BE&K. ER 235 at 8-10.

[**5] The unions then advised the district court they intended to seek partial summary judgment on the antitrust claim on the ground that the surviving allegations involved activities protected by the statutory labor exemption. The court ruled that, in order to overcome the statutory exemption, BE&K would have to prove "both a combination with non-labor groups *and* an illegitimate purpose in such combination." ER 283 at 8 (emphasis added). The court then limited BE&K's discovery to the first of these elements. Because BE&K was unable to show a triable issue of fact as to whether there was a combination with non-labor groups, the court granted the unions' subsequent motion for partial summary judgment.

[*805] BE&K stipulated to dismissal of its remaining claims with prejudice. It appeals only the antitrust claims and the imposition of sanctions.

//

In *United States v. Hutcheson*, 312 U.S. 219, 232, 85 L. Ed. 788, 61 S. Ct. 463 (1941), the Supreme Court examined [HN1](#)[↑] the "interlacing" Sherman, Clayton and Norris-LaGuardia Acts, and held that they gave unions a statutory exemption to the antitrust laws:²

¹ UPI voluntarily dismissed its complaint against all defendants in February 1990, and is no longer a party to this suit. See *Firm, Building Trades, Settle Feud Over Environmental Concerns at Steel Plant*, Daily Lab. Rep. (BNA), Mar. 1, 1990, at A-8.

² There is also a non-statutory exemption for agreements between unions and employers that are intimately related to the unions' vital concern with wages, hours and working conditions. [*Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622, 44 L. Ed. 2d 418, 95 S. Ct. 1830 \(1975\)](#); [*Richards v. Neilson Freight Lines*, 810 F.2d 898, 905 \(9th Cir. 1987\)](#). As no such collective bargaining relationship existed here, the non-statutory exemption is not at issue.

[**6] So long as a union acts *in its self-interest and does not combine with non-labor groups*, the licit and the illicit . . . 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.

Hutcheson, 312 U.S. at 232 (emphasis added). This passage has been read as establishing [HN2](#) a two-prong test for the statutory labor exemption: (1) Did the union combine with a non-labor group? (2) Did the union act in its legitimate self-interest? See, e.g., United Mine Workers of America v. Pennington, 381 U.S. 657, 662, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965); Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. 797, 806-07, 89 L. Ed. 1939, 65 S. Ct. 1533 (1945); Bodine Produce, Inc. v. United Farm Workers Org. Comm., 494 F.2d 541, 557-58 (9th Cir. 1974). A key question in this case is whether these two prongs of *Hutcheson* are to be [**7] read in the conjunctive (i.e., that plaintiff must establish both elements in order to get around the exemption), or in the disjunctive (i.e., that plaintiff can bypass the exemption by proving either element).

The district court read the *Hutcheson* test in the conjunctive and granted summary judgment on the antitrust claim because BE&K was unable to establish a triable issue of fact as to the first element - whether the unions had combined with non-labor groups. BE&K appeals this ruling, arguing first, that the district court defined non-labor group too narrowly; and second, that BE&K should have been allowed to show the union acted for an improper purpose, as an alternative avenue for defeating the statutory labor exemption.³

[**8] A. What constitutes a non-labor group for purposes of the antitrust laws has never been very clearly defined.⁴ It is possible, [[*806](#)] however, to derive a fair approximation of what the term means based on certain common-sense observations.

[**9] On the one hand, [HN3](#) when a labor union combines with an entity that is competing in the plaintiff's market, this normally is deemed to be a combination with a non-labor group, stripping the union of the statutory labor exemption. *But see n.5 infra*. Thus, in most statutory labor exemption cases, the focus has been on whether the union combined with a competitor of the targeted employer. See, e.g., H.A. Artists, 451 U.S. at 715 (discussing nonlabor group as "one or more employers"); Federal Maritime Comm'n v. Pacific Maritime Ass'n, 435 U.S. 40, 51

³ BE&K also complains that the district court improperly assigned to it the burden of proving that the statutory labor exemption did not apply, since defendants normally bear the burden of proving exceptions to the antitrust laws. See Feather v. UMWA, 711 F.2d 530, 542 (3d Cir. 1983); Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494, 521 (3d Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980); 9 Julian O. von Kalinowski, *Antitrust Laws and Trade Regulation*, § 81.09[2] (1993). But the statutory exemption is not an affirmative defense; it's an element of any claim that unions violated the antitrust laws. Plaintiff bears the burden of proof. See Pennington, 381 U.S. at 669 ("the alleged agreement between UMW and the large operators . . ., if proved, was not exempt from the antitrust laws"); Richards, 810 F.2d at 902 ("failure on the part of the plaintiff to produce evidence from which a jury could infer reasonably that conduct was conspiratorial, not unilateral, will lead to summary judgment for the defendant"); Bodine Produce, 494 F.2d at 561 (plaintiff must specifically allege non-labor group combination); Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council, 675 F.2d 881, 886 (7th Cir. 1982) ("if the defendants' conduct is to fall outside the statutory exemption, the plaintiffs must allege a conspiracy under *Allen Bradley*"). *But see United States Steel Corp. v. Fraternal Ass'n of Steelhaulers, 431 F.2d 1046, 1051 (3d Cir. 1970)* (union failed to meet burden of proving element of statutory exemption).

⁴ Indeed, the case law is saturated with confusing formulations. See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702, 721, 73 L. Ed. 2d 327, 102 S. Ct. 2672 (1982) (labor group depends on "the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests") (quoting American Federation of Musicians v. Carroll, 391 U.S. 99, 106, 20 L. Ed. 2d 460, 88 S. Ct. 1562 (1968)); H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 717, 68 L. Ed. 2d 558, 101 S. Ct. 2102 (1981) ("nonlabor group" consists of "persons who are not 'parties to a labor dispute' within the meaning of the Norris-LaGuardia Act) (quoting Hutcheson, 312 U.S. at 232); Allen Bradley, 325 U.S. at 798, 801, 809 (union lost statutory exemption where it combined with "employers and manufacturers of goods" to "aid and abet business men to do the precise things which the Act prohibits"; "when [a union participates] with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation [is] created not included within the exemptions of the Clayton and Norris-LaGuardia Acts").

n.15, 55 L. Ed. 2d 96, 98 S. Ct. 927 (1978) (considering whether there is "combination with nonlabor groups, i.e., whether there is no conspiracy with management"); Pennington, 381 U.S. at 665-66 (union forfeited statutory exemption where it "agrees with one set of employers" to eliminate competition from the industry); Allen Bradley, 325 U.S. at 811 ("Congress evidently concluded . . . [**10] that the chief objective of Anti-trust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition."); Bodine, 494 F.2d at 560 ("alliance between the defendant union and non-labor business groups engaged in competition with the plaintiffs" constituted combination with non-labor group); see also Phillip Areeda & Donald F. Turner, Antitrust Law Par. 229e (1978).

At the other end of the spectrum, HN4[¹] labor unions carrying out their normal functions must be free to hire law firms, contract for lease space and negotiate with other business entities, without risking antitrust liability. Even though many of the entities that unions deal with on a daily basis cannot fairly be described as labor groups, they are not deemed "non-labor groups" for purposes of the statutory labor exemption. Were it otherwise, this requirement - which lies at the heart of the test announced by *Hutcheson* - would be rendered utterly meaningless in the sense that *everything* unions do would become a combination with a non-labor group and [**11] possibly subject to antitrust liability.

To allow unions breathing space in carrying out their legitimate functions without giving them free rein to extend their substantial economic power into markets for goods and services other than labor, we conclude that HN5[¹] the definition of non-labor group must not stray too far from the paradigm of the union combining with the employer's competitors. To constitute a non-labor group for purposes of the statutory labor exemption, therefore, the entity in question must operate in the same market as the plaintiff to a sufficient degree that it would be capable of committing an antitrust violation against the plaintiff, quite independent of the union's involvement. See R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 148 (9th Cir. 1989) (en banc) ("The requirement that the alleged [antitrust] injury be related to anticompetitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors.") (quoting Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir. 1985)); see also Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 539, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); [**12] Areeda & Hovenkamp, Antitrust Law at 400 Par. 334.1b (1993 Supp.).

As noted, a competitor of the plaintiff clearly falls within that definition, as would a supplier or purchaser of the plaintiff's goods or services. See, e.g., E.W. French & Sons, Inc. v. General Portland, Inc., 885 F.2d 1392 (9th Cir. 1989) (ready-mix concrete supplier bringing antitrust suit against cement producer); [*807] Zidell Explorations, Inc. v. Conval Int'l Ltd., 719 F.2d 1465 (9th Cir. 1983) (distributor of valves bringing antitrust action against suppliers). Other entities, though more remote, may nevertheless stand in such a relationship to the plaintiff that they are deemed to be operating in the same market. See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988) (antitrust suit by manufacturer against private standard-setting organization); Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992) (antitrust class action by title insurance consumers against insurers for participation [**13] in state-licensed rating bureaus). When the union combines with such an entity, it loses the protections of the antitrust exemption.⁵

[**14] BE&K took discovery on this issue and, although the initial order seemed to restrict discovery to BE&K's competitors, ER 283 at 14, the court subsequently explained that it did not mean to "cut off any discovery reasonably designed to identify contractors, manufacturers or other commercial entities with whom the defendants may have formed illegal combinations." IBEW SER 304 at 3. This was sufficiently broad to allow BE&K to identify anyone falling under the definition of non-labor group as explicated above, but BE&K has been able to point to no

⁵ There appears to be at least one exception to this general rule. In some cases, a party that would otherwise meet the definition of a "non-labor group" was considered a "labor group" because of an "economic interrelationship" between that party and the union. See, e.g., Jacksonville Bulk Terminals, 457 U.S. at 721 (status as "labor group" depends on "whether there is 'some . . . economic interrelationship affecting legitimate union interests'"); Carroll, 391 U.S. at 106 ("labor group" characterized by "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members" and the purported "labor group"); accord H.A. Artists, 451 U.S. at 718.

such entity. We therefore agree with the district court that BE&K has failed to raise a material issue of fact as to whether the unions combined with non-labor groups, and therefore did not carry its burden under this prong of the *Hutcheson* test.

[3] B. The district court didn't allow BE&K discovery on the alternate prong of *Hutcheson* because it took the view that failure as to one prong was fatal to BE&K's case. In its most recent pronouncement on the subject, however, the Supreme Court clearly held that [HN6](#)[↑] a union that combines only with other labor groups may nonetheless lose the statutory exemption under the second prong of *Hutcheson* [**15](#). [*H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 68 L. Ed. 2d 558, 101 S. Ct. 2102 \(1981\)](#), involved a challenge under the Sherman Act to certain rules of the Actors' Equity Union, including the exaction of a franchising fee from theatrical agents licensed by the union.

The Supreme Court first inquired whether there was a combination between the union and any "non-labor groups," or persons who are not "parties to the labor dispute." [Id. at 717](#). The Court found that the theatrical agents were not a "non-labor group" for purposes of the statutory exemption. *Id.* Had this been sufficient to establish the union's entitlement to the labor exemption, the Court could have stopped right there. Instead, it proceeded to evaluate whether the union's activities were undertaken in pursuit of its legitimate self-interest. While it found the union's activity generally exempt because the regulations were "clearly designed to promote the union's legitimate self-interest," [id. at 721](#), it found "the [**16](#) fees that [the union] levied upon the agents" might not be "a permissible component of the exempt regulatory system," [id. at 722](#). Because no evidence had been presented at trial "to show that the costs justified the fees actually levied," [id. at 712](#), the case was remanded for further factfinding.

Had the Court in *H.A. Artists* eventually approved all aspects of the arrangement between the union and the agents, its examination of the fee structure might have been explainable on a belt-and-suspenders rationale. But the Court found fault with the fee structure - or at least found that there might be fault. Since *H.A. Artists* was an antitrust case, the only possible fault could be a violation [*808](#) of the antitrust laws. We read this as a clear holding that [HN7](#)[↑] a union may violate the antitrust laws - in other words, that it may lose the benefit of the labor exemption - even when it does not combine with a non-labor group. Although, prior to *H.A. Artists*, there was some doubt on this point,⁶ there no longer is. See Daralyn J. Durie & Mark A. Lemley, *The Antitrust [**17](#) Liability of Labor Unions for Anticompetitive Litigation*, [80 Cal. L. Rev. 757, 783](#) & n.155 (1992).

[**18](#) What, then, does it mean for a union to pursue an illegitimate purpose? In the broadest sense, everything a union does serves its self-interest. But *Hutcheson* requires that [HN8](#)[↑] it act in pursuit of its *legitimate* self-interest. Whether the interest in question is legitimate depends on whether the ends to be achieved are among the

⁶ Some cases had suggested that the union must combine with a non-labor group as a predicate for antitrust liability. In [*Allen Bradley*, 325 U.S. at 810](#), the Court explained that whether union activities violated the Sherman Act was "dependent upon whether the union acts alone or in combination with business groups." See, e.g., [*Hunt v. Crumboch*, 325 U.S. 821, 89 L. Ed. 1954, 65 S. Ct. 1545 \(1945\)](#) (unilateral actions of union to drive petitioner out of business are immune from Sherman Act liability); [*Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 903-04 \(5th Cir. 1974\)](#) ("A Union can, without forfeiting the exemption, . . . act with a purpose to injure or even eliminate the business of an employer What makes the exemption disappear is sufficient proof of a *concerted* purpose, between the union and a favored employer.") (emphasis in original); [*Bodine Produce*, 494 F.2d at 550](#) ("Following *Hutcheson*, the issue became primarily one of whether there existed an improper combination with non-labor groups.").

Other cases had suggested that illegitimate purpose alone might bring a union outside the statutory exemption. See, e.g., [*Jacksonville Bulk Terminals*, 457 U.S. at 714](#) ("the protections of [the statutory labor exemption] do not extend to labor organizations when they cease to act as labor groups or when they enter into illegal combinations with non-labor groups in restraint of trade") (emphasis added); [*Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 & n.12 \(1st Cir. 1981\)](#) (although ILA didn't conspire with any non-union group, its boycott of Soviet cargo was not immunized by statutory exemption because it didn't relate to "legitimate union interest"), aff'd, [456 U.S. 212, 72 L. Ed. 2d 21, 102 S. Ct. 1656 \(1982\)](#); [*Bodine*, 494 F.2d at 558](#) (activities of non-labor group combination remain within statutory exemption because union was pursuing own interests).

traditional objectives of labor organizations. Thus, if a union forces employers to funnel money into a commercial enterprise from which the union derives profits; or if it forces the employer to hire the union president's spouse; or if a union is involved in illegal activities unrelated to its mission, such as dealing drugs or gambling, those would not be objectives falling within the union's legitimate interest. In such cases, the unions "cease to act as labor groups." *Jacksonville Bulk Terminals, 457 U.S. at 714.*

Of course, [HN9↑](#) the means employed by the union bear on the degree of scrutiny we will cast on the legitimacy of the union's interest. See *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 689-90, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965)* [**19] (plurality opinion) (restraints on the product market must be "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act"). Thus, where a union engages in activities normally associated with labor disputes, see, e.g., [29 U.S.C. § 104](#),⁷ these will be presumed to be in pursuit of the union's legitimate interest absent a very strong showing to the contrary. See, e.g., *Bodine Produce, 494 F.2d at 557* (group boycott and demands for recognition were "intimately related to wages, hours, and working conditions which . . . places it within the protection of national labor policy and exempt from the Sherman Act"). Where the [^{*}809] union's activities are farther afield, the scrutiny is more searching. See, e.g., *H.A. Artists, 451 U.S. at 722* (examining [**20] whether franchise fees are sufficiently related to legitimate union ends); *Carroll, 391 U.S. at 112* ("the price-list requirement is brought within the labor exemption under the finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader").

H.A. Artists casts a highly instructive light on this issue. The activity there - collection of franchise fees from the agents for the direct [**21] benefit of union members - was not a traditional union activity; it looked like the union may have been using its bargaining power with theatrical agents to generate a collateral source of revenue. The Court did not say the franchise fees violated the antitrust laws per se, but placed a substantial burden on the union to prove why this method of collecting revenues was not merely convenient but necessary. "Without the fees . . .," the Court reasoned, "the dues of [the union's] members would perhaps have to be increased to offset the loss of a general revenue source," but there was "no reason to believe that any of its legitimate interests would be affected." [451 U.S. at 722](#). The Court's concern thus seemed to be that the union may have funneled the market power granted to it by the labor laws into a money-making enterprise. That the money would then be used to finance labor-related activities was not, in the Court's view, exculpatory, unless the union could show it could not achieve those objectives some other way.

Many of the activities of which BE&K complains are traditional organizational activities, closely related to traditional [**22] union ends. For example, the unions allegedly "picketed and handbilled the plaintiffs' premises" after BE&K refused to "recognize them as the exclusive collective bargaining representative for the employees of BE&K and its subcontractors, and enter into a collective bargaining agreement with the defendants . . ." SAC Par. Par. 31(e)(i), (iii). And the unions encouraged work stoppages by unionized employees because of well-founded safety concerns at the project site. See Contra Costa SER 3-5, 316-40; 348-52.⁸

That these activities were not undertaken to unionize this particular employer but in order to eliminate non-union shops [**23] altogether by making an example of BE&K does not matter. See *Pennington, 381 U.S. at 666* ("a consequence of [legitimate] union activity may be to eliminate competition based on differences in [labor]

⁷ Congress has provided special protection for certain traditional union activities in [29 U.S.C. § 104](#), which, *inter alia*, prohibits restraining orders or injunctions where persons involved in a labor dispute engage in work stoppage, publicize the existence or facts of their dispute, assemble or organize to promote their interest in the dispute, advise or notify persons of their intent to do any of these acts, or advise, urge, cause or induce without fraud or violence any of these acts.

⁸ BE&K also vaguely alleged that there were violent pickets. But violence alone is not sufficient to turn protected conduct like labor picketing into an antitrust violation. See *Apex Hosiery Co. v. Leader, 310 U.S. 469, 513, 84 L. Ed. 1311, 60 S. Ct. 982 (1940)*; *Bodine Produce, 494 F.2d at 559*.

standards"); [*Bodine Produce, 494 F.2d at 549*](#) (unions' purpose is "to eliminate competition based on differences in labor standards"). [HN10](#) Encouraging the use of unionized labor is an objective well within the legitimate interests of labor unions and, so long as this end is pursued by activities normally associated with labor disputes, there's a strong presumption that the unions are protected from antitrust liability by the statutory labor exemption.

More troublesome are certain other activities allegedly undertaken by the unions, such as pressing frivolous lawsuits, automatically protesting against permits sought by BE&K, pressing for the passage of a regulatory measure and then agitating for its enforcement against BE&K - all allegedly to make an example of BE&K and discourage use of merit shop contractors by parties such as UPI. Taking a cue from *H.A. Artists*, we cannot say that pursuing legitimate [**24](#) labor goals through this kind of activity is per se exempted from the antitrust laws. See Durie & Lemley, 80 Cal. L. Rev. at 759-62 (using BE&K as case study). [HN11](#) The question here, as in *H.A. Artists*, is whether the non-traditional means were appropriate - in other words, whether the non-traditional means were not only lawful, but necessary because the goals could not be achieved through traditional tactics. And the burden to show this lies with the unions. See [*H.A. Artists, 451 U.S. at 722*](#).

[\[*810\]](#) Because the district court erroneously construed *Hutcheson*'s two-part test in the conjunctive, it did not allow discovery on this issue. In this, we conclude, the district court erred. Plaintiff was entitled to try to raise a triable issue of fact on this point by gathering evidence in support of its allegations.

///

That's not the end of the matter, however, because the unions raise another defense. [HN12](#) The Noerr-Pennington doctrine provides broad antitrust protection for those who "petition the government for a redress of grievances." [*City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S. Ct. 1344, 1353, 113 L. Ed. 2d 382 \(1991\)*](#) [**25](#) (quoting [*First Amendment*](#)). This protection extends to lobbying of government officials, [*Noerr Motor Freight, Inc., 365 U.S. at 144*](#), and petitioning of administrative agencies and courts, [*California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)*](#). In those contexts, immunity from antitrust liability is lost only if a party engages in "sham" petitioning.

BE&K argues that the unions engaged in a pattern of "automatic petitioning of governmental bodies . . . without regard to and regardless of the merits of said petitions." SAC Par. 27; see also *id.* at Par. 32(a) (alleging that unions filed "a series of overlapping, repetitive and sham lawsuits against plaintiffs, their employees and attorneys . . . with or without probable cause and regardless of the merits of the claims asserted therein") (emphasis added); *id.* at Par. 30(a) (describing published article by the Business Manager of the Contra Costa Building Trades Council describing a computer system through which "all permits for known non-union [**26](#) contractors would automatically be protested, regardless of size or amount of permit"). BE&K relies on *California Motor Transport Co. v. Trucking Unlimited*, where the Supreme Court held the allegations "that petitioners 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases,'" [*404 U.S. at 512*](#), were "on their face . . . within the 'sham' exception," *id. at 516*.

The unions counter that the Supreme Court's most recent pronouncement on the sham exception forecloses reliance on *California Motor Transport*. In [*Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 123 L. Ed. 2d 611, 113 S. Ct. 1920, 1928 \(1993\)*](#), the Court set out [HN13](#) a two-part test for sham litigation: First, the suit must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the baseless lawsuit must conceal "an attempt to interfere directly with the business relationships of a competitor." [**27](#) *Id. at 1928* (quoting [*Noerr, 365 U.S. at 144*](#)) (emphasis in original). The two parts of the test operate in succession: Only if the suit is found to be objectively baseless does the court proceed to examine the litigant's subjective intent. *Id.*; [*Liberty Lake Investments, Inc. v. Magnuson, 12 F.3d 155 \(9th Cir. 1993\)*](#). Under this two-prong test, the unions argue, BE&K must show that each individual suit the unions brought was objectively baseless - a task it abandoned by phrasing the question on appeal as follows: "Whether litigation *that is not objectively baseless* can still constitute 'sham litigation' sufficient to eliminate . . . Noerr-Pennington immunity." BE&K Opening Br. at 1 (emphasis added).

We're not persuaded that *Professional Real Estate Investors* effectively overrules *California Motor Transport*. Far from criticizing or limiting *California Motor Transport*, the *Professional Real Estate Investors* majority cited it with approval. The Court acknowledged that the cases dealt with different questions and noted that "nothing in *California Motor Transport* [**28] retreated from the[] principle[]" that "unprotected activity [must] lack objective reasonableness

... regardless of intent or purpose." [113 S. Ct. at 1926-27](#).

We reconcile these cases by reading them as applying to different situations. *Professional Real Estate Investors* provides [*811] a strict two-step analysis to assess whether a single action constitutes sham petitioning. This inquiry is essentially retrospective: [HN14](#)↑ If the suit turns out to have objective merit, the plaintiff can't proceed to inquire into subjective purposes, and the action is perforce not a sham. See [113 S. Ct. at 1928](#) & n.5.

California Motor Transport deals with the case where the defendant is accused of bringing a whole series of legal proceedings. Litigation is invariably costly, distracting and time-consuming; having to defend a whole series of such proceedings can inflict a crushing burden on a business. *California Motor Transport* thus recognized that [HN15](#)↑ the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action, and [*29] can serve as a very effective restraint on trade. When dealing with a series of lawsuits, the question is not whether any one of them has merit - some may turn out to, just as a matter of chance - but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. The inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?

The allegations in BE&K's complaint track the language of *California Motor Transport* and, if proven, would be sufficient to overcome the unions' *Noerr-Pennington* defense. The record, as developed to date, however, forecloses any possibility that BE&K could substantiate its claim. As noted, the fact that a small number in the series of lawsuits turn out not to be frivolous will not be fatal to a claim under *California Motor Transport*; even a broken clock is right twice a day. Here, however, fifteen of the twenty-nine lawsuits alleged by BE&K as part of the pattern of filings "without regard [**30] to the merits" have proven successful.⁹ The fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success. Given that the plaintiff has the burden in litigation, a batting average exceeding .500 cannot support BE&K's theory. BE&K therefore cannot sustain its burden of showing that the unions' conduct falls within the sham exception to the *Noerr-Pennington* doctrine.¹⁰

[**31] /V

Finally, BE&K challenges the sanctions awarded against it by the district court because of its persistent reincorporation of stricken parts of the complaint in the amended complaints. The district court found that BE&K "clearly violated the Court's . . . Order by repleading causes of action for which summary judgment was granted for defendants." Order of 8/24/89 at 9. BE&K responds that its repleading was required by our decision in *London v. Coopers & Lybrand*, [644 F.2d 811, 814 \(9th Cir. 1981\)](#), which held that [HN16](#)↑ "a plaintiff waives all causes of

⁹ The twenty-nine actions are listed in paragraph 32(b) of the Second Amended Complaint. BE&K lists separately seven suits in federal court and eight arbitration actions the unions filed against Eichleay Corporation. All were successful and ultimately enforced by the Third Circuit in [Eichleay Corp. v. International Assoc. of Bridge, Structural and Ornamental Iron Workers](#), [944 F.2d 1047 \(1991\)](#).

¹⁰ Before us, the unions have moved for sanctions on the ground that BE&K's continued prosecution of this issue after the Supreme Court decided *Professional Real Estate Investors* was frivolous. We obviously disagree.

action alleged in the original complaint which are not alleged in the amended complaint." Accord [*King v. Atiyeh, 814 F.2d 565, 567 \(9th Cir. 1987\)*](#).

BE&K's lawyers could find no case applying this rule where the amended complaint was filed after summary judgment rather than after a motion to dismiss. Nonetheless, they claim a good faith belief that [*812] they were required to replead the claims on which the court had granted summary judgment in order to preserve them for appeal.

We agree with the district court that [**HN17**](#) the *London* rule only applies to amended complaints that **[**32]** follow upon dismissal with leave to amend, and not to those that follow summary judgment. Nonetheless, we have found no case drawing this distinction. Counsel were not required to risk forfeiting their client's right to appeal in order to avoid sanctions. BE&K's reading of *London* is not frivolous and, in the absence of authority on point, counsel's decision to err on the side of caution cannot be faulted.

* * *

We conclude that [**HN18**](#) unions can forfeit the statutory labor exemption even without combining with non-labor groups if the union acts outside this legitimate self-interest. While most of the unions' activities alleged here were protected by the statutory labor exemption, the lawsuits, permit protests and lobbying activities allegedly designed to make an example of BE&K may not have been. The district court therefore erred by precluding discovery into whether these means were intimately related to legitimate union ends. Nonetheless, the error was harmless because these petitioning activities were protected from antitrust liability under the Noerr-Pennington doctrine. We also **[**33]** reverse the award of sanctions against BE&K.

AFFIRMED IN PART; REVERSED IN PART.

End of Document

Manufacturers Life Ins. Co. v. Superior Court

Court of Appeal of California, First Appellate District, Division Two

July 29, 1994, Decided

No. A052795, No. A055038.

Reporter

32 Cal. App. 4th 821 *; 33 Cal. Rptr. 2d 424 **; 1994 Cal. App. LEXIS 785 ***; 94 Cal. Daily Op. Service 5899; 94 Daily Journal DAR 10686

MANUFACTURERS LIFE INSURANCE COMPANY et al., Petitioners, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; WEIL INSURANCE AGENCY, INC., Real Party in Interest; WEIL INSURANCE AGENCY, INC., Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; MANUFACTURERS LIFE INSURANCE COMPANY et al., Real Parties in Interest.

Notice: NOT CITABLE - SUPERSEDED BY GRANT OF REVIEW

Subsequent History: [***1] Review Granted October 13, 1994 (S031022), Reported at: [1994 Cal. LEXIS 5393](#).

[Reprinted without change to permit tracking pending disposition on review by the Supreme Court. (See Preface to Cumulative Subsequent History Table. Previous cite [27 Cal. App. 4th 67](#).)] (See [10 Cal. 4th 257](#))

Prior History: Superior Court of the City and County of San Francisco, No. 920327, Alex J. Saldamando and Ira A. Brown, Jr., Judges.

Disposition: In No. A052795, let a peremptory writ of mandate issue directing the superior court to set aside its order of January 25, 1991, insofar as that order overruled defendants' demurrers to the third cause of action (Unruh Civil Rights Act) and the fourth cause of action ([Ins. Code, § 790.03, subd. \(c\)](#)), and to sustain those demurrers to said causes of action without leave to amend. The alternative writ is otherwise discharged.

Core Terms

Cartwright Act, remedies, cause of action, superseded, counts, review den, annuities, defendants', settlement, demurrers, practices, dictum, violations, implied repeal, regulation, preserves, Unfair, repeal, right of action, anti trust law, provisions, displace, italics, courts, unfair competition, antitrust, exemption, appears, Amend, cases

LexisNexis® Headnotes

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

[HN1](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The Cartwright Act states a general prohibition against conduct effecting a combination in restraint of trade, i.e., a "trust." [Cal. Bus. & Prof. Code, § 16720, 16721.5](#). One common species of a trust is a concerted refusal to deal with

other traders, or, as it is often called, the group boycott. The prohibition on such conduct extends to every type of business, including insurance.

Governments > Legislation > Interpretation

HN2 **Legislation, Interpretation**

Courts are not at liberty to impute a particular intention to the Legislature when nothing in the language of the statute implies such intention. The statute must be construed with reference to the whole system of law of which it is a part, so that each part may be harmonized and have effect. This rule applies even if the statutes to be harmonized appear in different codes. The different codes blend into each other and constitute a single statute for the purposes of statutory construction and legislative intent may be determined not only from an individual code but the whole body of law.

Evidence > Inferences & Presumptions > Presumptions > Conflicting Presumptions

Governments > Legislation > Expiration, Repeal & Suspension

HN3 **Presumptions, Conflicting Presumptions**

The law shuns repeals by implication. They are recognized only when there is no rational basis for harmonizing two potentially conflicting laws. The presumption against implied repeal is so strong that. To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together. There must be no possibility of concurrent operation. Implied repeal should not be found unless the later provision gives undebatable evidence of an intent to supersede the earlier.

Governments > Legislation > Interpretation

Governments > Legislation > Statutory Remedies & Rights

HN4 **Legislation, Interpretation**

Courts are particularly reluctant to view a statute as affording an exclusive remedy when it appears inadequate to redress the wrong toward which it is directed.

Governments > Legislation > Interpretation

HN5 **Legislation, Interpretation**

The rule of subsequent ratification applies to statutes which have previously been judicially construed.

Governments > Legislation > Statutory Remedies & Rights

HN6 **Legislation, Statutory Remedies & Rights**

Before a court may imply a right of action based on violations of a substantive statute it must appear that the plaintiff belongs to the class of persons the statute is intended to protect; a private remedy will appropriately further the purpose of the legislation; and such a remedy appears to be needed to assure the effectiveness of the statute.

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

Torts > Business Torts > Unfair Business Practices > General Overview

HN7 **Regulated Practices, Trade Practices & Unfair Competition**

The Unfair Competition Act defines as "unfair competition" any unlawful, unfair or fraudulent business act or practice. [Cal. Bus. & Prof. Code § 17200](#). It broadly authorizes any person to sue on behalf of the general public for injunctive and restitutionary relief based on such practices. [Cal. Bus. & Prof. Code § 17204, 17203](#). The act declares that unless otherwise expressly provided, its remedies are cumulative to each other and to the remedies or penalties available under all other laws of this state.

Counsel: Khourie, Crew & Jaeger and Townsend & Townsend, Khourie & Crew, Eugene Crew, Timothy F. Perry and Amy Slater for Real Party in Interest in A052795 and for Petitioner in A055038.

Daniel E. Lungren, Attorney General, Roderick Walston, Chief Assistant [***2] Attorney General, Sanford Gruskin, Assistant Attorney General, Thomas P. Dove and Jesse W. Markham, Jr., Deputy Attorneys General, as Amici Curiae on behalf of Petitioner in A055038 and Real Party in Interest in A052795.

Howard, Rice, Nemirovski, Canady, Robertson & Falk, Jerome B. Falk, Jr., H. Joseph Escher III, Pauline E. Calande and Theresa M. Beiner for Petitioners in A052795 and for Real Parties in Interest in A055038.

Buchalter, Nemer, Fields & Younger, Marcus M. Kaufman and Hugh A. Linstrom as Amici Curiae on behalf of Petitioners in A052795 and Real Parties in Interest in A055038.

No appearance for Respondent.

Judges: Opinion by Benson, J., * with Smith, Acting P. J., and Phelan, J., concurring.

Opinion by: BENSON, J.

Opinion

[*827] [**426] **BENSON, J.** * --Plaintiff Weil Insurance Agency, Inc. (Weil), brought this action for damages alleging primarily an unlawful boycott in the sale of annuities used to fund structured settlements of personal injury claims. Various defendants successfully demurred to the complaint, [***3] insofar as it asserted statutory causes of action, mainly on the ground that such causes of action are superseded by provisions of the Insurance Code. We have concluded that this contention is unsound and that plaintiff can state a cause of action under the Cartwright Act ([Bus. & Prof. Code, § 16720, 16721.5](#)). Plaintiff can also state a cause of action under the Unfair Competition Act ([Bus. & Prof. Code, § 17200- 17208](#)), insofar as the claim is predicated on a violation of the Cartwright Act. However, plaintiff cannot state a private cause of action under, or predicated on violations of, the Unfair Insurance Practices Act ([Ins. Code, § 790- 790.10](#)).

* Retired Associate Justice of the Court of Appeal, First District, sitting under assignment by the Chairperson of the Judicial Council.

* Retired Associate Justice of the Court of Appeal, First District, sitting under assignment by the Chairperson of the Judicial Council.

BACKGROUND

The action concerns plaintiff's attempt to engage in business as a broker of, and consultant in connection with, settlement annuities. A settlement annuity is an annuity purchased by a liability carrier to fund [***4] a structured settlement in a personal injury action. A structured settlement is one in which the injury claimant agrees to accept periodic payments (i.e., the proceeds of an annuity) rather than a single lump sum. It appears to be conceded by all concerned that such an annuity is classified in this state as a form of life insurance. (See [Ins. Code, § 101](#).)

The gist of the complaint's allegations contained in the four statutory counts with which we are now concerned is that defendants boycotted plaintiff's brokerage business because of opposition to plaintiff's conduct in providing injury claimants and their attorneys with information concerning the underlying features of settlement annuities, in particular their actual costs. Such disclosures were inimical to a plan defendants had formed to market settlement annuities as a way for liability carriers to settle injury claims below their cash settlement value. Therefore defendants schemed to prevent claimants from acquiring such information. They pursued this scheme, in part, by boycotting and disparaging plaintiff, as a broker and consultant supplying such information to injury claimants.

Plaintiff alleges it built a successful [***5] brokerage and consulting business based upon advising and educating claimants and their attorneys in connection with various aspects of settlement annuities including those which [*828] concerned defendants. This conduct, however, interfered with defendants' marketing scheme. Accordingly, defendants coerced or induced suppliers of annuities to stop doing business with plaintiff. As a result, plaintiff's settlement annuities business was destroyed.

[**427] The first four surviving counts ¹ allege violations of (1) [Business and Professions Code section 16720](#), part of the Cartwright Act; (2) [Business and Professions Code section 16721.5](#), also part of that act; (3) [Insurance Code section 790.03, subdivision \(c\)](#), part of the Unfair Insurance Practices Act; and (4) [Business and Professions Code section 17200 et seq.](#), the Unfair Competition Act (UCA). ² Three other counts sound in tort and are not at issue in these writ proceedings.

[***6] In the earliest ruling before us, the trial court sustained demurrers to the Cartwright Act claims (counts 1 and 2) with leave to amend. However, it concluded that plaintiff had stated causes of action under the UIPA and the UCA (counts 4 and 5). Defendants filed petition No. A052795 seeking a writ of mandate directing the trial court to sustain the demurrers to these counts. We issued an alternative writ.

¹ At oral argument plaintiff expressly abandoned a fifth statutory cause of action, based on the Unruh Civil Rights Act ([Civ. Code, § 51.5](#)). Our discussion of the complaint will, naturally, disregard this count. In light of plaintiff's abandonment, however, we will direct the trial court to sustain the demurrer to this count.

² [Insurance Code sections 790- 790.10](#) are often referred to as the "Unfair Practices Act." (See [Moradi-Shalal v. Fireman's Fund Ins. Companies \(1988\) 46 Cal.3d 287, 292 \[250 Cal.Rptr. 116, 758 P.2d 58\]](#); [Royal Globe Ins. Co. v. Superior Court \(1979\) 23 Cal.3d 880, 883 \[153 Cal.Rptr. 842, 592 P.2d 329\]](#), overruled in [Moradi-Shalal, supra, 46 Cal.3d at pp. 292, 304](#).) The Legislature, however, has mysteriously labeled this portion of the Insurance Code the "Unfair Trade Practices Act." ([Ins. Code, § 1620.2, subd. \(a\)](#), italics added.) It has given the name "Unfair Practices Act" to [sections 17000 through 17101 of the Business and Professions Code](#). ([Bus. & Prof. Code, § 17000](#)) The Supreme Court has used that name to refer not only to those sections but also to [section 17200 et seq.](#) ([Farmers Ins. Exchange v. Superior Court \(1992\) 2 Cal.4th 377, 395 \[6 Cal.Rptr.2d 487, 826 P.2d 730\]](#); [State of California ex rel. Van de Kamp v. Texaco, Inc. \(1988\) 46 Cal.3d 1147, 1169 \[252 Cal.Rptr. 221, 762 P.2d 385\]](#); cf. [Bank of the West v. Superior Court \(1992\) 2 Cal.4th 1254, 1260 \[10 Cal.Rptr.2d 538, 833 P.2d 545\]](#) [describing § 17200 as part of "Unfair Business Practices Act"].)

To avoid this confusion of terms we will adopt our own nomenclature for the affected statutes. Thus we refer to [Insurance Code sections 790 through 790.10](#) as the Unfair Insurance Practices Act (UIPA), [Business and Professions Code sections 17000 through 17101](#) as the Unfair Business Practices Act (UBPA), and [Business and Professions Code sections 17200 through 17208](#) as the Unfair Competition Act (UCA).

While that matter was pending, plaintiff amended the complaint and various defendants again demurred to the Cartwright Act counts. The trial court sustained those demurrers without leave to amend. Plaintiff filed petition No. A055038, seeking a writ which would direct the trial court to [*829] overrule the demurrers to those counts. We initially denied plaintiff's petition. Plaintiff sought review in the Supreme Court. That court granted the petition and retransferred the matter to us with directions to issue an alternative writ. We have done so.

I. CARTWRIGHT ACT

A. Introduction

HN1[[↑]] The Cartwright Act states a general prohibition against conduct effecting a combination in restraint of trade, i.e., a "trust." ([Bus. & Prof. Code, § 16720, 16721.5](#)) One common species [***7] of a trust is a "concerted refusal to deal with other traders, or, as it is often called, the group boycott." ([Marin County Bd. of Realtors, Inc. v. Palsson \(1976\) 16 Cal.3d 920, 931 \[130 Cal.Rptr. 1, 549 P.2d 833\]](#).) The prohibition on such conduct extends to "every type of business," including insurance. ([Speegle v. Board of Fire Underwriters \(1946\) 29 Cal.2d 34, 43, 44, 46 \[172 P.2d 867\]](#); see [Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d at pp. 927-928](#).)

At the same time, the UIPA prohibits acts of "boycott, coercion, or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance." ([Ins. Code, § 790.03, subd. \(c\) \[section 790.03\(c\)\]](#).) The major issue before us is whether the UIPA supplants the Cartwright Act so as to provide the sole basis by which unlawful conduct of the type alleged here may be subjected to legal restraint or may otherwise produce legal consequences.

In dealing with any problem of statutory effect, we begin and often end with the [**428] words of the statute. **HN2**[[↑]] "[C]ourts are not at liberty to impute a particular intention to the Legislature when nothing in the language [***8] of the statute implies such intention." ([Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist. \(1992\) 9 Cal.App.4th 644, 658 \[11 Cal.Rptr.2d 850\]](#), review den. [rejecting claim of implied exemption from general statute]; see [Code Civ. Proc., § 1858](#).) The statute "must be construed with reference to the whole system of law of which it is a part, so that each part may be harmonized and have effect." ([Yoffie v. Marin Hospital Dist. \(1987\) 193 Cal.App.3d 743, 748 \[238 Cal.Rptr. 502\]](#), review den.; see [Code Civ. Proc., § 1858](#).) "This rule applies even if the statutes to be harmonized appear in different codes." ([193 Cal.App.3d at p. 748](#).) "[T]he different codes blend into each other and constitute a single statute for the purposes of statutory construction and ... legislative intent may be determined not only from an individual code but the whole body of law. ([Pesce v. Dept. Alcoholic Bev. Control \(1958\) 51 Cal.2d 310, 312 \[333 P.2d 15\]](#); [American Friends Service \[*830\] Committee v. Procurier \(1973\) 33 Cal.App.3d 252, 260 \[109 Cal.Rptr. 22\]](#))." ([Winzler & Kelly v. Department of Industrial Relations \(1981\) 121 Cal. App.3d 120, 125 \[174 Cal.Rptr. 1***91 744\]](#).)

As explained in the following discussion, we have concluded that the UIPA expressly preserves existing remedies for unlawful conduct in the business of insurance. Such preservation is consistent with the history of the UIPA and with the interpretational presumption against the implied repeal of statutory remedies. A contrary holding is not warranted by case law or by any claimed legislative ratification. Accordingly, the demurrers to the Cartwright Act claims should have been overruled.

B. Express Preservation of Existing Remedies

The UIPA itself expresses an affirmative intention and expectation that it will preserve intact existing remedies for insurance industry misconduct. [Insurance Code section 790.09](#) states that the commissioner's issuance of a cease-and-desist order shall not obstruct or impede the imposition of "civil liability or criminal penalty under the laws of this State" arising from the same conduct.³

³ [Insurance Code section 790.09](#) provides: "No order to cease and desist issued under this article directed to any person or subsequent administrative or judicial proceeding to enforce the same shall in any way relieve or absolve such person from any administrative action against the license or certificate of such person, civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive."

[***10] Defendants have never offered a plausible interpretation of this statute consistent with the view that the UIPA supersedes the Cartwright Act. To be sure, the statute only refers to situations in which the commissioner issues a cease and desist order. Numerous absurdities would arise, however, if we concluded that the UIPA supersedes other laws in most cases, but preserves existing remedies when the commissioner issues such an order. This would make the commissioner's jurisdiction exclusive *only so long as it is not exercised*-a result which would appear to maximize the potential for jurisdictional conflict without creating any discernible benefit. Under such a regime, *mere administrative inaction* would cloak all manner of insurance misconduct with immunity. Furthermore, there would be no textual basis for withholding this immunity from criminal prosecutions as well, since [Insurance Code section 790.09](#) mentions criminal penalties in tandem with civil remedies.

At oral argument defendants' counsel appeared to agree that a cease-and-desist order could not have the effect of restoring liability from which an insurer had otherwise become immune. Yet if [Insurance Code section 790.09](#) [*831] does not have that effect it becomes meaningless under defendants' regime, for there is no "civil remedy" for the statute to preserve; any such remedy has been superseded by the UIPA as a whole. [Section 790.09](#) can only be given meaning by acknowledging a *subsisting* "civil liability ... under the laws of this State," to which violators are already subject when the commissioner issues a cease-and-desist order, and from which no such order "shall in any way relieve or absolve" them.

The history of the UIPA indicates that the original bill did not contain a provision preserving civil remedies, but only a section [**429] preserving the *commissioner's* powers under existing law.⁴ The first amended version of the bill and each successive version contained what is now [Insurance Code section 790.09](#). (Assem. Amend. to Assem. Bill No. 1530 (1959 Gen. Sess.) Apr. 8, 1959; see Assem. Amend. to *id.*, May 6, 1959; Sen. Amend. to Assem. Bill No. 1530 (1959 Gen. Sess.) June 11, 1959; Stats. 1959, ch. 1737, § 1, p. 4191.) This provision originated even earlier, however, in the 1947 "Chicago Draft" of the Model Unfair Insurance Practices Act proposed by the National Association [***12] of Insurance Commissioners (NAIC).⁵ Its pointed adoption in California may have emphasized a legislative perception that the UIPA effected little if any change in existing law. Indeed, at the time of the enactment of the UIPA the Legislative Analyst wrote that the bill would "make[] no substantive change in existing law." (Ops. Legis. Analyst, "Analysis of Assembly Bill No. 1530" (May 20, 1959) p. 1, *italics added*; exhibit 1 to Request for Judicial Notice filed Sept. 20, 1991, in A055038.)

[***13] If the Legislature wished to exempt the insurance industry from the Cartwright Act, it knew full well how to do so. The Insurance Code contains no fewer than four express exemptions of specified classes of insurance from other laws. ([Ins. Code, § 795.7](#) [senior citizens' health insurance]; 1860.1 [casualty insurance]; 11758 [workers' compensation]; 12414.26 [title insurance].) All of these statutes would be superfluous if defendants' view of the UIPA were correct. Yet two of them were enacted well after the effective date of that act. (Stats. 1973, ch. 1130, § 15, p. 2314 [[§ 12414.26](#)]; Stats. 1963, ch. 2055, § 1, p. 4301 [[§ 795.7](#)].)

Our view that the UIPA effects no displacement of general laws is consistent with the commissioner's interpretation of the UIPA, not only as [*832] amicus curiae in this proceeding but as adviser to the Governor and litigant in other proceedings. Beginning when the UIPA was initially adopted, the Department of Insurance repeatedly expressed the view that the act would have little or no effect on California law, but was enacted primarily, if not entirely, to conform to the actions of other states.⁶ Somewhat later, in *Royal Globe* [***14] [Ins. Co. v. Superior Court, supra](#),

⁴ "§ 790.11. The powers vested in the commissioner in this article shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive." (Assem. Bill No. 1530 (1959 Reg. Sess.) § 1; see now [Ins. Code, § 790.08](#).)

⁵ "No order of the Commissioner under this Act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state." (Exhibit B to Rep. of Joint Com. on Federal Legislation etc. (Jan. 24, 1947) § 8(d); Proceedings, 78th Ann. Sess., NAIC (1947) p. 398.)

⁶ In a memorandum to the Governor, the Chief Assistant Insurance Commissioner indicated that the UIPA had been enacted in all but one other state and that it was expected to add little if anything to California law. He concluded, "The Department is neither opposed to nor an advocate for this Bill. We know of nothing in the Bill which is detrimental to the public interest." (J.

23 Cal.3d at page 897 (dis. opn.), Justice Richardson quoted the commissioner as flatly asserting that the UIPA "does not supplant other remedies available under state law."

[***15] Defendants assert that we should give no particular weight to the commissioner's interpretation. But the department's long standing interpretation, first conveyed to the Governor at the time of the act's adoption and espoused with apparently perfect consistency since, reinforces our view that the statute simply cannot support the interpretation defendants urge upon us. (See Truta v. Avis Rent A Car System, Inc. (1987) 193 Cal.App.3d 802, 814 [238 Cal.Rptr. 806], review den.; Gay Law Students Assn. v. [**430] Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, 491 [156 Cal.Rptr. 14, 595 P.2d 592].)

Defendants' claim of implied supersession also runs afoul of the interpretational presumption against implied repeal. An "implied repeal" occurs " [w]hen a later statute supersedes or substantially modifies an earlier law but without expressly referring to it." (Department of Personnel Administration v. Superior Court (1992) 5 Cal.App.4th 155, 191 [6 Cal.Rptr.2d 714], review den., quoting Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41, 54 [69 Cal.Rptr. 480].) Under this definition, defendants' argument must be viewed as relying on [***16] an implied partial repeal of the Cartwright Act, i.e., a repeal insofar as that act would otherwise apply to the business of insurance.

HN3 [↑] "[T]he law shuns repeals by implication." (Board of Supervisors v. Lonergan (1980) 27 Cal.3d 855, 868 [167 Cal.Rptr. 820, 616 P.2d 802]; Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal.3d 245, 249 [279 [**833] Cal.Rptr. 325, 806 P.2d 1360].) They "are recognized only when there is *no rational basis* for harmonizing two potentially conflicting laws." (Fuentes v. Workers' Comp. Appeals Bd. (1976) 16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449], italics added.) "The presumption against implied repeal is so strong that, 'To overcome the presumption the two acts must be *irreconcilable, clearly repugnant*, and so inconsistent that the two *cannot* have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.' (Penziner v. West American Finance Co. [(1937) 10 Cal.2d 160, 176 [74 P.2d 252].) There must be '*no possibility of concurrent operation*.' (Hays v. Wood (1979) 25 Cal.3d 772, 784 ...) ... [I]mplied repeal [***17] should not be found unless '... the later provision gives *undebatable evidence* of an intent to supersede the earlier' (*Ibid.* ...)" (Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal.3d 408, 419-420 [261 Cal.Rptr. 384, 777 P.2d 157], first and second italics added; see Roberts v. City of Palmdale (1993) 5 Cal.4th 363, 379 [20 Cal.Rptr.2d 330, 853 P.2d 496].)⁷

[***18] Amici curiae California Chamber of Commerce et al. suggest that the presumption against implied repeal does not fully apply where a general statute overlaps an "administrative regulatory scheme." We find no support for this assertion in the case cited by amici curiae (Gordon v. New York Stock Exchange (1975) 422 U.S. 659 [45 L.Ed.2d 463, 95 S.Ct. 2598]), or in any other authority. At most, schemes regulating in minute detail may produce such pervasive conflicts with preexisting laws that the two cannot coexist and are, for that reason, mutually repugnant. (See I. E. Associates v. Safeco Title Ins. Co., supra, 39 Cal.3d at p. 285.) The mere presence of

Thomas, Mem. from Dept. of Ins. to Hon. Edmund G. Brown (June 30, 1959) pp. 1-2; exhibit 1 to Request for Judicial Notice filed Sept. 20, 1991, in A055038.)

A few years later, the same author wrote that the Model Act "had only a psychological application to states, such as New York and California[,] which already had extensive laws regulating practically every phase of the business [P] California and some of the other active states hesitated [to adopt the Act] because it was difficult to justify the expense and time expenditure of enacting and having in the books an Act which, for all practical purposes, was unnecessary." (J. Thomas, Interdepartmental Mem. (May 17, 1960) pp. 1-2; exhibit 3 to Request for Judicial Notice filed Sept. 20, 1991, in A055038.)

⁷ Statutes are also presumed to be consistent with the common law. (Dry Creek Valley Assn., Inc. v. Board of Supervisors (1977) 67 Cal.App.3d 839, 844 [135 Cal.Rptr. 726]; see Rojo v. Kliger (1990) 52 Cal.3d 65, 75 [276 Cal.Rptr. 130, 801 P.2d 373]; Lacher v. Superior Court (1991) 230 Cal.App.3d 1038, 1050 [281 Cal.Rptr. 640], review den.; cf. I. E. Associates v. Safeco Title Ins. Co. (1985) 39 Cal.3d 281, 285 [216 Cal.Rptr. 438, 702 P.2d 596].) In this regard, we observe that plaintiff's antitrust claims have their roots in common law. (See Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d at pp. 44, 45, 46.)

administrative regulation, no matter how broad the regulatory authority, does not in itself create an irreconcilable conflict or otherwise warrant an inference of intent to repeal.

Nor may defendants avoid the presumption against implied repeal by relying on different terminology. In particular we reject the claim that the UIPA presumptively provides an "exclusive remedy" for conduct covered by its terms. Repeal by any other name is still repeal, and a claim of implied repeal is viewed with skepticism no matter how it [***19] is characterized. (See *Physicians & Surgeons Laboratories, Inc. v. Department of Health Services (1992) 6 Cal.App.4th 968, 985-986 [8 Cal.Rptr.2d 565]*, review den. [applying presumption against implied repeal in rejecting claim that new regulation [*834] superseded existing ones]; *Rojo v. Kliger, supra, 52 Cal.3d at p. 80* [new statutory remedy deemed exclusive only if it exhibits "a legislative intent to displace all preexisting or alternative remedies"]; [**431] *McKee v. Bell-Carter Olive Co. (1986) 186 Cal.App.3d 1230, 1244-1245 [231 Cal.Rptr. 304]*, review den. [new statutory remedy generally regarded as cumulative, not exclusive]; *Hentzel v. Singer Co. (1982) 138 Cal.App.3d 290, 301 [188 Cal.Rptr. 159, 35 A.L.R.4th 1015]*; *Glaser v. Meyers (1982) 137 Cal.App.3d 770, 774 [187 Cal.Rptr. 242]*; 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 8, p. 39.)

We also observe a certain illogic in referring to the UIPA as providing an "exclusive remedy" when, as we conclude in the following section, it provides no private remedy at all. Nor does it empower the commissioner to redress private injuries. (See *Shernoff v. Superior Court (1975) 44 Cal.App.3d [***20] 406, 409 [118 Cal.Rptr. 680]* [commissioner's authority "is limited to restraint of future illegal conduct, and he possesses no authority to enter money judgments for past injuries"]; *Greenberg v. Equitable Life Assur. Society (1973) 34 Cal.App.3d 994, 1001 [110 Cal.Rptr. 470]* ["the sole disciplinary authority of the commissioner would be to issue a cease and desist order or obtain an injunction to restrain the illegal conduct"].) **HN4**⁸ Courts are particularly reluctant to view a statute as affording an exclusive remedy when it appears inadequate to redress the wrong toward which it is directed. (3 Witkin, *op. cit. supra*, § 9, p. 40; *Orloff v. Los Angeles Turf Club (1947) 30 Cal.2d 110, 113 [180 P.2d 321, 171 A.L.R. 913]*; see *Rojo v. Kliger, supra, 52 Cal.3d at pp. 80-82* [given various limitations, Fair Employment and Housing Act did not displace other remedies]; *Farmers Ins. Exchange v. Superior Court, supra, 2 Cal.4th 377, 391-392, fn. 9* [discretionary relief from "primary jurisdiction" doctrine where administrative remedy inadequate].) Here, the denial of a Cartwright Act claim would deprive plaintiff, and others in its position, of any [***21] remedy whatsoever for substantial damages resulting from concededly unlawful conduct. No justification for such a regime has been proposed, and we discern none.

Nothing in the UIPA suggests a purpose, unmistakable or otherwise, to displace existing state-law remedies. Rather the avowed purpose of the act was to displace federal law to the maximum extent possible in accordance with the offer of federal abstention embodied in the McCarran-Ferguson Act, *15 United States Code Annotated sections 1011-1015* (hereafter McCarran).⁸ (See *Karlin v. Zalta (1984) 154 Cal.App.3d 953, 966 [201 Cal.Rptr. 379]*; *American Internat. Group, Inc. v. Superior [**835] Court (1991) 234 Cal.App.3d 749, 756-758 [285 Cal.Rptr. 765]*, review den.) Under McCarran, federal law is inapplicable to insurance insofar as the state "generally proscribes" (or permits) certain conduct. (*Ohio AFL-CIO v. Insurance Rating Board (6th Cir. 1971) 451 F.2d 1178, 1181, 1184*, cert. den. *(1972) 409 U.S. 917 [34 L.Ed.2d 180, 93 S.Ct. 215]*; *California League of Ind. Ins. Pro. v. Aetna Cas. & S. Co. (N.D.Cal. 1959) 175 F.Supp. 857, 860*.) "The condition of state regulation is satisfied by 'a state [***22] regulatory scheme possess[ing] jurisdiction over the challenged practice.' " (*In re Insurance Antitrust Litigation (N.D.Cal. 1989) 723 F.Supp. 464, 474*, revd. on other grounds (9th Cir. 1991) *938 F.2d 919*; quoting *Feinstein v. Nettleshop Co. of Los Angeles (9th Cir. 1983) 714 F.2d 928, 933*, cert. den. *(1984) 466 U.S. 972 [80 L.Ed.2d 82, 104 S.Ct. 2346]*; brackets in Antitrust.) In other words, the mere assertion of state jurisdiction is sufficient to preclude the application of federal **antitrust law** under McCarran.

⁸ "The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, Seventy-ninth Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (*Ins. Code, § 790*.)

[***23] By enacting the UIPA, the Legislature explicitly accepted the federal offer of abstention on the broadest possible terms, using language designed to ensure that the entire insurance industry was brought under the state's jurisdiction. Nothing in the statute suggests an intent to shelter the insurance industry from *state laws*.⁹ (See *Rojo v. [**432] Kliger, supra, 52 Cal.3d at p. 81* [statute expressing intent to "occupy the field" displaced local regulation, not other state legislation].)

[***24] C. Case Law

Defendants' challenge to the Cartwright Act claims ultimately rests on a single sentence in *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 322 [70 Cal.Rptr. 849, 444 P.2d 481]*: "These statutes and the common law which once constituted 'the protection of the public against combinations in restraint of the insurance trade' (*Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 45 [172 P.2d 867]*) are now expressly superseded and contravened by the specific provisions of the Insurance Code." After scrutinizing this statement in context, we have concluded that *Chicago Title* is neither compelling nor persuasive authority for a rule holding the Cartwright Act superseded by the UIPA. [*836]

The quoted statement is dictum. Dictum is the "statement of a principle not necessary to the decision." (*People v. Squier (1993) 15 Cal.App.4th 235, 240 [18 Cal.Rptr.2d 536]*, internal quotation marks omitted.) The *holding* of *Chicago Title* is that the complaint failed to adequately plead the elements of a Cartwright Act cause of action, or any other claim. The court undertook a painstaking count-by-count analysis of the [***25] complaint, identifying numerous factual and legal deficiencies.¹⁰ If the Supreme Court had believed that the statutes cited by the plaintiffs (including the Cartwright Act) were superseded by the Insurance Code, there would have been no occasion for this discussion. But the court explicitly identified factual insufficiency as the "determinative" issue.¹¹

[***26] Dictum, of course, is not controlling authority even when it emanates from the Supreme Court. (*Grange Debris Box & Wrecking Co. v. Superior Court (1993) 16 Cal.App.4th 1349, 1358 [20 Cal.Rptr.2d 515]*; cf. *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937]*; *Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 734-735 [257 Cal.Rptr. 708, 771 P.2d 406]*.) Nonetheless it " 'carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic.' " (*Grange, supra, at p. 1358*; citations omitted.) *Chicago Title*'s statement concerning Insurance Code exclusivity satisfies neither of these requirements.

⁹ Amici curiae California Chamber of Commerce et al. describe the UIPA as "answer[ing] a concern expressed by the California Supreme Court" in *Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d 34, 45*. It is true that the court noted the absence of "special legislation" in this state against combinations in restraint of the insurance trade. But the only "concern" expressed in the cited passage is the potential effect of *denying enforcement of the Cartwright Act* in the insurance business. Certainly the court had no intention of prognosticating upon the hypothetical preemptive effect of statutes which did not then exist.

¹⁰ For example: "We are persuaded ... that appellants' vague and conclusionary pleadings fail to allege facts which might reasonably be construed to reveal a wrongful combination." (*Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal.2d at p. 315*.)

"[T]he factual allegations, as illustrated, fail in each instance to support the charge. Just as the earlier counts state facts insufficient to establish proscribed conduct on the parts of the alleged actors and thus cannot reach their purported conspirators, so the final counts charging antitrust infringements fall for similar reasons." (*69 Cal.2d at p. 323*, brackets original.)

"The allegation of boycott cannot be supported in this instance because everyone has the unrestricted right to select customers and sources of supply." (69 Cal.3d at p. 324.)

¹¹ "We must determine ... whether the superior court has jurisdiction to entertain an action based upon appellants' theories, or any of them, and, if so, whether appellants have stated a cause of action against any of the various named defendants. *The latter finding, which is determinative, is in the negative.*" (*Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at p. 313*, italics added.)

Like most of the opinion in *Chicago Title*, the quoted statement was authored by a Court of Appeal and "adopted" by the Supreme Court. ([69 Cal.2d at p. 311](#).) This in itself does not warrant lessened deference, but the statement also betrays a certain lack of authorial [**433] attention. To begin with, it confuses the Cartwright Act with the UBPA. The subject dictum is immediately preceded by a citation to [Business and Professions Code sections 17040- 17051](#). [***27] ([69 Cal.2d at p. 322](#).) These statutes are part of the UBPA and not, as the author of the dictum seemed to believe, the Cartwright Act. (See [*837] *ibid.*; cf. [id. at pp. 315, 322](#) [correctly defining "Cartwright Act"]; [Food & Agr. Code, § 66524, 65521](#) [same]; [Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d at p. 42](#) [same]; cf. [Bus. & Prof. Code, § 17000](#) [defining "Unfair Practices Act"].) ¹² The statement that "these statutes" have been superseded by the Insurance Code is thus burdened with a glaring anomaly.

Moreover, the court never identified *any* provision of the Insurance Code which "expressly superseded and contravened" *any* other statute. In particular, *the opinion never mentioned the UIPA*. Instead it cited certain provisions of the Insurance Code involving the regulation of *title insurance rates*. ([Chicago Title Ins. Co. v. Great Western Financial](#) [***28] [Corp., supra, 69 Cal.2d at pp. 322-323](#), citing [Ins. Code, § 12404- 12412](#).) None of those provisions could be said to "expressly abrogate" any other statute. Indeed, some five years later the Legislature *did* enact an express exemption covering some of the activities authorized by the cited portion of the code. ([Ins. Code, § 12414.26](#), added by Stats. 1973, ch. 1130, § 15, p. 2314.) The absence of such a statute in 1968 renders the *Chicago Title* dictum nearly unintelligible. Certainly the Legislature could not have given that case the meaning defendants do, or it would not have bothered to enact the cited statute.

The two paragraphs immediately following the subject dictum suggest that three of the complaint's eleven counts might intrude upon the commissioner's jurisdiction over title insurance rates. ([Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at pp. 322-323](#).) None of these three counts invoked the Cartwright Act. We note sharp historical and analytical distinctions between the regulation of rate-setting practices and the broad prohibitions in the UIPA. (See [Karlin v. Zalta, supra, 154 Cal.App.3d at pp. 973-977](#).)

The [***29] court thus seemed to say no more than that *part* of the complaint *might* intrude upon regulatory turf. Even with respect to that part of the complaint, however, the court ultimately returned to its *holding*, declaring that the factual allegations under scrutiny "fail in each instance to support the charge" and that the counts discussed to that point "state facts insufficient to establish proscribed conduct." ([Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at p. 323](#).) The court only then turned to claims having any bearing here, declaring that "... the final counts charging antitrust infringements fall for similar reasons." (*Ibid.*) On the next page, the Supreme Court itself inserted a declaration that the Cartwright Act counts failed "because plaintiffs' vague and conclusionary pleadings fail to allege sufficient facts." ([Id. at p. 324](#).)

It thus appears that the subject dictum means *at most* that the three claims concerning rates were repugnant, or potentially repugnant, to the "specific [*838] provisions of the Insurance Code" concerning rate setting. The allusion to the *Speegle* case, and thus apparently to the Cartwright [***30] Act, was not only dictum, but unsound. (See 9 Witkin, *op. cit. supra*, Appeal, § 795, p. 768, quoting [In re Johnson \(1949\) 92 Cal.App.2d 467, 470 \[207 P.2d 123\]](#).)

Indeed, if we held California's general antitrust laws superseded by the UIPA, we would stand alone in opposition to "general law throughout the country." (9 Witkin, *op. cit. supra*, Appeal, § 799, p. 772.) Every court to address the issue has concluded that its version of the UIPA does *not* displace general laws regulating unlawful trade restraints or unfair competition. ([Mead v. Burns \(1986\) 199 Conn. 651 \[509 A.2d 11, 18\]](#); [Dodd v. Commercial Union Ins. Co. \[**434\] \(1977\) 373 Mass. 72 \[365 N.E.2d 802, 803-806\]](#); [Fischer, etc. v. Forrest T. Jones & Co. \(Mo. 1979\) 586 S.W.2d 310](#) [general **antitrust law** applied to claimed conspiracy to withhold necessary information from potentially competing brokers]; St. ex rel. [Stratton v. Gurley Motor Co. \(1987\) 105 N.M. 803 \[737 P.2d 1180, 1182-1184\]](#); [Ray v. United Family Life Ins. Co. \(W.D.N.C. 1977\) 430 F.Supp. 1353, 1356-1357](#), approved in [Ellis v. Smith-Broadhurst, Inc. \(1980\) 48 N.C.App. 180 \[268 S.E.2d 271, 273\]](#); [Skinner v. Steele \[***31\] \(Tenn.App. 1987\) 730](#)

¹² Concerning our use of the term "Unfair Business Practices Act," see footnote 2, *ante*.

S.W.2d 335, 337-338 [purpose of act was to "oust federal antitrust jurisdiction as completely as possible," not to exempt insurance from other state statutes]; Attorney General of Tex. v. Allstate Ins. Co. (Tex.Civ.App. 1985) 687 S.W.2d 803, 805; Grams v. Boss (1980) 97 Wis.2d 332 [294 N.W.2d 473, 480].) Several of these courts expressly cited their states' respective versions of Insurance Code section 790.09. (See Mead v. Burns, supra, 509 A.2d at p. 17; Dodd v. Commercial Union Ins. Co., supra, 365 N.E.2d at p. 804; Skinner v. Steele, supra, 730 S.W.2d at p. 338; Attorney General of Tex. v. Allstate Ins. Co., supra, 687 S.W.2d at p. 805.)¹³

[***32] Defendants cite Greenberg v. Equitable Life Assur. Society, supra, 34 Cal.App.3d 994, where the court stated in a footnote that under *Chicago Title*, the Cartwright Act was "superseded and contravened" by the Insurance Code. (34 Cal.App.3d 994, 999, fn. 2.) However, the court explained *Chicago Title's* lengthy discussion of pleading issues by attributing it to tacit recognition of a private right of action under Insurance Code section 790.03. This reading of *Chicago Title* is untenable. As previously noted, the court in *Chicago Title* never mentioned the UIPA. The only sections of the Insurance [*839] Code cited in proximity to the "superseded and contravened" language dealt with title insurance rates. (69 Cal.2d at pp. 322-323.)

Furthermore, the premise on which the *Greenberg* interpretation of *Chicago Title* rests that the UIPA itself affords a private right of action has been flatly repudiated by the Supreme Court in Moradi-Shalal v. Fireman's Fund Ins. Companies, supra, 46 Cal.3d at page 304. While rejecting the attempt to predicate new rights of action on the UIPA, the court in *Moradi-Shalal* emphasized that existing remedies were unaffected [***33] by that act. It "urge[d] the Insurance Commissioner and the courts to continue to enforce the laws forbidding [unlawful insurance] practices to the full extent consistent with our opinion," and declared that "... the courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions, based on such traditional theories as fraud, infliction of emotional distress, and (as to the insured) either breach of contract or breach of the implied covenant of good faith and fair dealing." (Id. at pp. 304-305, italics added.)

Defendants assert that *Moradi-Shalal* recognizes only the preservation of *common law* claims, not those based on statute. Such a scheme, how ever, would fail to protect the putative exclusivity of regulatory jurisdiction, while forcing prospective plaintiffs, for no apparent reason, to attempt to conform their claims to obsolete pre-Cartwright forms. We are no more willing to attribute such bizarre distinctions to the Supreme Court than to the Legislature.

We understand the reference to the common law in *Moradi-Shalal* to rest on the premise that the cause of action asserted there--unfair claims [***34] practices--had no statutory basis outside the UIPA. Since the UIPA itself afforded no right of action, the plaintiff was relegated to such common law claims as might be available.

[**435] *Moradi-Shalal* marks a return to the fundamental principle that the UIPA, like all statutes, is to be applied according to its terms. Its language neither creates new private rights nor destroys old ones. This was the view of Justice Richardson, whose dissent in Royal Globe Ins. Co. v. Superior Court, supra, 23 Cal.3d at pages 895-898, was heavily cited in *Moradi-Shalal*. (46 Cal.3d at pp. 294-296.) He wrote that section 790.09 "preserves any preexisting civil or criminal liability which the insurer might face under other statutory or decisional law." (Royal Globe, supra, 23 Cal.3d at p. 893, some italics added; see id. at p. 896.) Similarly, the court in Shernoff v. Superior Court, supra, 44 Cal.App.3d 406, 409, acknowledged that Insurance Code section 790.09 "expressly reserves to litigants all civil and criminal remedies against [*840] persons who have violated the law." (Italics added.) These authorities are consistent with the language of the statute [***35] and with the *unanimous* view of courts elsewhere. Insofar as *Greenberg* reached a contrary conclusion, it must be considered unsound.

¹³ Apparently failing to discover this solid edifice of adverse sister-state authority, defendants cite only Chick's Auto Body v. State Farm, etc. (1979) 168 N.J.Super. 68 [401 A.2d 722], affd. (1980) 176 N.J.Super. 320 [423 A.2d 311]. That case is patently inapposite because it rests on an express exemption from that state's antitrust laws for the activities of insurers " 'to the extent that such activities are subject to regulation by the Commissioner of Insurance.' " (401 A.2d at p. 724, citing N.J. Stat. Ann. § 56:9-5, subd. (b)(4).) We can find no fault with the court's analysis. Nor can we find any guidance in it, for this state has no such statute.

For these reasons we are disinclined to follow later cases which, in dicta, uncritically accepted Greenberg's view of UIPA exclusivity. The court in [Liberty Transport Inc. v. Harry W. Gorst Co. \(1991\) 229 Cal.App.3d 417, 432 \[280 Cal.Rptr. 159\]](#), disapproved on another point in [Adams v. Murakami \(1991\) 54 Cal.3d 105, 116 \[284 Cal.Rptr. 318, 813 P.2d 1348\]](#), followed Greenberg because, due to the limited retroactivity of *Moradi-Shalal*, it had to apply the law in effect under *Royal Globe*. ([229 Cal.App.3d at p. 426, fn. 1.](#)) In [Karlin v. Zalta, supra, 154 Cal.App.3d 953,](#) the court ultimately concluded that the claims before it were not governed by the UIPA but by the McBride-Grunsky Insurance Regulatory Act. (At p. 979.) It had no occasion to reconsider Greenberg's reading of *Chicago Title* since it found both cases (along with *Royal Globe*) inapposite. (*Ibid.*)

We reject any notion that defendants' claim of exemption from the antitrust laws, however unsound, rests upon a settled rule and is therefore **[***36]** sheltered by the doctrine of *stare decisis*. (See 9 Witkin, *op. cit. supra*, Appeal, § 787, 795, pp. 758, 768-769.) *No court has ever held that insurance companies are immune from civil liability for antitrust injuries.* Rather, some cases--notably Greenberg and Royal Globe--mistook the statute under which such remedy should be pursued. Defendants seek to blend those discredited cases with the anomalous and misleading dictum in *Chicago Title*, and the corrective holding of *Moradi-Shalal*, to fashion a new immunity made of odds and ends and resting neither on statute nor principle but on misconstrued precedents. We decline to adopt such a course based on the false invocation of *stare decisis*.

D. Subsequent Ratification

Defendants contend that the Legislature ratified *Chicago Title* and Greenberg by amending the UIPA on several occasions "without altering the rule articulated in those opinions." This contention is unsound.

HN5  The rule of subsequent ratification applies to statutes which "have previously been judicially construed." ([Marina Point, Ltd. v. Wolfson \(1982\) 30 Cal.3d 721, 734 \[180 Cal.Rptr. 496, 640 P.2d 115, 30 A.L.R.4th \[***37\] 1161\]](#), cert. den., 459 U.S. 858 [74 L.Ed.2d 111, 103 S.Ct. 129].) (Italics added.) No case has construed the UIPA to bar Cartwright Act claims. The court in Greenberg merely cited *Chicago Title* for the proposition that unspecified provisions of the Insurance Code superseded the Cartwright Act. ([Greenberg v. I*841 Equitable Life Assur. Society, supra, 34 Cal.App.3d at p. 999, fn. 2](#), citing [Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal.2d at p. 322.](#)) As we have already noted, *Chicago Title* never so much as mentioned the UIPA. Ensuing cases repeated Greenberg's conclusion without seeking or offering any justification in the language of the UIPA or any other statute. Since none of the cases purports to "construe" a statute, an inference of legislative approval is wholly unwarranted.

Moreover, the holding in Greenberg, and then in Royal Globe, granted persons suffering antitrust injuries the substantial remedial equivalent of a Cartwright Act claim. These **[**436]** developments deprived the Legislature of any concrete reason to correct the courts' error. As the Supreme Court has acknowledged, the Legislature is concerned with "**[***38]** 'bottom-line' results" and is unlikely to fine-tune judicial decisions. ([Harris v. Capital Growth Investors XIV \(1991\) 52 Cal.3d 1142, 1157 \[278 Cal.Rptr. 614, 805 P.2d 873\].](#))

E. Proposition 103

The parties devote considerable attention to Proposition 103, by which the voters in 1988 substantially revised the McBride-Grunsky Insurance Regulatory Act of 1947, [Insurance Code sections 1850- 1860.3](#) (McBride Grunsky). (See Stats. 1947, ch. 805, § 1 et seq., p. 1896 et seq.) That act previously authorized casualty insurers to cooperate in rate setting and other matters in ways which might otherwise violate antitrust laws. (See Ins. Code, former § 1853-1853.8.) Proposition 103 repealed these provisions. It also added a declaration that the insurance industry "shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act ..., and the antitrust and unfair business practices laws" ([Ins. Code, § 1861.03, subd. \(a\).](#))

If [Insurance Code section 1861.03](#) stood by itself it would easily dispose of this case by explicitly subjecting defendants to state antitrust law. In context, however, it is unclear whether **[***39]** the statute reaches life insurance. McBride-Grunsky is by its terms inapplicable to life insurance. ([Ins. Code, § 1851, subd. \(b\).](#)) On the

other hand, if [section 1861.03](#) does not subject defendants to the Cartwright Act, Proposition 103 appears to be irrelevant to this case.

Defendants point out that the ballot summary concerning Proposition 103 stated that under then-existing law, insurance companies were "not subject to the state's antitrust laws." However, such a summary " 'cannot supply language which does not appear [on the face of the initiative].'" ([Sanford v. Garamendi \(1991\) 233 Cal.App.3d 1109, 1123 \[284 Cal.Rptr. 1*842\] 897](#), review den., brackets in original; quoting [Metropolitan Water District v. Dorff \(1979\) 98 Cal.App.3d 109, 115 \[159 Cal.Rptr. 211\]](#).) Obviously, it cannot supply language missing from existing laws. Indeed, courts are never bound by a legislative statement concerning the intent of a prior enactment. ([Droeger v. Friedman, Sloan & Ross \(1991\) 54 Cal.3d 26, 44, fn. 14 \[283 Cal.Rptr. 584, 812 P.2d 931\]](#).)

We conclude that the UIPA does not pose an impediment to plaintiff's claims under the Cartwright Act.

II. UNFAIR INSURANCE [***40] PRACTICES ACT

As previously noted, the Supreme Court has already determined that the UIPA does not create a private right of action for violations of its terms. ([Moradi-Shalal v. Fireman's Fund Ins. Companies, supra, 46 Cal.3d 287, 304](#).) Plaintiff asks us to distinguish that case on the ground that it involved unfair claims practices prohibited by [Insurance Code section 790.03, subdivision \(h\)](#), whereas this case involves an unlawful boycott in violation of subdivision (c). We see no basis, however, for such a distinction here.

Moradi-Shalal's conclusion that the UIPA does not create private rights of action appears fully applicable to any unlawful conduct in the business of insurance. The court in effect concluded that *Royal Globe* had misconstrued [Insurance Code section 790.09](#) to recognize a right of action, when in fact there was no textual basis for such a right. It may remain possible, at least theoretically, to judicially "imply" a right of action for some violations of the UIPA. Even were we to accept that theoretical possibility, however, the conditions for such an implied right of action are not satisfied here.

HN6 [↑] Before a court may imply a right [***41] of action based on violations of a substantive statute it must appear that (1) the plaintiff belongs to the class of persons the statute is intended to protect; (2) a private remedy will appropriately further the purpose of the legislation; and (3) such a remedy appears to be "needed to assure the effectiveness" of the statute. ([Rest.2d Torts, § 874A](#), quoted and applied in [Middlesex Ins. Co. v. Mann \(1981\) 124 Cal.App.3d 558, 570 \[177 Cal.Rptr. 495\]](#).)

[**437] In this case the third element of this test is not satisfied, if only because the Cartwright Act already grants plaintiff remedies which will "assure the effectiveness" of [section 790.03\(c\)](#). Accordingly, there is occasion to "imply" a private remedy under the UIPA and plaintiff has not stated a cause of action under that statute. (See [Arriaga v. Loma Linda University \(1992\) 10 Cal.App.4th 1556, 1564 \[13 Cal.Rptr.2d 619\]](#), review den.)

[*843] III. UNFAIR COMPETITION ACT

HN7 [↑] The UCA defines as "unfair competition" any "unlawful, unfair or fraudulent business act or practice." ([Bus. & Prof. Code, § 17200](#).) It broadly authorizes "any person" to sue on behalf of the general public for injunctive and restitutionary relief [***42] based on such practices. ([§ 17204, 17203](#).) The act declares that "[u]nless otherwise expressly provided," its remedies are "cumulative to each other and to the remedies or penalties available under all other laws of this state." (§ 17205.)

Plaintiff seeks to base UCA claims on both the Cartwright Act and the UIPA. The former theory is sound; the latter is not.

Violations of the Cartwright Act may constitute the predicate acts for a claim under the UCA. ([People v. National Association of Realtors \(1981\) 120 Cal.App.3d 459, 473-475 \[174 Cal.Rptr. 728\]](#), later appeal (1984) 155

Cal.App.3d 578 [202 Cal.Rptr. 243]; B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal.App.3d 1341, 1348, fn. 6 [235 Cal.Rptr. 228], review den.)

Existing authority, however, precludes reliance on the UCA to " 'plead around' absolute barriers to relief by relabeling the nature of the action as one brought under the unfair competition statute." (Rubin v. Green (1993) 4 Cal.4th 1187, 1201 [17 Cal.Rptr.2d 828, 847 P.2d 1044]) It is thus settled that the UCA cannot be utilized to confer private standing to enforce the UIPA. In Rubin v. Green, supra, the Supreme Court [***43] cited approvingly three decisions which, as the court put it, "held that the bar on ... implied private causes of action, imposed by our decision in *Moradi-Shalal* ... may not be circumvented by recasting the action as one under Business and Professions Code section 17200." (Id. at p. 1202, citing Safeco Ins. Co. v. Superior Court (1990) 216 Cal.App.3d 1491 [265 Cal.Rptr. 585]; Maler v. Superior Court (1990) 220 Cal.App.3d 1592 [270 Cal.Rptr. 222], review den.; Industrial Indemnity Co. v. Superior Court (1989) 209 Cal.App.3d 1093 [257 Cal.Rptr. 655]; see also American Internat. Group, Inc. v. Superior Court, supra, 234 Cal.App.3d at p. 768.)

It follows that the demurrs to the UCA cause of action were properly overruled because plaintiff has stated a viable cause of action predicated on defendant's alleged violations of the Cartwright Act. Plaintiff may pursue the equitable remedies afforded by the UCA insofar as those allegations are borne out in further proceedings. Plaintiff may not pursue remedies under the UCA based upon posited violations of the UIPA.

DISPOSITION

In No. A052795, let a peremptory writ of mandate issue directing the superior [***44] court to set aside its order of January 25, 1991, insofar as that order [*844] overruled defendants' demurrs to the third cause of action (Unruh Civil Rights Act) and the fourth cause of action (Ins. Code, § 790.03, subd. (c)), and to sustain those demurrs to said causes of action without leave to amend. The alternative writ is otherwise discharged.

In No. A055038, let a peremptory writ of mandate issue directing the superior court to set aside its order of July 23, 1991, insofar as that order sustained defendants' demurrs to the first and second causes of action (Cartwright Act) and to overrule the demurrs to those causes of action.

The alternative writ is otherwise discharged.

Smith, Acting P. J., and Phelan, J., concurred.

End of Document



Roy B. Taylor Sales v. Hollymatic Corp.

United States Court of Appeals for the Fifth Circuit

August 3, 1994, Decided

No. 93-1211

Reporter

28 F.3d 1379 *; 1994 U.S. App. LEXIS 19888 **; 1994-2 Trade Cas. (CCH) P70,672

ROY B. TAYLOR SALES, INC., Plaintiff-Appellee, versus HOLLYMATIC CORPORATION, Defendant-Appellant.

Subsequent History: [\[**1\]](#) As Corrected. Second Correction. Certiorari Denied January 9, 1995, Reported at: [1995 U.S. LEXIS 464](#).

Prior History: Appeal from the United States District Court for the Northern District of Texas.

Disposition: REVERSED.

Core Terms

machines, customers, dealer, tie, consumers, manufacturer, products, competitors, prices, sales, tying arrangement, purchasing, market power, monopoly, selling, Sherman Act, buy, distributors, antitrust, possessed, restrain

LexisNexis® Headnotes

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

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

HN1[] Price Fixing & Restraints of Trade, Tying Arrangements

An illegal tie may be shown by proof that the tying firm exerts sufficient control over the tying market to have a likely anticompetitive effect on the tied market. This is sometimes described as "per se" illegality.

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

[**HN2**](#) [down] **Tying Arrangements, Defenses**

Unlike other "per se" illegal arrangements, not every refusal to sell two products separately can be said to restrain competition. Rather, there must be proof, as a threshold matter, of a substantial potential for impact on competition in order to justify per se condemnation of a tie.

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

[**HN3**](#) [down] **Price Fixing & Restraints of Trade, Tying Arrangements**

Vertical non-price restraint is an agreement between entities at different levels of distribution that does not purport to affect prices charged for goods. Vertical non-price restraints are generally not subject to per se analysis. Ties, however, are often instrumental to suspect vertical non-price restraints. They may enable an entity to circumvent laws proscribing anticompetitive or other behavior. Thus, for example, a firm may avoid price regulation, may engage in price discrimination, or may undertake predatory pricing through the use of a tie.

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

[**HN4**](#) [down] **Price Fixing & Restraints of Trade, Tying Arrangements**

Tying arrangements that threaten competition come in myriad industries. A seller of machines, for example, may condition the availability of parts on the purchase of repair services, or a hospital may provide care only if patients use particular anesthesiologists. Their common ground is ultimate consumers have to buy one product or service to receive another, removing them from the market for the tied good.

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

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

Where only dealers are subject to a tie, competitors do not lose a segment of the tied market if there are genuine alternative paths to consumers. Ties that constrain only dealers create relatively little danger to competition, provided consumers may purchase the two goods separately.

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

[**HN6**](#) [down] **Price Fixing & Restraints of Trade, Tying Arrangements**

Where a dealer serves as an intermediate link in a distribution chain, if one manufacturer is foreclosed from selling to a dealer because of an arrangement, it is likely going to find another way to take its product to market, providing a profit potential continues to exist. In such a case, there is no ultimate foreclosure to the consumer of a choice of goods. In other more traditional tying arrangements there is an ultimate foreclosure of choice to the ultimate

consumer. Thus, a foreclosure of choice to an ultimate consumer appears to be the principal key to a tie that is illegal per se. No such foreclosure occurs or is threatened in a typical line forcing situation.

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

HN7 Price Fixing & Restraints of Trade, Tying Arrangements

A tie that does not foreclose choice by the ultimate consumer is nevertheless illegal if it has an actual adverse effect on competition.

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

HN8 Price Fixing & Restraints of Trade, Tying Arrangements

The fact that consumers might buy goods because of convenience created by a tie does not suffice as evidence of an unreasonable restraint on competition. Speculation about anticompetitive effects is not enough.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN9 Sherman Act, Claims

The elements necessary to establish a conspiracy in violation of S.1 of the Sherman Act are (1) joint or concerted action between more than one party (2) that unreasonably restrains trade (3) in interstate or foreign commerce.

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

Evidence > Burdens of Proof > General Overview

HN10 Regulated Practices, Price Fixing & Restraints of Trade

To establish an unreasonable restraint of trade, a plaintiff's proof must include evidence from which the jury could find that defendant's actions had a substantially adverse impact on competition. Assessing such an impact requires an inquiry into the conditions of the relevant market.

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

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

HN11 Market Definition, Relevant Market

An assessment of market power requires a definition of the relevant market. This definition requires two limiting terms: characterization of the product itself and characterization of the relevant geographic market in which that product is sold.

Counsel: For Plaintiff-Appellee: Donald M. Hunt, Gary M. Bellair, CARR, FOUTS, HUNT, CRAIG, TERRILL & WOLFE, Lubbock, TX.

For Defendant-Appellant: John H. Ehrlich, SACHNOFF & WEAVER, Chicago, IL. Lawrence R. Levin, LEVIN & FUNKHOUSER, LTD, Chicago, IL.

Judges: Before GOLDBERG, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

Opinion by: HIGGINBOTHAM

Opinion

[*1380] HIGGINBOTHAM, Circuit Judge:

Roy B. Taylor Sales, Inc., a dealer of hamburger patty machines and patty paper, sues its supplier, Hollymatic Corporation, a manufacturer of patty products. Taylor alleges that Hollymatic violated the antitrust laws by requiring Taylor to purchase patty paper as a condition to purchasing patty machines. A Texas jury found that Hollymatic illegally tied the products in violation of § 1 of the Sherman Act¹ and § 3 of the Clayton Act,² [*1381] that Hollymatic conspired with its paper supplier, Bomarko Corporation, to restrain trade in violation of § 2 of the Sherman Act,³ and that Hollymatic established or attempted to establish a monopoly in violation of § 1 of the Sherman Act.⁴ The district court trebled the jury's award and entered judgment for Taylor. We find insufficient evidence of either a threat or injury to competition and reverse.

I.

Roy B. Taylor Sales, Inc. sells and services food handling equipment and supplies. Hollymatic Corporation manufactures food processing equipment and related products, including machines for making hamburger patties and paper for handling hamburger patties. Bomarko Corporation supplies Hollymatic with paper goods to make patty paper.

Taylor began selling Hollymatic products in 1970 subject to an agreement requiring Taylor not to stock or sell the merchandise of Hollymatic's competitors. The parties forged a different agreement in 1979 requiring Taylor to make its "best efforts" to promote, sell, and service the full line of Hollymatic products. Taylor alleges that while the 1979 agreement did not formally prohibit Taylor from selling products other than Hollymatic's, Hollymatic informally maintained the requirement. Taylor claims that Hollymatic required Taylor, and other dealers and distributors, to purchase exclusively Hollymatic patty paper as a condition for the purchase of patty machines.

[*1381] According to Taylor, Hollymatic and Bomarko conspired to resist a decline in patty paper prices. Taylor suggests that Hollymatic could sustain prices above the market rate for patty paper because dealers and consumers were dependent on Hollymatic for supplying and servicing its patty machines. Taylor further alleges that Hollymatic offered rebates on patty paper only to some customers. Taylor sought such rebates, but claims that it

¹ [15 U.S.C. § 1](#).

² [15 U.S.C. § 14](#).

³ [15 U.S.C. § 2](#).

⁴ [15 U.S.C. § 1](#).

received only a slight reduction in price in one instance and that it was refused any reduction in others.⁵ After selling no patty paper other than Hollymatic's for years, Taylor began in 1988 to purchase a substitute.

Hollymatic officials confronted Taylor's president, Ronnie Taylor, in 1990 about Taylor's decreased demand for Hollymatic's product. When Mr. Taylor acknowledged purchasing patty [**4] paper from another company, Hollymatic expressed an intention to end the relationship with Taylor. Taylor offered to sell only Hollymatic patty paper in the future and Hollymatic responded with a new agreement that would result in probation rather than termination. After the parties failed to come to terms over the amount of patty paper that Taylor would purchase each month, Hollymatic severed relations.

Taylor adduced statements made by Hollymatic executives indicating a policy of requiring dealers to purchase exclusively Hollymatic patty paper as a condition for purchasing other Hollymatic products, and evincing an intent to make an example of Taylor for failing to abide by that requirement. Hollymatic in turn acknowledges that its dissatisfaction with Taylor stemmed in part from Taylor's decision not to purchase patty paper from Hollymatic beginning in 1988. Indeed, Hollymatic also accuses Taylor of purchasing "counterfeit" Hollymatic spare parts. Nevertheless, Hollymatic claims that its termination in 1990 of its relationship with Taylor was not a response to Taylor selling the products of other companies.

Taylor seeks damages for the loss of profits it suffered in the five years [**5] subsequent to Hollymatic's cessation of business relations. Taylor asserted at trial that it could have made profits of approximately \$ 80,000 each year for a present value total of roughly \$ 370,000. Taylor acknowledged that, after a lapse of five years, it could recover from the loss of Hollymatic's product line. The jury found for Taylor and awarded \$ 296,662.60 in damages, trebled as a matter of law to \$ 889,987.80.⁶

[**6] [*1382] II.

Hollymatic argues that insufficient evidence supported the jury's finding of a tie. Hollymatic also contends that the evidence did not support the conclusion that Hollymatic threatened, or caused the kind of harm, to competition necessary for an antitrust violation. We do not pause over the question of whether there was a tie because we conclude that, assuming there was one, Taylor failed to prove that it was illegal.⁷ We also conclude that the insufficiency of the evidence is fatal to Taylor's alternative theories.

⁵ Taylor does not claim that Hollymatic used the tie to effect price discrimination in violation of the Robinson-Patman Act. See [15 U.S.C. § 13, et seq.](#)

⁶ Hollymatic appeals the district court's denial of its motion to dismiss Taylor's complaint, its motion for summary judgment, its motion for judgment as a matter of law, its renewed motion for judgment as a matter of law, and its motion for a new trial. See [Fed. R. Civ. P. 12\(b\)\(6\)](#), [56](#), [50\(a\)](#), [50\(b\)](#), and [59\(a\)](#). As a jury ruled on the evidence at trial, we need not consider whether at any given stage Hollymatic might have prevailed. We assess instead the propriety of the jury verdict. See, e.g., [Bealmer v. Texaco, Inc.](#), [427 F.2d 885, 886](#) (9th Cir.), cert. denied, [400 U.S. 926, 27 L. Ed. 2d 185, 91 S. Ct. 187](#) (1970) (refusing to entertain appeal of denial of summary judgment after final resolution of case). Compare [Savarin Corporation v. National Bank of Pakistan](#), [447 F.2d 727, 732 \(2d Cir. 1971\)](#) (entertaining challenge of denial of summary judgment after final resolution of case) with [Glaros v. H.H. Robertson Co.](#), [797 F.2d 1564, 1573 \(Fed.Cir. 1986\)](#) (criticizing Savarin and refusing to entertain appeal of denial of summary judgment).

Hollymatic provides support only for the contention that it may appeal the district court's denial of its [Rule 12\(b\)\(6\)](#) and summary judgment motions. Hollymatic cites two cases in which we entertained interlocutory appeals of, respectively, denial of a motion for summary judgment and of a motion under [Rule 12\(b\)\(6\)](#), both requested on the basis of qualified immunity. See [Spann v. Rainey](#), [987 F.2d 1110, 1112 \(5th Cir. 1993\)](#); [Jackson v. Beaumont Police Dept.](#), [958 F.2d 616, 618 \(5th Cir. 1992\)](#). Qualified immunity provides a rare exception to the general rule that we will not address on appeal a denial of summary judgment. Hollymatic offers no grounds for entertaining appeals of motions denied prior to the jury's verdict in cases that do not involve qualified immunity.

⁷ We review the evidence to determine whether a reasonable jury could have found for Taylor. [R.D. Imports Ryno Indus. v. Mazda Distrib.](#), [807 F.2d 1222, 1224](#) (5th Cir.), cert. denied, [484 U.S. 818, 98 L. Ed. 2d 38, 108 S. Ct. 75](#) (1987). Hollymatic

[**7] A.

Taylor does not claim that Hollymatic limited the choices available to consumers. Hollymatic required Taylor, a dealer, to provide only Hollymatic patty paper. Customers purchasing patty machines from Taylor remained free to buy paper elsewhere. Only Taylor was bound. As we examine Taylor's complaints about this restriction, we must keep in mind that the antitrust laws protect competition, not competitors.⁸ Ultimately, the consumer is the beneficiary.

HN1 [↑] An illegal tie may be [**8] shown by proof that the tying firm "exerts sufficient control over the tying market . . . to have a likely anticompetitive effect on the tied market."⁹ This is sometimes described as "per se" illegality. This label makes sense when describing price fixing or horizontal market division, but is confusing here because it insists on an inquiry into market power as a predicate to "per se" illegality.

This odd use of the term "per se" is descriptive of a rule located between a per se and a rule of reason inquiry. The best that can be said for it is that it reflects the intermediate danger tying arrangements pose to the market: **HN2** [↑] unlike other "per se" illegal arrangements, "not every refusal to sell two products separately can be said to restrain [**9] competition."¹⁰ Rather, there must be proof "as a threshold matter . . . [of] a substantial potential for impact on competition in order to justify *per se* condemnation" of a tie.¹¹

The alleged tying arrangement between Hollymatic and Taylor was a form of [*1383] **HN3** [↑] vertical nonprice restraint, that is, "an agreement between entities at different levels of distribution that does not purport to affect prices charged for . . . goods."¹² [**11] Vertical nonprice restraints are generally not subject to per se analysis.¹³ Ties, however, are often instrumental to suspect vertical nonprice restraints. They may enable an entity to circumvent laws proscribing anticompetitive [**10] or other behavior. Thus, for example, a firm may avoid price regulation,¹⁴ may engage in price discrimination,¹⁵ or may undertake predatory pricing through the use of a tie.¹⁶

also contends that the district court committed reversible error in instructing the jury. We do not address this issue because we rule for Hollymatic on other grounds.

⁸ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962) (antitrust laws provide "protection of competition, not competitors."); *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977) (antitrust jurisprudence deals primarily with "market considerations," not with "restrictions on the autonomy of independent businessmen").

⁹ *Breaux Bros. Farms v. Teche Sugar Co.*, 21 F.3d 83, 86 (5th Cir. 1994) (citing *Jefferson Parish Hops. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-18, 26-29, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)).

¹⁰ See *Jefferson Parish*, 466 U.S. at 11. See also *id. at 32-44* (O'Connor, J., concurring) (arguing that per se analysis should not apply to tying arrangements).

¹¹ *Id. at 16*.

¹² *Smith Machinery Co., Inc. v. Hesston Corp.*, 878 F.2d 1290, 1295 (10th Cir. 1989), cert. denied, 493 U.S. 1073, 107 L. Ed. 2d 1026, 110 S. Ct. 1119 (1990) (footnote and citations omitted). See *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.") (footnote omitted).

¹³ See *Business Electronics*, 485 U.S. at 735-36 ("Economic analysis supports the view, and no precedent opposes it, that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels.").

¹⁴ See *Jefferson Parish*, 466 U.S. at 36 n.4 (O'Connor, J., concurring) ("In a regulated industry a firm with market power may be unable to extract a supercompetitive profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated, tied products or services.") (citations omitted).

Taylor does not allege that Hollymatic pursued any of these specific ends. More generally, a firm may leverage power in one market into additional power in another. This leveraging can force existing competitors from the tied market or create barriers to entry.¹⁷ **[**12]** As the tied market weakens, the tying firm's market power may increase.¹⁸

HN4 Tying arrangements that threaten competition come in myriad industries. A seller of machines, for example, may condition the availability of parts on the purchase of repair services,¹⁹ or a hospital may provide care only if patients use particular anesthesiologists.²⁰ Their common ground is ultimate consumers have to buy one product or service to receive another, removing them from the market for the tied good.

HN5 Where, however, *only* dealers are subject to a tie,²¹ competitors do not lose a segment of the tied market if there are **[**13]** genuine alternative paths to consumers. Here, assuming a tie was in place, customers could purchase Hollymatic patty machines from Taylor and purchase patty paper elsewhere. Alternative distributors did not have to be robust to compete; they merely had to exist. Companies entering the patty paper market could attract Taylor's customers provided they charged a lower price, produced a superior product, or both. Ties that constrain only dealers, like the one Taylor complains of, create relatively little danger to competition,²² provided consumers may purchase the two goods separately.²³

[14] [*1384]** As we have suggested, mechanical inquiry into the fit of per se categories has little utility in exposing any injurious impact upon competition of ties. Inquiry into Hollymatic's power in the tying market tells us nothing of other patty paper distributors. Ronnie Taylor testified, "Patty paper was I guess always available through paper companies if customers called and asked paper companies about it." When asked if paper "was always available to end users in [his] territory," he replied, "Yes." The evidence suggests that competition in patty paper sales was fierce, and that Hollymatic was dependent on Taylor's aggressive efforts to move its product. Under these circumstances, any obligation on Taylor to carry only Hollymatic's patty paper would have enhanced competition by ensuring Hollymatic access to the market. Yet assessing Hollymatic's power in the *tying* market, and whether there was a not insubstantial amount of commerce in the tied market, would not uncover this fact.

¹⁵ See *id.* ("Tying may . . . help the seller engage in price discrimination by 'metering' the buyer's use of the tying product.") (citations omitted).

¹⁶ See generally E. Thomas Sullivan and Jeffrey L. Harrison, *Understanding Antitrust and Its Economic Implications* 183-85 (2d ed. 1994) (summarizing rationales for proscribing tying arrangements).

¹⁷ See [Jefferson Parish, 466 U.S. at 14-15](#); *id. at 36-40* (O'Connor, J., concurring).

¹⁸ See generally Louis Kaplow, *Extension of Monopoly Power Through Leverage*, [85 Colum. L. Rev. 515, 520-25 \(1985\)](#).

¹⁹ See [Eastman Kodak Co. v. Image Technical Servs., 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#).

²⁰ See [Jefferson Parish, 466 U.S. at 4-5](#).

²¹ Cf. [Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 \(1969\)](#) (consumers and intermediaries in line of distribution required to purchase home to receive loans on favorable terms) and [429 U.S. 610, 97 S. Ct. 861, 51 L. Ed. 2d 80 \(1977\)](#) (same case).

²² See Phillip E. Areeda, [Antitrust Law](#), P 1725b, at 316-18 (1991).

²³ Where the only competition for an item occurs at the level of the distributor, a tie at that level may foreclose part of the market to competitors in the tied good. If a company sells canning machinery on condition that a canner also buys cans, the consumers will purchase the two as a single product. Competitors will not be able to sell cans directly to consumers of canned goods. See *id.* P 1725b, at 317 (providing this example). A similar situation arose in [United States v. Loew's, Inc., 371 U.S. 38, 9 L. Ed. 2d 11, 83 S. Ct. 97 \(1962\)](#). Distributors conditioned purchases by television stations of desirable films on purchases of undesirable films. Consumers received transmission of both.

The present situation is analogous to others in which a manufacturer requires a dealer to carry one product in its line to receive another. The Tenth Circuit addressed these circumstances in *Smith Machinery Co. v. Hesston Corp.*,²⁴ in which a manufacturer conditioned sale of farm equipment to a dealer on purchase of its tractors.²⁵ The court acknowledged that the arrangement constituted a tie but focused on the risk posed to competition rather than on labels.²⁶ Although free to sell tractors from other manufacturers, the dealer complained that in light of its limited resources purchase of one tractor would foreclose purchase of another. The court responded that this claim "even if true" would not affect its analysis.²⁷ The court reasoned:

HN6 [↑] Where a dealer is serving as an intermediate link in a distribution chain, [**16] if one manufacturer is foreclosed from selling to a dealer because of [an] arrangement, it is likely going to find another way to take its product to market, providing a profit potential continues to exist. In such a case, there is no ultimate foreclosure to the consumer of a choice of goods. In other more traditional tying arrangements there is an ultimate foreclosure of choice to the ultimate consumer. Thus, a foreclosure of choice to an ultimate consumer appears to be the principal key to a tie that is illegal per se. No such foreclosure occurs or is threatened in a typical line forcing situation such as that at bar.²⁸

[**17] We find the same to be true of the alleged tie in the present case. The claimed arrangement between Hollymatic and Taylor constituted a vertical nonprice restraint between a manufacturer and a dealer on goods that the dealer offered to customers independently. It was in effect an exclusive-dealing agreement in which Hollymatic required Taylor to sell Hollymatic, and only Hollymatic, patty paper.²⁹ [**18] Such an arrangement is not the sort "that would always or almost always tend to restrict competition and decrease [*1385] output."³⁰ It does not threaten competition to the same extent as tying arrangements that bind ultimate customers. Regardless of whether the restraint also constitutes a tying arrangement, subjecting it to *per se* analysis would ignore our directive from the Court.³¹ The measure of legality of relationships between manufacturers and independent distributors must not be

²⁴ [878 F.2d 1290 \(10th Cir. 1989\)](#), cert. denied, [493 U.S. 1073](#), [107 L. Ed. 2d 1026](#), [110 S. Ct. 1119](#) (1990).

²⁵ [Id. at 1291-92](#).

²⁶ See [id. at 1295](#) (citing [Jefferson Parish](#), [466 U.S. at 21 n.34](#)).

²⁷ [Id. at 1296](#).

²⁸ [Id. at 1297](#) (citing [Jefferson Parish](#), [466 U.S. at 5](#); [Loew's Inc.](#), [371 U.S. at 40](#); [Northern Pac. Ry. Co. v. United States](#), [356 U.S. 1](#), [3, 2 L. Ed. 2d 545](#), [78 S. Ct. 514](#) (1958); [International Salt Co. v. United States](#), [332 U.S. 392](#), [393](#), [92 L. Ed. 20](#), [68 S. Ct. 12](#) (1947)).

²⁹ See [Roland Machinery Co. v. Dresser Indus., Inc.](#), [749 F.2d 380](#), [393-94](#) (7th Cir. 1984) (Posner, J.) (arguing that exclusive-dealing agreements which require dealer to sell only manufacturers product line are assessed under "Rule of Reason") (cited with approval in [Stitt Spark Plug Co. v. Champion Spark Plug Co.](#), [840 F.2d 1253](#), [1258 n.18](#) (5th Cir.), cert. denied, [488 U.S. 890](#), [102 L. Ed. 2d 214](#), [109 S. Ct. 224](#) (1988)).

³⁰ [Business Electronics](#), [485 U.S. at 723](#) (quoting [Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.](#), [472 U.S. 284](#), [289-290](#), [86 L. Ed. 2d 202](#), [105 S. Ct. 2613](#) (1985) (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))) (internal quotation marks omitted).

³¹ [485 U.S. at 726](#) ("departure from [the rule-of-reason] standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions") (interpreting [Monsanto Co. v. Spray-Rite Service Corp.](#), [465 U.S. 752](#), [79 L. Ed. 2d 775](#), [104 S. Ct. 1464](#) (1984) and [Continental T.V., Inc. v. GTE Sylvania, Inc.](#), [433 U.S. 36](#), [53 L. Ed. 2d 568](#), [97 S. Ct. 2549](#) (1977)); [Jefferson Parish](#), [466 U.S. at 21 n.34](#) ("The legality of . . . conduct depends on its competitive consequences, not on whether it can be labeled 'tying.' If the competitive consequences of [an] arrangement are not those to which the *per se* rule is addressed, then it should not be condemned irrespective of its label.").

allowed to turn on labels. Here the language of per se violations has little utility in the absence of price fixing or horizontal division of markets.

[**19] B.

HN7 The alleged tie was nevertheless illegal if it "had an actual adverse effect on competition." ³² Taylor's dissatisfaction resulted from competition in the patty paper market. Taylor claims to have lost business because Hollymatic's prices made it difficult for Taylor to compete. Ronnie Taylor, a member of the family that owned and ran Taylor Sales, Inc., complained that because of Hollymatic's high patty paper prices, Taylor "began to lose customers to competition." These signs of a healthy market in patty paper belie Taylor's claim that the tying arrangement harmed patty paper purchasers.

Taylor's claim was, ironically, that it lost customers to competitors; that the consumer's response to the asserted high price of paper was to purchase paper elsewhere. Now, this may have cost Taylor money--injured it--but it [**20] belies its claim of injury to competition. Purchasers of machines from Taylor simply found a different seller. Taylor's incentive to accept Hollymatic's requirement that Taylor buy its paper rested on the profitability of its machine sales.

Taylor characterizes as a threat to competition the possibility that patty paper purchasers bought Hollymatic's paper at supracompetitive prices. The claim is:

A customer receiving Hollymatic machines, parts, and service from a Hollymatic dealer may well buy the Hollymatic Patty Paper because of that "common tie" to the dealer. After all, that is more convenient to the customer than seeking an independent source who could sell patty paper at a competitive price.

The Supreme Court rejected such reasoning in *Jefferson Parish*. **HN8** The fact that consumers *might* buy goods because of convenience created by a tie does not suffice as evidence of an unreasonable restraint on competition. ³³ Speculation about anticompetitive effects is not enough. Taylor had to show that the tie "as it actually operated in the market" ³⁴ harmed competition. The record does not indicate that consumers continued to purchase Hollymatic patty paper at prices [**21] above the market.

III.

This lack of evidence also defeats Taylor's claim of conspiracy under [§ 1](#) of the Sherman Act. ³⁵ Taylor claims that Hollymatic conspired with Bomarko to restrain trade. **HN9** The elements of a [§ 1](#) claim are: "1) joint or concerted action between more than one party [[*1386](#)] that 2) unreasonably restrains trade in 3) interstate or foreign commerce." ³⁶

[**22] Taylor's claim of conspiracy is derivative of its tying claim. Taylor contended in its closing argument:

Hollymatic was being pressured to buy more paper than it could sell. Hollymatic in turn was putting pressure on its dealers. Why? Because Bomarko and Hollymatic together could not compete in a free market--not and both of them take double digit profits they were taking.

³² *Breaux Brothers*, 21 F.3d at 86 (quoting [Jefferson Parish, 466 U.S. at 31](#)) (internal quotation marks omitted).

³³ [Id. at 29-30](#).

³⁴ [Id. at 29](#).

³⁵ [15 U.S.C. § 1](#).

³⁶ [R.D. Imports Ryno Indus. v. Mazda Distrib., 807 F.2d 1222, 1224](#) (5th Cir.), cert. denied, **484 U.S. 818, 98 L. Ed. 2d 38, 108 S. Ct. 75 (1987)**. Hollymatic argues that it and Bomarko were not distinct entities and that the two therefore could not have conspired. We need not address this issue because Taylor's [§ 1](#) claim fails in any case.

Taylor implicated Bomarko in the alleged tying arrangement. This accusation is consistent with the request for damages resulting from termination, which followed from enforcement of the claimed tie. The conspiracy claim fails because the underlying tie was not illegal--the concert of action did not unreasonably restrain trade.

HN10[³⁷] To establish an unreasonable restraint of trade, Taylor's proof must have included evidence from which the jury could have found that Hollymatic's actions had a "substantially adverse" impact on competition.³⁷ [**23] Assessing such an impact requires an inquiry into the conditions of the relevant market.³⁸ As we explained, Taylor provided no basis for concluding that Hollymatic's actions affected competition adversely.

Taylor also contends that Hollymatic amassed monopoly power in the patty machine market in violation of [§ 2](#) of the Sherman Act. Market power is the ability to control prices or exclude competition.³⁹ [**24] **HN11**[³⁹] An assessment of market power requires a definition of the relevant market.⁴⁰ This definition requires two limiting terms: "characterization of the product itself and characterization of the relevant geographic market in which that product is sold."⁴¹ Hollymatic complains that Taylor has never defined the market in which Hollymatic wields power. We agree.

Taylor argues that its sales area drew the geographical lines for the market in which Hollymatic possessed power. We find that Taylor failed to offer evidence to support a jury finding that Hollymatic possessed the requisite power in the market for any particular product in Taylor's sales area. We assume without deciding that the sales area was the appropriate geographical area for measuring competition.⁴²

[**25] Taylor's claim of monopoly tracks its allegation of a tying arrangement. Taylor describes the "Hollymatic Patty Machine" as the tying product, suggesting that Hollymatic amassed power in the market for this machine and its competitors. However, Hollymatic contends, and the record confirms, that the "Hollymatic Patty Machine" does not exist. Taylor's arguments on appeal and the record indicate that Taylor may have intended to refer to either of two possible product markets: the market for the Super Patty Machine, a particularly successful Hollymatic product; or the market for all Hollymatic patty machines.⁴³ Taylor failed to prove that [*1387] Hollymatic possessed monopoly power in either market, or that the Super Patty Machine and comparable machines were sufficiently insulated from competition to constitute a distinct market.

³⁷ *Id.*

³⁸ *Id.* ("Market considerations provide the objective benchmark for the measurement of competitive impact.") (citing [Continental T.V., Inc. v. GTE Sylvania, Inc.](#), 433 U.S. 36, 54, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977); [Daniels v. All Steel Equipment, Inc.](#), 590 F.2d 111, 113 (5th Cir. 1979)).

³⁹ See [Spectrofuge Corp. v. Beckman Instruments, Inc.](#), 575 F.2d 256, 276 (5th Cir. 1978), cert. denied, 440 U.S. 939, 59 L. Ed. 2d 499, 99 S. Ct. 1289 (1979).

⁴⁰ See [Seidenstein v. National Medical Enterprises, Inc.](#), 769 F.2d 1100, 1106 (5th Cir. 1985) ("Before a defendant's market power can be determined, the relevant market must be defined.").

⁴¹ [R.D. Imports](#), 807 F.2d at 1224-25.

⁴² See [id. at 1225](#) ("the geographic dimensions of [a] market encompass[] the areas of effective competition in which the particular product or its reasonably interchangeable substitutes are traded") (quoting [Hornsby Oil Co. v. Champion Spark Plug Co.](#), 714 F.2d 1384, 1393 (5th Cir. 1983)) (internal quotation marks omitted).

⁴³ Taylor relies on the pretrial order and the jury instructions as identifying the "Hollymatic Patty Machine." The pretrial order, however, describes "Hollymatic hamburger patty machines as a tying product and Hollymatic patty paper as a tied product." The district court's instruction to the jury similarly explains, "Taylor has alleged that Hollymatic established a tying arrangement whereby Hollymatic sold Taylor hamburger patty machines (the tying product) conditioned on Taylor purchasing Hollymatic patty paper (the tied product)." These sources indicate that the jury addressed Hollymatic's power in the market for patty machines in general, not in the market for the Super Patty Machine.

[**26] We could assume that Taylor meant the tying market to include Hollymatic's Super Patty Machine and comparable machines sold by other manufacturers. Taylor at times adopts this approach, noting that all parties to the litigation acknowledge the prominent place in the market of the Super Patty Machine. This testimony sometimes suggested that the Super Patty Machine was a "lead product," "flagship product," "market leader," "dominant," and "premiere product." Beyond these general descriptions of market success, however, Taylor provides little basis for a conclusion that Hollymatic possessed monopoly power in the market consisting of the Super Patty Machine and its competitors. Taylor does not specify the percentage of sales attributable to the Super Patty Machine in any market⁴⁴ [**27] or provide any basis for even a rough estimate of such a figure, nor does Taylor recount information useful in assessing the strength and scope of competition in the market for the Super Patty Machine.⁴⁵

Significantly, there was inadequate evidence about other products available to Hollymatic's customers. Hollymatic faced competition, for example, from manufacturers of machines that produced patties on a larger scale than the Super Patty Machine. In the mid-1980s, Wendy's, at the time a faithful customer of Hollymatic, abandoned the Super Patty Machine for larger machines sold by a rival of Hollymatic, which Wendy's stationed in central locations. This event indicates that larger machines provided a viable alternative to the Super Patty Machine, at least in a substantial segment of the market. It also increased the supply of used Super Patty Machines, which decreased sales in new machines. Ronnie Taylor acknowledged selling used Super Patty Machines at a profit equal to or greater than the profits available from selling new machines, both before and after Hollymatic terminated his dealership. These competitive threats to the Super Patty Machine are at odds with a claim of market power--a [**28] concept that is not interchangeable with market success. Despite these disquieting features of the market, Taylor provided no evidence of the size and strength of the market in used machines or the incidence of customers changing to larger machines. This illustrates the absence of focus upon market power. Without such basic information about the market, the jury had no means to assess the market power the Super Patty Machine conferred on Hollymatic.

Taylor may have meant the term "Hollymatic Patty Machine" to refer, instead, to all of Hollymatic's patty machines. Thus, Roy B. Taylor, a member of the family that owns Taylor, was asked, "And you are saying that the continuation of being able to sell the Super Machine is what forced you to sell paper at a higher price at that amount of profit?" He responded, "No, sir. I am saying the failure to sell all their patty machines." The jury did not, however, have a sufficient basis for concluding that Hollymatic possessed monopoly power in the market for all patty machines.

Taylor relies on only two statements that Roy B. Taylor made about Hollymatic's presence in the patty machine market. First, Mr. Taylor provided "just an estimate" that [**29] in 1979 of the 200 to 300 patty machines in his territory, no more than five were manufactured by Hollymatic's competitors. This statement casts little light on Hollymatic's [*1388] power in the patty machine market at relevant times. Second, Mr. Taylor responded to the question, "What percentage or share of the patty machine market to the customers that you were serving, customer base that you were serving, did you have as a Hollymatic distributor?" Mr. Taylor answered, "Conservatively I think I could honestly say 95 percent of the business." While Mr. Taylor acknowledged that there were machines competitive with Hollymatic's products, he claimed that they did not "perform efficiently" and that "some" of them were no longer on the market. Mr. Taylor did not define his "patty machine market" such as the range of patty machines that the market included. Testimony indicated that Hollymatic was "the industry leader" in certain lines of patty machines but, as we explained, did not suggest the share of the market Hollymatic controlled or the nature of the competition Hollymatic faced. The evidence indicates that customers could purchase used machines or replace several small patty machines with [**30] a single large one sold by a competitor of Hollymatic.

⁴⁴ See, e.g., [Jefferson Parish, 466 U.S. at 26-28](#) (identifying percentage of particular market garnered by tying product); [Breaux Bros., 21 F.3d at 86-88](#) (same).

⁴⁵ See [Jefferson Parish, 466 U.S. at 26-28](#).

Importantly, there was no evidence of significant barriers to entry. In the absence of barriers to entry such as a capital intensive industry or patents, a competitor waiting on the sidelines can deny those in the market the power to control prices--because current players cannot exclude competition.

In short, Taylor offered no direct evidence that Hollymatic could control prices in the market for patty machines or for any particular machine, and offered no evidence of Hollymatic's share in either market. As a result, "there was simply no evidence from which the jury could begin to measure [Hollymatic's] power to control prices or to exclude competition in [any] relevant market." ⁴⁶ Taylor offers no reason to believe that Hollymatic acquired or maintained, ⁴⁷ **[**31]** or threatened to acquire or maintain, ⁴⁸ a monopoly. Taylor cannot succeed under [§ 2](#) of the Sherman Act.

Finally, Taylor claims that Hollymatic's actions violated the Texas Free Enterprise and Antitrust Act. ⁴⁹ The **[**32]** parties agree that Texas [**antitrust law**](#) mirrors federal law as applied to the present case. ⁵⁰ State law does not offer an alternative grounds for affirmance.

REVERSED.

End of Document

⁴⁶ [Spectrofuge Corp., 575 F.2d at 286](#).

⁴⁷ [Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 487 \(5th Cir. 1984\)](#) ("The offense of monopoly under [§ 2](#) [of the Sherman Act] has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.") (quoting [United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#)) (internal quotation marks omitted).

⁴⁸ [732 F.2d at 490](#) ("The offense of attempted monopolization has two elements: (1) specific intent to accomplish the illegal result; and (2) a dangerous probability that the attempt to monopolize the relevant market will be successful.") (quoting [Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc., 679 F.2d 516, 525 \(5th Cir. 1982\)](#), cert. denied, [460 U.S. 1082, 103 S. Ct. 1770, 76 L. Ed. 2d 344 \(1983\)](#); [Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276](#) (5th Cir. 1978), cert. denied, [440 U.S. 939, 59 L. Ed. 2d 499, 99 S. Ct. 1289 \(1979\)](#)) (internal quotation marks omitted). See [Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884, 892 \(1993\)](#) (requiring proof of dangerous probability of monopoly for attempt claim under [§ 2](#) of Sherman Act).

⁴⁹ [Tex. Bus. & Comm. Code Ann. § 15.05\(a\)-\(c\)](#).

⁵⁰ See [Caller-Times Pub. Co. v. Triad Communications, Inc., 826 S.W.2d 576, 580 \(Tex. 1992\)](#).

Staudinger v. Educational Comm'n for Foreign Medical Graduates

United States District Court for the Southern District of New York

August 3, 1994, Decided ; August 3, 1994, Filed

92 Civ. 8071 (JFK)

Reporter

1994 U.S. Dist. LEXIS 10580 *; 1994 WL 410875

ROBERT STAUDINGER, Plaintiff, v. EDUCATIONAL COMMISSION FOR FOREIGN MEDICAL GRADUATES and MARIE SHAFFRON, Defendants.

Core Terms

antitrust, monopolization, residency program, certification, motion to dismiss, Sherman Act, Graduates

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[Motions to Dismiss, Failure to State Claim

A motion to dismiss for failure to state a claim should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Plaintiff must show that the complaint contains allegations concerning all the material elements necessary to sustain recovery under a viable legal theory.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN2[Estoppel, Collateral Estoppel

Giving leave to amend a pleading in order to insert what may be a viable claim does not make that claim automatically acceptable upon submission of the amendment and does not collaterally estop a defendant from seeking to dismiss the amended claim.

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

Business & Corporate Compliance > ... > Healthcare Law > Business Administration & Organization > Accreditation

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3 **Conspiracy to Monopolize, Sherman Act**

Under the Sherman Act, [15 U.S.C.S. §2](#), a claimant must allege (1) monopolization; (2) attempted monopolization; or (3) conspiracy to monopolize.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN4 **Antitrust & Trade Law, Sherman Act**

A monopolization claim requires claimant to demonstrate monopolizing conduct coupled with monopoly power in the relevant market. Monopolizing conduct is the willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN5 **Antitrust & Trade Law, Sherman Act**

To have standing to sue under [§2](#) of the Sherman Act, [15 U.S.C.S. §2](#), plaintiff must allege an "antitrust injury"--an injury the antitrust laws were intended to prevent against business or property.

Counsel: [*1] For Plaintiff: SVI ZER, ESQ., New York, New York, Of Counsel: Svi Zer.

For Defendants: DAVIS, SCOTT, WEBER & EDWARDS, P.C., New York, New York, Of Counsel: George F. Hritz, John Houston Pope. LAPIN, HUBBARD & JOHNSON, P.C., Denver, Colorado, Of Counsel: Bruce A. Hubbard.

Judges: KEENAN

Opinion by: JOHN F. KEENAN

Opinion

OPINION AND ORDER**JOHN F. KEENAN, United States District Judge:**

Before the Court is the motion of defendants, Educational Commission for Foreign Medical Graduates ("ECFMG") and Marie Shaffron (collectively, "Defendants"), to dismiss the "Complaint Dated Nov. 93" ("Third Amended Complaint"), for failure to state a claim pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). Jurisdiction in this court is based upon [15 U.S.C. §§ 15](#) and [26](#) and [28 U.S.C. § 1337](#). For the reasons set forth below, Defendants' motion is granted.

BACKGROUND

The Court assumes familiarity with the Opinion and Order of former United States District Judge Louis J. Freeh dated April 27, 1993 ("Judge Freeh's Opinion").¹ Robert Staudinger ("Plaintiff") is a citizen of Austria, a permanent resident of the United States living in New York County, and [*2] a graduate of the medical school of the University of Innsbruck, Austria. He is currently employed by New York Medical College as a research associate. See Zer Affirmation, Exhibit B P 2. He wishes to enter a hospital residency program in the United States. His applications, however, have been rejected because he has not been certified by defendant ECFMG.

ECFMG is a non-profit organization that assesses the qualifications of Foreign Medical Graduates ("FMGs") applying to residency programs in the United States. See Defendants' Memorandum in Support at 3-4. Defendant Marie Shaffron is a Vice President of Operations at ECFMG. See Zer Affirmation, Exhibit B P 4. Hospitals apparently rely upon the ECFMG certification process when choosing candidates for their residency programs. See Zer Affirmation, Exhibit B P 27. The process as is relevant to this case entails [*3] medical science and English exams, as well as proof that the FMG is licensed to practice in the country in which he received his medical degree. See Defendants' Memorandum in Support at 3-4.

In the present case, ECFMG has denied Plaintiff's application for certification because he is not licensed to practice medicine in Austria.² Austria has not licensed plaintiff because he never completed a hospital residency program in Austria. See Defendants' Memorandum in Support at 4. His failure to obtain a license to practice in Austria has led the ECFMG to deny his certification request, which has effectively precluded plaintiff from gaining admission to residency programs in the United States.

Plaintiff initiated this lawsuit in November of 1992, alleging, under various theories of liability, that ECFMG's standards for certification are arbitrary. The complaint has been amended three times,³ and all claims have been dismissed except for those [*4] addressed here.

DISCUSSION

¹ This case was reassigned to the Court following Judge Freeh's appointment to the position of Director of the Federal Bureau of Investigations.

² Plaintiff has passed ECFMG's medical science and English exams.

³ Plaintiff's original complaint was filed in November of 1992. On January 5, 1993, Plaintiff filed an Amended Complaint. In June of 1993, Plaintiff sought permission to file a Second Amended Complaint. The proposed Second Amended Complaint was submitted to the Court on July 29, 1993, but never formally filed with the Clerk of the Court. Following the reassignment of the case, this Third Amended Complaint, different in content from the proposed Second Amended Complaint, was filed on November 30, 1993. See Defendants' Memorandum in Support at 2-3.

Plaintiff's Third Amended Complaint states claims against Defendants for (1) violations of [Section 2](#) of the Sherman Act, [15 U.S.C. § 2](#); (2) violations of [New York's Executive Law § 296](#); and (3) tortious interference with contract. Defendants have moved to dismiss the entire complaint for failure to state a claim.

HN1[] A motion to dismiss for failure to state a claim should be granted only if it appears beyond [*5] doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. See [Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#). Plaintiff must show that the Complaint contains allegations concerning all the material elements necessary to sustain recovery under a viable legal theory. [Connolly v. Havens, 763 F. Supp. 6, 9 \(S.D.N.Y. 1991\)](#).

A. Collateral Estoppel

Plaintiff contends that under the doctrine of collateral estoppel, Defendants are precluded from relitigating the existence of an antitrust claim, based upon Judge Freeh's Opinion and this Court's "confirmation" of that antitrust claim at a status conference held on October 18, 1993. See Zer Affirmation PP 2-3. At the status conference, the Court did not "confirm" the existence of this claim, but rather supported the Opinion of Judge Freeh. In his Opinion, Judge Freeh stated that the Court could not find, at the initial stage of the litigation, that ECFMG did not exercise monopoly power in the market for testing of FMGs or that competition in that market had not been [*6] reduced as a result of ECFMG's conduct. See Judge Freeh's Opinion at 14. Significantly, at that time, plaintiff had not yet pled the antitrust theory that is the subject of this motion; instead, Plaintiff first raised this theory in his opposition to Defendants' motion to dismiss the original complaint. [Id. at 13](#). Thus, in his Opinion, Judge Freeh stated that a claim may exist if it was properly pleaded. He did not state that a claim actually existed. **HN2**[] Giving leave to amend a pleading in order to insert what may be a viable claim does not make that claim automatically acceptable upon submission of the amendment and does not collaterally estop a defendant from seeking to dismiss the amended claim.

B. Sherman Act Violations

HN3[] Under the Sherman Act, a claimant must allege (1) monopolization; (2) attempted monopolization; or (3) conspiracy to monopolize. See [Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Servs., 746 F. Supp. 320, 326 \(S.D.N.Y. 1990\)](#). Plaintiff has attempted to assert that Defendants have monopolized the market for certification of FMGs and that ECFMG and the Accreditation Council for Graduate [*7] Medical Education ("ACGME") have "teamed up" to adopt the ECFMG's standards. **HN4**[] A monopolization claim requires claimant to:

demonstrate monopolizing conduct coupled with monopoly power in the relevant market. Monopolizing conduct is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [\[Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 \(2d Cir. 1990\)\]](#) (quoting [United States v. Grinnell, 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#)). This requirement is in keeping with the cornerstone precept of [antitrust law](#) that competition is to be safeguarded, not competitors.

See [Broadcast Music, 746 F. Supp. at 326](#) (citations omitted).

As the claimant must demonstrate conduct in a particular market, it follows that the plaintiff must first define that market. In this case, Plaintiff has made repeated attempts to define the relevant market. In the Third Amended Complaint, plaintiff has defined the market [*8] as "the annual 'pool' of FMGs (Foreign Medical Graduates) candidates [sic] for residency positions available for residency programs administered in New York state, from which New York Hospitals draw their candidates for residency each year when they fill up the vacant positions." See Zer Affirmation, Exhibit B P 12. ECFMG is clearly not part of the pool of FMGs nor is it a candidate for a residency position. Plaintiff has yet again failed to properly define the relevant market, which in this case is, as Judge Freeh stated, the market for certifying the credentials of FMGs. See Judge Freeh's Opinion at 13. This failure, standing alone, is sufficient to dismiss the Third Amended Complaint. See [Walker Process Equip. Inc. v.](#)

Food Mach. Chem. Corp., 382 U.S. 172, 177, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965); American Hoist & Derrick Co. v. Sowa & Sons, 725 F.2d 1350, 1366 (Fed. Cir. 1984).

Assuming, *arguendo*, that Plaintiff had pled the proper relevant market, this motion to dismiss would still have been granted because Plaintiff lacks standing to sue. In order HN5[[↑]] to have standing to sue [*9] under Section 2 of the Sherman Act, Plaintiff must allege an "antitrust injury"--an injury the antitrust laws were intended to prevent against business or property. See Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110-111, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986). For example, a failure to meet the academic standards set by leading medical schools is not an antitrust injury. See Selman v. Harvard Medical School, 494 F. Supp. 603, 621 (S.D.N.Y. 1980). Similarly, Plaintiff's failure to meet the ECFMG certification requirements is not an antitrust injury.

Plaintiff may have been able to assert standing had he been seeking to enter the business of certifying the credentials of FMGs. Even if plaintiff claims that he is seeking to certify himself, he still fails to obtain standing because the market that he is interested in is merely the market to certify himself. The antitrust laws were not intended to apply to such economically insignificant markets. See Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1421 (6th Cir. 1990), cert. denied [*10] 116 L. Ed. 2d 29, 112 S. Ct. 51 (1991). See also Brown Shoe Co. v. United States, 370 U.S. 294, 336-37, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962) (defined market must correspond to economic realities of the industry and be economically significant). The mere fact that he is affected by ECFMG's standards is insufficient to give him standing to sue under the antitrust laws. See Selman, 494 F. Supp. at 621. Thus, plaintiff's monopolization claim must be denied.

Without standing to sue, Plaintiff's remaining Sherman Act claim must also be dismissed.

C. State Law Claims

Having dismissed Plaintiff's grounds for subject matter jurisdiction, this Court lacks jurisdiction over the state law claims and declines to address them. Accordingly, the state law claims against both defendants are also dismissed.

CONCLUSION

For the reasons stated above, this motion to dismiss for failure to state a claim is hereby granted. The Court orders the Clerk of the Court to close this case and remove it from the Court's active docket.

SO ORDERED.

Dated: New York, [*11] New York

August 3, 1994

JOHN F. KEENAN

United States District Judge

Northlake Mktg. & Supply v. Glaverbel S.A.

United States District Court for the Northern District of Illinois, Eastern Division

August 4, 1994, Decided ; August 8, 1994, Docketed

No. 92 C 2732

Reporter

861 F. Supp. 653 *; 1994 U.S. Dist. LEXIS 11017 **; 1994-2 Trade Cas. (CCH) P70,767

NORTHLAKE MARKETING & SUPPLY, INC., Plaintiff, v. GLAVERBEL S.A., et al., Defendants.

Subsequent History: [**1] Supplemental Opinion of September 29, 1994, Reported at: [1994 U.S. Dist. LEXIS 13990](#).

Core Terms

patent, antitrust claim, antitrust, infringement, ceramic, welding, relevant market, hearsay, repair, reasonable inference, unfair competition, Counts, summary judgment, market power, evidentiary, predicate, genuine, patent infringement, memorandum opinion, present evidence, Sherman Act, procurement, invalidity, nonmovant, steel

LexisNexis® Headnotes

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

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

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

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

HN1[Entitlement as Matter of Law, Genuine Disputes

Fed. R. Civ. P. 56 principles impose on the movant the burden of establishing the lack of a genuine issue of material fact. For that purpose the court is not required to draw every conceivable inference from the record--only those inferences that are reasonable--in the light most favorable to the nonmovant.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

HN2[Summary Judgment, Evidentiary Considerations

When a defendant moves for summary judgment on the ground that the plaintiff lacks evidence of an essential element of his claim, the plaintiff is required by [Fed. R. Civ. P. 56](#), if he wants to ward off the grant of the motion, to present evidence of evidentiary quality--either admissible documents or attested testimony, such as that found in depositions or in affidavits--demonstrating the existence of a genuine issue of material fact.

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

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

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

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

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

[HN3](#) [] Summary Judgment, Opposing Materials

The non-movant in a motion for summary judgment may not rely upon mere allegations, but must present specific facts to show that a genuine issue of material fact exists. Not just any tendered material will suffice to meet that burden. Such proffered material must meet the strictures of the Federal Rules of Evidence so as to be admissible at trial. Where a nonmovant fails to present evidence that satisfies its burden in opposing the movant's [Fed. R. Civ. P. 56](#) motion, the motion must be granted.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

[HN4](#) [] Bad Faith, Fraud & Nonuse, Fraud

Sherman Act liability may not be imposed merely for the fraudulent procurement of a patent. It must also be shown that the patent has been used after its issuance in an anticompetitive fashion.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Evidence > Inferences & Presumptions > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

861 F. Supp. 653, *653A 1994 U.S. Dist. LEXIS 11017, **1

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

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

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

HN5 **Bad Faith, Fraud & Nonuse, Fraud**

The mere possession of a patent does not establish presumption of market power in the antitrust sense.

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

Antitrust & Trade Law > Sherman Act > General Overview

HN6 **Regulated Practices, Price Fixing & Restraints of Trade**

Sherman Act, [15 U.S.C.S. § 1](#), violations must involve (1) a contract, combination or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury. In comparison, Sherman Act [§ 2](#) requires 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 historic accident.

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

Evidence > Burdens of Proof > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > General Overview

HN7 **Regulated Practices, Market Definition**

The Sherman Act, [15 U.S.C.S. § 2](#), requires 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 historic accident.

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

Evidence > Burdens of Proof > General Overview

861 F. Supp. 653, *653A994 U.S. Dist. LEXIS 11017, **1

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > 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 > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN8 **Per Se Rule & Rule of Reason, Per Se Violations**

Crucial both to the rule of reason analysis and to assessing the existence of Sherman Act, [15 U.S.C.S. § 2](#), monopoly power are the delineation of the relevant market and evidence of the defendant's power in that market. "Relevant market" is defined as being made up of commodities reasonably interchangeable by consumers for the same purposes. Identification of the relevant market is crucial in evaluating an antitrust claim.

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

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

HN9 **Regulated Practices, Market Definition**

A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffices to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in those situations will have no market power: for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product.

Counsel: For Plaintiff: ANTHONY S. DiVINCENZO, CAMPBELL & DiVINCENZO, CHICAGO, IL.

For Defendants: JEROLD I. SCHNEIDER of SPENCER, FRANK & SCHNEIDER, WASHINGTON, D.C. BLAKE L. HARROP of SONNENSCHEIN, NATH & ROSENTHAL, CHICAGO, IL.

Judges: Shadur

Opinion by: MILTON I. SHADUR

Opinion

[*655] MEMORANDUM OPINION AND ORDER

After two false starts, Northlake Marketing & Supply, Inc. ("Northlake") has filed its five-count Second Amended Complaint ("SAC") against Glaverbel S.A. ("Glaverbel"), Foseco, Inc. ("Foseco") and Fosbel, Inc. ("Fosbel") (the latter two are collectively termed "Foseco-Fosbel" for convenience).¹ Three counts seek judicial declarations only against Glaverbel and Fosbel as to United States Patent Nos. 4,792,468 ("'468"), 4,920,084 ("'084") and 4,489,022 ("'022"), all owned by Glaverbel and exclusively licensed to Fosbel: Count I requests a ruling that

¹ Only Foseco and Fosbel have been served with process. Glaverbel has not and hence is not subject to this Court's jurisdiction.

Northlake is not infringing Patents '468 and '084, while Counts II and III allege that all three patents (1) are invalid under [35 U.S.C. §§ 101, 102, 103](#) and [112](#) and [\(2\)](#) are unenforceable for having been fraudulently or inequitably obtained. Counts IV and V accuse all three defendants of having obtained and of seeking to enforce those allegedly invalid patents in violation of (1) the Sherman and Clayton Antitrust Acts ([15 U.S.C §§ 1, 2](#) and [15](#)) and [\[**2\]](#) (2) the common law of unfair competition.²

In earlier litigation Glaverbel and Fosbel had sued Northlake and other parties in the United States District Court for the Northern District of Indiana, asserting two claims of patent infringement. On those claims Magistrate Judge Andrew Rodovich granted summary judgment in Northlake's favor, finding that Glaverbel and Fosbel had failed to meet their burden of establishing a genuine factual issue as to the existence of such infringement. Northlake had also responded with counterclaims asserting both the invalidity of Patent '022 (and another patent not at issue here-see [\[**3\]](#) n.11) and violations of federal antitrust and state unfair competition law. After a bench trial Magistrate Judge Rodovich dismissed those counterclaims on March 31, 1992 on the ground that Northlake had failed to meet its burden of proof.

As a consequence of that last ruling this Court's December 9, 1992 memorandum opinion and order held that this is not the proper forum for Northlake to advance its claims based on Patent '022, so all such claims were stricken from the SAC. This Court's April 7, 1993 memorandum opinion and order summarized the effect of two other rulings that it had made:

In combination, this Court's oral ruling of December 17, 1992 and its brief February 26, 1993 memorandum opinion and order (the "Opinion") held that to the extent that Northlake's current antitrust and unfair competition claims arise out of any alleged conduct up to and including the date of Judge Rodovich's decision, those claims are barred against all three defendants on claim preclusion grounds.

Now before this Court is the Foseco-Fosbel [Fed. R. Civ. P. \("Rule"\) 56](#) motion for summary judgment on the remaining temporal segment of Northlake's antitrust and unfair competition claims--that is, [\[**4\]](#) any such claims covering the period from April 1, 1992 to the present.³ For the reasons set forth in this memorandum opinion and order, the Foseco-Fosbel motion is granted, those claims are dismissed with prejudice and Foseco is dismissed as a party to this action.

Summary Judgment Standards

[HN1](#) Familiar [Rule 56](#) principles impose on the movant the burden of establishing the lack of [\[*656\]](#) a genuine issue of material fact ([Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#)). [\[**5\]](#) For that purpose this Court is "not required to draw every conceivable inference from the record--only those inferences that are reasonable"--in the light most favorable to the nonmovant ([Bank Leumi Le-Israel, B.M. v. Lee, 928 F.2d 232, 236 \(7th Cir. 1991\)](#) and cases cited there).

But it is not the movant alone that bears a burden under [Rule 56](#). In accordance with the teaching of [Celotex, 477 U.S. at 322-23](#) and the plain command of [Rule 56\(c\)](#) and [\(e\)](#), a nonmovant plaintiff has the burden of coming forth with evidence in support of its case. Here is how [Winskunas v. Birnbaum, 23 F.3d 1264, 1267 \(7th Cir. 1994\)](#) has framed the issue:

² Although neither the SAC nor any of the submissions on the current motion suggest just which jurisdiction's law should supply the rules of decision in that last respect, this Court's disposition of Count V renders it unnecessary to address that choice of law question.

³ Neither side has filed the General Rule 12 statements that are required by this District Court to facilitate the resolution of [Rule 56](#) motions, though each has submitted evidentiary materials together with its memoranda. All of this opinion's factual recitals are therefore gleaned from those memoranda (when properly supported by attached exhibits, deposition testimony or affidavits). This opinion refers to only one other submission: Northlake's January 18, 1994 Further Supplemental Response, which will be cited as "F. Supp. Mem.--."

HN2[When as in the present case a defendant moves for summary judgment on the ground that the plaintiff lacks evidence of an essential element of his claim, the plaintiff is required by [Fed.R.Civ.P. 56](#), if he wants to ward off the grant of the motion, to present evidence of evidentiary quality--either admissible documents or attested testimony, such as that found in depositions or in affidavits--demonstrating the existence of a genuine **[[**6]]** issue of material fact.

And [Buscaglia v. United States, 25 F.3d 530, 534 \(7th Cir. 1994\)](#) has paraphrased [Rule 56\(e\)](#) to convey the same message:

HN3[The non-movant may not rely upon mere allegations, but must present specific facts to show that a genuine issue of material fact exists.

Not just any tendered material will suffice to meet that burden. Such proffered material must meet the strictures of the Federal Rules of Evidence so as to be admissible at trial ([Winskunas, 23 F.3d at 1267](#); [Waldrige v. American Hoechst Corp., 24 F.3d 918, 921 n.2 \(7th Cir. 1994\)](#)).⁴ Where a nonmovant fails to present evidence that satisfies its burden in opposing the movant's [Rule 56](#) motion, the motion must be granted ([Waldrige, 24 F.3d at 920-21](#)).

[[7]] Parties**

Northlake is a competitor of Foseco, Fosbel and Glaverbel in the United States market for the ceramic welding and repair of industrial ovens used principally by the steel, glass and copper industries (Foseco's Vice President of Administration Anthony Money ("Money") Dep. 11, 24; Northlake's President James Hamilton ("Hamilton") Aff. PP1,4). Foseco is a wholly-owned Delaware-incorporated great-grandchild subsidiary of Dutch company Foseco Holding BV (Money Dep. 4, 14). Fosbel is an Ohio corporation whose stock is held 51% by Foseco Holding BV and 49% by Glaverbel (Money Dep. 21).⁵ Of the nine seats on Fosbel's Board of Directors, Foseco controls five and Glaverbel controls the other four (Money Dep. 23).

Under the joint venture agreement pursuant **[[**8]]** to which the participants formed Fosbel, Foseco manages Fosbel and supplies it with the powders used in ceramic welding, while Glaverbel supplies technical advice and has made Fosbel the exclusive licensee of its Patents '468 and '084 (Money Dep. 10-11; Fosbel's Director of Business Development Chuck Zvosec Dep. 28, 73; P. Supp. Mem. Ex. C at 2). Fosbel supplies the actual ceramic welding services to industrial customers (Money Dep. 24).

Lack of Evidence Supporting Northlake's Claims

For nearly 30 years (ever since the decision in [Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 176-77, 15 L. Ed. 2d 247, 86 S. Ct. 347 \(1965\)](#)) it **[[**657]]** has been established that a suit for violation of the antitrust laws may be predicated on a defendant's attempted enforcement of a fraudulently procured patent (though since *Walker v. FMC* the Federal Circuit has supplanted the concept of "fraud on the Patent Office" with a term that has somewhat broader connotations--" inequitable conduct"--the basis for an antitrust claim remains that of actual fraud in the procurement; see, e.g., [FMC Corp. v. Manitowoc Co., 835 F.2d 1411, 1417-18 \(Fed. Cir. 1987\)](#) **[[**9]]** and cases cited there). Northlake's SAC alleges just such conduct by Foseco and Fosbel, but that is not enough for

⁴ While affidavits are not ordinarily the proper form in which to admit evidence at trial, they are clearly sufficient to meet a nonmovant's burden under [Rule 56\(e\)](#) as long as they are "admissible in content, in the sense that a change in form but not in content, for example a substitution of oral testimony for a summary of that testimony in an affidavit, would make the evidence admissible at trial" ([Winskunas, 23 F.3d at 1268](#)).

⁵ To be more precise, Money Dep. 21 discloses only that "a Glaverbel Group Company" is the other shareholder. Because this Court has no jurisdiction over Glaverbel anyway, that other shareholder will simply be referred to as Glaverbel for ease of designation.

Rule 56 purposes. In response to Foseco-Fosbel's motion Northlake must present sufficient evidence to support the reasonable inference that Foseco or Fosbel or both acted or attempted to act in such a manner after March 31, 1992. Northlake runs aground on that requirement.

More specifically, Northlake invokes *Walker v. FMC* by alleging that defendants hindered its ability to secure ceramic welding work by telling prospective customers that Northlake was infringing Glaverbel's patents (remember that it is a predicate of Northlake's claim, which is being accepted as true solely for purposes of dealing with the current motion, that the patents were procured by inequitable conduct). To support that allegation Northlake cites to Hamilton's affidavit. What follows is a summary of what he says there.

In June 1992 Hamilton asked Inland Steel ("Inland") about the possibility of Northlake's replacing Fosbel in performing such work on Inland's coking ovens (Hamilton Aff. P4). On August 5, 1992 Northlake performed a trial repair to Inland's satisfaction, and Northlake was **[**10]** then invited to submit a price for such repair work and was also advised that Fosbel would be told of Northlake's successful trial and would be "given the opportunity to submit a new price in response to Northlake's quotation" (Hamilton Aff. PP5,6). During an October 1992 meeting with Inland supervisor Willie Johnson ("Johnson") Hamilton was told that Northlake had submitted a lower bid than Fosbel but that Fosbel's Vice President of Sales Ernie Goffe ("Goffe") and salesman Jerry Verdi ("Verdi") had told Johnson that Fosbel was going to sue Northlake for patent infringement, a warning that Johnson had reported to his supervisor Alan Ellis (Hamilton Aff. PP9-10). Johnson suggested that Northlake should present evidence to Inland of its "legal rights" to use the ceramic welding process, and it then submitted a copy of Magistrate Judge Rodovich's grant of summary judgment in its favor in the Indiana litigation (Hamilton Aff. PP11-12). Northlake ultimately secured Inland's business and began doing ceramic repair work for it on January 25, 1993 (Hamilton Aff. P13).

Northlake's problem is that the key pieces of evidence in that account--the claimed statements by Fosbel employees Goffe and **[**11]** Verdi that interfered with Northlake's effort to get business from Inland--face problems posed by the hearsay rule and other rules of evidence. Although *Johnson*'s testimony as to the making of such statements would clearly have been admissible as nonhearsay under Fed. R. Evid. ("Rule" ⁶) 801(d)(2)(D), the asserted statements were not heard directly by Hamilton but were rather relayed to him by Johnson. If the story of what Johnson told Hamilton were being offered for the truth of the matter asserted (that is, to prove that Goffe and Verdi had really said what Johnson reported to Hamilton), those purported Goffe-Verdi statements would be inadmissible hearsay (Rule 801(c) and 802). With those statements thus out of the case for that purpose, this Court would have been tendered no evidence that Fosbel or Foseco voiced any warnings or threats of suits for infringement of Glaverbel's patents (*Wigod v. Chicago Mercantile Exch.*, 981 F.2d 1510, 1518-19 (7th Cir. 1992) (stating the rule in connection with a similar Rule 56 motion brought against antitrust claims); accord, *Winskunas*, 23 F.3d at 1268; *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 570 **[*658]** n.4 (7th Cir. 1989) **[**12]** and cases and treatises cited there).

But suppose that Hamilton's affidavit testimony as to what Johnson told him were somehow independently admissible when viewed in a clearly nonhearsay sense--that is, simply as evidence of the fact and of the content of Johnson's statement, rather than for its truth. In that event the Hamilton testimony itself could be admissible, but *not* to serve Northlake's ultimate goal of establishing the truth of Johnson's account of the Fosbel threats (the impermissible hearsay purpose described in the last paragraph). Would the result be any different in the special environment of a summary judgment motion, remembering that Northlake's Rule 56 task is not to *prove* the asserted fact, but only to create a *reasonable inference* **[**13]** of its existence?

Factfinders are regularly instructed, as provided in Rule 105, as to the limited use of evidence that is admissible only for one purpose, rather than unconditionally (see, e.g., *Moylan v. Meadow Club, Inc.*, 979 F.2d 1246, 1247-48, 1250 (7th Cir. 1992); *Thronson v. Meisels*, 800 F.2d 136, 143 (7th Cir. 1986)). And just as the constraints of the hearsay rule prevent Hamilton's testimony from being employed to prove that Johnson was truthful in attributing the

⁶ No confusion should be engendered by this opinion's dual use of the term "Rule" to denote both the Federal Rules of Civil Procedure (all of which bear single-digit or two-digit numbers) and the Federal Rules of Evidence (all of which bear three-digit numbers).

claimed statements to Goffe and Verdi, so too those constraints forbid the use of that same testimony to create an inference to the same effect (see generally 1 Jack Weinstein & Margaret Berger, *Weinstein's Evidence* P10503 (1993); G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 Mo. -K.C. L. Rev. 1, 58-62 (1993))--even as logical as such an inference might be if the Johnson statement were permitted to be taken as gospel.⁷ Again Northlake would strike out, even on the most favorable basis on which Hamilton's statement could arguably be considered.

[**14] Indeed, even if that had not been the case Northlake could not survive the present summary judgment motion on the basis of the evidence now under consideration. It will be remembered that the Rule 56 standard coincides with that under Rule 50(a), which asks whether "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [Northlake] with respect to that issue"--that is the teaching of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). If a jury were to find on the sole strength of Hamilton's affidavit that the asserted Goffe-Verdi statements had been made to Johnson, the purposes that underlie the hearsay rule would be seriously subverted: Look at the impossible task that faces a cross-examiner who is required to challenge the truth of such a twice-removed alleged statement--to pierce two levels of absent witnesses. That is the stuff of which a Rule 403 exclusion is fashioned: Attenuated probative force of the purported underlying statement, heavily overbalanced by unfair prejudice to the party opposing admissibility. So even if such a hypothetical [**15] (though analytically unsound) premise were to be adopted, this Court would perforce still exclude the testimony under discussion.

That then leads to consideration of the next proposed item of evidence. Hamilton also says that Northlake has pursued other welding work but with very limited success: Other than Inland it has obtained work only from Geneva Steel, and that not until February 1993 (Hamilton Aff. P17). Hamilton has attempted to solicit work from other companies, including six for whom Northlake had done such work before the Indiana litigation, but in each case the prospect raised the possibility of Northlake's continued infringement of Glaverbel's patents and the consequential threat of lawsuits by Fosbel and Glaverbel (Hamilton Aff. PP16, 18). Although Hamilton does not say so expressly, he clearly seeks to imply that Northlake's limited success in securing work stems from actions by Fosbel or Foseco or both.

In those respects Northlake does not even reach a level that would bar the evidence in hearsay terms. This time it does not offer even hearsay evidence, by way of Hamilton's [*659] affidavit or otherwise, that the various companies learned of Northlake's alleged patent problems [**16] from Foseco or Fosbel (or even from Glaverbel for that matter). Given that evidentiary void, Northlake fails to create a reasonable (that is, a fact-based) inference that it was actually Fosbel's or Foseco's conduct that had created the concerns voiced by those companies--the necessary predicate for Northlake's claim that Fosbel or Foseco has threatened to enforce the patents in a manner violating federal antitrust and state unfair competition laws. It is Northlake's burden to present evidence sufficient to create a genuine issue, and not for this Court to indulge pure speculation as to the requisite causal connection. Total silence of the evidentiary record on that crucial issue is necessarily fatal to Northlake under Rule 56(e). Thus that second part of Hamilton's affidavit cannot create a reasonable inference of improper conduct by either Fosbel or Foseco during the relevant time frame.

Still another piece of evidence to which Northlake refers is this April 15, 1992 letter sent to Northlake's lawyers by Glaverbel's Washington, D.C. counsel (P. Supp. Mem. Ex. P):

As you know, this office represents Glaverbel, S.A. in patent matters. We wish to "formally" bring the following [**17] to your attention.

The use in the United States of ceramic welding powder by Exo-Ram⁸ and/or Northlake of the type which was seized by Court Order in Belgium and tested by an independent laboratory designated by a Court-appointed expert, for refractory repair, infringes at least claim 1 of U.S. Patent No. 4,792,468. Furthermore, the powder

⁷ After all, the other alternative would seem to be that Johnson had fabricated the making of the Goffe-Verdi statements--and with what motive, to what end?

⁸ Exo-Ram is "an affiliate of Northlake" (P. Supp. Mem. 5).

mixture per se infringes at least claim 1 of U.S. Patent No. 4,920,084. Duplicate copies of each patent are enclosed by fax and mail. As you know, the corresponding Belgian patent has been asserted against your clients in the litigation in Belgium.

The first tentative corroboration we had from Northlake that the same type of powder was actually used in the United States was the November 22nd, 1991 Declaration of Samuel E. May. This information was, of course, confirmed by Mr. May's testimony in the recent case of *Glaverbel and Fosbel v. Northlake et al.*

In Germany, the challenges to validity of the corresponding German patent by Northlake Marketing & Supply, Inc. and by Lichtenberg Feuerfest GmbH have been rejected by the German Patent Office, and neither has appealed this determination.

Your "invalidity defense" that the "modified ****18**" drawing of the '468 patent" which showed a *refractory* particle distribution from U.S. Patent No. 3,684,560, was also the distribution curve of the oxidizable particles (of '560) has been established as mathematically impossible at the deposition of Mr. Mottet which Mr. Brezina took in August 1991.

If you have any other defenses to validity and/or infringement, we invite you to share them with us promptly. Absent very strong, credible, non-cumulative evidence supporting invalidity and/or non-infringement received in this office by Friday, April 24th, 1992, we have been authorized to proceed with a patent infringement lawsuit against your clients based upon infringement of U.S. Patent Nos. 4,792,468 and 4,920,084.⁹

As against Glaverbel that letter would unquestionably be admissible, and it is just as unquestionably evidence of Glaverbel's conduct during the relevant time period.

****19** But the difficulty here is that Northlake seeks to use the letter as evidence of improper conduct by Foseco or Fosbel, and not against the defense chair that is unoccupied by Glaverbel. It was after all Glaverbel's counsel who wrote the letter and who put Northlake on notice of a threatened patent infringement suit by Glaverbel itself. Nothing in the letter suggests any conduct by Foseco or Fosbel: Neither is mentioned in the letter, and nothing in the letter suggests ***660** that either is joining in Glaverbel's indicated enforcement activity.

To rely on that item of evidence in opposition to the Foseco-Fosbel Rule 56 motion, Northlake must present some evidence linking one or both of them to Glaverbel by way of "contract, conspiracy or combination" so that it may reasonably be inferred that the content of the letter--assuming only for the moment that it states a sufficient predicate for an antitrust claim--is ascribable to one or both of them (Greater Rockford Energy & Technology Corp. v. Shell Oil Co., 998 F.2d 391, 397 (7th Cir. 1993)). It is not enough that Fosbel as Glaverbel's licensee would derive benefit from the latter's successful enforcement of ****20** the '468 and '084 Patents against Northlake.

One added factor bears mention. By definition any evidence against Fosbel or Foseco or both must reflect its or their post-March 31, 1992 conduct, because only that conduct is now at issue in this case. Even if some inference could be drawn that either or both of them was or were involved in triggering Glaverbel's letter (again a matter of sheer speculation), nothing has been offered to support an inference that such hypothetical conduct antedated April 1, 1992 rather than taking place during the ensuing two weeks.

Hence this additional proposed item of evidence is also of no help to Northlake in creating any reasonable inference that Foseco or Fosbel or both engaged in conduct after March 31, 1992 that is violative either of federal antitrust law (see, e.g., Greater Rockford, 998 F.2d at 397; Wigod, 981 F.2d at 1519; Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 48-55 (7th Cir. 1992)) or of the common law of unfair competition.

That leaves, as the final gossamer strand in Northlake's effort to weave an evidentiary web, its ****21** reference to this Glaverbel "Press Release" (P. Supp. Mem. Ex. S):

The High Court of Justice in London recently gave a decision in favor of Glaverbel in the action for infringement of its ceramic welding process brought, in June or 1987, against the British Coal Corporation (BCC) and other companies of that group. The compensation which will have to be paid by BCC is likely to amount to several

⁹ [Footnote by this Court] As of the parties' last submission in this case (on March 23, 1994) no such suit had been filed.

millions of sterling pounds; the definitive amount, however, must still be determined by the court. We have not yet been advised if BCC will file an appeal.

The ceramic welding process is a novel process developed by Glaverbel for the hot repair of industrial furnaces, mainly in the glass, coke, steel and copper metallurgy fields. It consists of repairs to the refractory linings of these furnaces by means of physicochemical reactions between oxidizing gases, finely divided metals and refractory particles at temperatures in excess of 2000degree C.

This technique, considered revolutionary at the time of its invention, remains today the process with the highest performance. It is protected throughout the world by patents and commercialized by Fosbel, a joint venture established in 1981 [**22] between the Belgian Glass Group, Glaverbel and the British Group, Foseco. Fosbel has a worldwide commercial network at its disposal, with companies established in Europe, Japan, the United States and Brazil.

Although the version of the Press Release tendered to this Court is undated, the final Foseco-Fosbel reply memorandum acknowledges that it was issued after March 31, 1992. Moreover, Hamilton asserts without contradiction that he received the Press Release in the mail from Fosbel and also that it was "published in several trade publications" (Hamilton Aff. PP14-15). At last, then, Northlake has presented some evidence of conduct that both (1) occurred after the watershed date and (2) is at least linked to one of the defendants over whom this Court has jurisdiction.

That however is not enough. To advance its antitrust claims Northlake must also create at least a reasonable inference of bad faith enforcement of Patents '084 and '468 against it.¹⁰ But when the Press [*661] Release is viewed alone--as it must be because it is really Northlake's only evidence in opposition to the current Rule 56 motion--it is unreasonable to construe the document as supporting any such inference.

[**23] In principal part the Press Release is a forthright factual report of the result of Glaverbel's U.K. litigation, coupled with a general description of Glaverbel's ceramic welding process. Its only assertion that is even arguably relevant to this case is that Glaverbel's process is also covered by other patents elsewhere (inferentially including the United States) and is commercialized by Fosbel. But those mere avowals of fact cannot reasonably be construed as being the type of action that rises to the level of enforcement (or threatened enforcement) of a patent, which is an essential predicate of Northlake's antitrust claims.

Case law in this area (involving claims of patent misuse) consistently rest on actual lawsuits charging infringement of the tainted patents (see FMC Corp., 835 F.2d at 1412, 1417-18; Argus Chem. Corp. v. Fibre Glass-Evercoat Co., 812 F.2d 1381, 1381, 1384-85 (Fed. Cir. 1987); Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 876-77 (Fed. Cir. 1985); Brunswick, 752 F.2d at 265-66, 268; Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 993 (9th Cir. 1979)). [**24] That is hardly surprising, for such claims (as was also true in the seminal *Walker v. FMC* litigation) are most typically brought as counterclaims to patent infringement suits (Brunswick, 752 F.2d at 265).

It may be possible, though this Court is aware of no case that has expressly so held, that some conduct short of instituting a suit (or directly threatening such a suit) could constitute the requisite enforcement action. But whatever that hypothetical lesser quantum of conduct might be, it surely would have to be more than the Delphic reference to the *existence* of a patent or patents that Northlake offers here. If it were otherwise, any such reference--however innocuous--could trigger exposure to an antitrust claim. Any such rule would be absurd, for common sense teaches that some more assertive conduct is required before a patent holder can be said, within the meaning of the antitrust laws, to be enforcing its patent.

It is also worth noting that the Press Release does not refer to any particular United States patent. At the time that the Press Release was issued and sent to Hamilton, Glaverbel had licensed to Fosbel not only the patents that [**25] are the subject of this litigation-- '468 and '084--but also '022, the validity of which is not open to

¹⁰ Northlake's Supp. Mem. 2 suggests that Sherman Act HN4 liability may be imposed merely for the fraudulent procurement of a patent. That is simply wrong--it must also be shown that the patent has been used after its issuance in an anticompetitive fashion (Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 266 (7th Cir. 1984)).

challenge here.¹¹ That ambiguity only serves further to underscore the unreasonableness of the inference that Northlake wishes to call into play here: when the subject of an assertion is itself unclear, it is hard to ascribe any specific assertion to the speaker.¹²

[**26] And so this final strand, like the others already discussed, cannot support the weight that Northlake wishes it to bear. It has produced no admissible evidence that reasonably supports the inference of conduct that is a sufficient predicate for an antitrust claim.

Northlake's Substantive Claims

What has been said to this point suffices to dispatch Northlake's Counts IV and V. But this opinion should not close without a few words about the lack of any showing of at [*662] least one essential element of any such antitrust claims as those asserted in Count IV.

This Court of course realizes that Northlake has been responding to the Fosbel-Foseco motion and that the focus of that motion has been on the insufficiency of the evidence already discussed. But the fact remains that the teaching of *Celotex Corp., 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548* is that the *Rule 56* movant need not "support its motion with affidavits or other materials *negating* the opponent's claim." As plaintiff, it is Northlake that bears the burden of proof of its antitrust claims in the summary judgment context, just as it would at trial (*id. at 324-25*). [**27]

It might therefore have been expected that Northlake would at least have taken a pass at addressing, in the form of admissible evidence, the *prima facie* elements of its antitrust claim. After all, *Rule 56(e)* could not make it more plain that the nonmovant plaintiff cannot rest on its pleadings, just as it could not at trial. Having said that, however, this Court would be reluctant to rest its own ruling here on a ground that Northlake might argue that it had not understood it was obligated to meet (even though it should have had such an understanding). What follows, then, is a brief exposition of another fundamental gap in Northlake's support for its antitrust claims--but as an independent deficiency on Northlake's part, unnecessary to the already-pronounced defeat of those claims.

As already stated, the purported basis for Northlake's Sherman Act claims is the type of conduct proscribed by *Walker v. FMC*: the alleged fraudulent procurement and the later maintenance and enforcement of patents (*Abbott Lab. v. Brennan, 952 F.2d 1346, 1354 (Fed. Cir. 1991); Brunswick, 752 F.2d at 264-66*). But HN5 [↑] the mere possession of a "patent [**28] does not establish presumption of market power in the antitrust sense" (*Abbott Lab. 952 F.2d at 1354*; accord, *American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1367 (Fed. Cir. 1984)*). So even if Northlake had established a reasonable inference of such conduct by Foseco or Fosbel or both after March 31, 1992, Northlake would still have to show by the same standard that "the other elements necessary to a [Sherman Act] § 2 case are present" (*Walker v. FMC, 382 U.S. at 174*). Although far less common, Sherman Act § 1 cases can also be based on the fraudulent procurement and bad faith enforcement of patents (see, e.g., *United States v. Singer Mfg. Co., 374 U.S. 174, 200, 10 L. Ed. 2d 823, 83 S. Ct. 1773 (1963)* (White, J., concurring)), in which event the antitrust elements required by that section must be similarly shown.

¹¹ Northlake and Foseco-Fosbel agree that the British patent referred to in the Press Release corresponds to Glaverbel's United States Patent No. 3,684,560--a patent that had expired as of March 31, 1992. That being so, the only United States patents to which the Press Release could have referred were one or more of Patents '468, '084 and '022.

¹² Northlake's Supp. Mem. 20 argues that because it "prevailed on Glaverbel's infringement claims under the '022 patent" in the Indiana litigation, the Press Release can logically be referring only to Patents '468 and '084. That contention is seriously misleading. In that prior litigation Magistrate Judge Rodovich did grant summary judgment to Northlake on Glaverbel's claim of patent infringement, but after a trial on the merits he held that Patent '022 was *valid*. Thus the statement in the Press Release that Glaverbel's ceramic welding process "is protected throughout the world by patents and commercialized by Fosbel" cannot by any stretch of the imagination be labeled a bad faith assertion. At least as to Patent '022, Glaverbel held and holds a patent that enjoys a judicial finding of validity.

Sherman Act [§ 1 HN6](#)¹³ violations must involve ([Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1220 \(7th Cir. 1993\)](#)):

(1) a contract, [\[**29\]](#) combination or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.

In comparison, Sherman Act [§ 2 HN7](#)¹⁴ requires a showing of ([United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#)):

(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Those respective requirements of "unreasonable restraint of trade" and "monopoly power"¹³ share the essential ingredient of demonstrating [\[*663\]](#) an adverse effect on competition in the "relevant market."

[\[**30\]](#) As for Northlake's [Section 1](#) claim, the determination of that competitive impact must be undertaken using the Rule of Reason, for Northlake has offered no evidence that the patents were used in a "manifestly anticompetitive" manner so as to justify the conclusion that defendants' actions are per se Sherman Act violations ([Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#)). And what are [HN8](#)¹⁵ crucial both to the Rule of Reason analysis and to assessing the existence of [Section 2](#) "monopoly power" are the delineation of the relevant market ([Fishman v. Estate of Wirtz, 807 F.2d 520, 531-32 \(7th Cir. 1986\)](#)) and evidence of the defendant's power in that market ([Grinnell Corp., 384 U.S. at 571](#); [Wilk v. American Medical Ass'n, 895 F.2d 352, 359 \(7th Cir. 1990\)](#)). "Relevant market" is defined as being made up of "commodities reasonably interchangeable by consumers for the same purposes" ([du Pont, 351 U.S. at 395](#)). [\[**31\]](#) Identification of the relevant market is crucial in evaluating an antitrust claim because, as Justice O'Connor observed in her concurrence to [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 37 n.7, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#):

[HN9](#)¹⁶ A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffices to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in those situations will have no market power: for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product.

Here Northlake has offered no evidence whatever as to the relevant market. Without data on such issues (for example) as (1) the relevant customer base (whether just coke ovens used by steel companies or whether also encompassing, for example, industrial ovens utilized in other industries¹⁷) or (2) even more critically, whether the relevant market is limited to the type of ceramic welding process offered by Fosbel and [\[**32\]](#) Northlake (rather than other methods of repair being "reasonably interchangeable" with that process), it is impossible to draw any reasoned inference as to the presence or absence of Fosbel's market power. That problem is further compounded

¹³ Sherman Act [§ 1](#)'s "restraint of trade" element is assessed in terms of "the competitive significance" of defendant's conduct ([National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 \(1978\)](#); see also [Wisconsin Music Network, Inc. v. Muzak Ltd. Partnership, 5 F.3d 218, 221-22 \(7th Cir. 1993\)](#); [Banks v. NCAA, 977 F.2d 1081, 1087-88 \(7th Cir. 1992\)](#), quoting [Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107-08 \(7th Cir. 1984\)](#)). Sherman Act [§ 2](#) also applies a competition-based definition ([United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#)):

Monopoly power is the power to control prices or exclude competition.

Accord, such cases as [American Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317, 1319 \(7th Cir. 1991\)](#); [Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 \(7th Cir. 1989\)](#).

¹⁴ Fosbel says that it services ovens used by the steel, glass and copper industries, while Northlake's filings mention only its repair work of coke ovens used by the steel industry.

by the total lack of information as to the presence or absence of other competitors in the marketplace. Perhaps Northlake and Fosbel are the only suppliers in the relevant market (whatever it may be), but it is entirely possible that they are only two entrants in a market filled with numerous other competitors. And uncertainty is Northlake's enemy. Silence on that issue (as on the several other issues) cuts against Northlake, as the plaintiff having the burden of proving (or in this instance, of creating reasonable inferences in support of) its claim.

Northlake's failure to present evidence as to [\[**33\]](#) the relevant market, which is crucial element of its antitrust claim would independently justify the granting of summary judgment in Foseco-Fosbel's favor ([American Hoist, 725 F.2d at 1366](#); cf. [Abbott Lab. 952 F.2d at 1354-55](#) (a like holding in the Rule 12(b)(6) dismissal context)). As already stated, though, this Court has no wish to court still another claim of wounded surprise (however unjustified) on Northlake's part. This opinion will rest on Northlake's utter failure of proof in evidentiary terms, which has occupied the principal part of the discussion.¹⁵

[**34] [*664] Conclusion

As to Northlake's Count IV antitrust claim, it has not met its [Rule 56](#) burden of creating a genuine issue of material fact. Because Northlake's Count V common law unfair competition claim is based on the same alleged conduct by Foseco or Fosbel or both, each of them is entitled to a judgment as a matter of law on both counts. Those counts are therefore dismissed with prejudice.

No claim against Foseco now remains in this action, and it is hence dismissed entirely as a defendant. In accordance with [National Metalcrafters v. McNeil, 784 F.2d 817, 821 \(7th Cir. 1986\)](#) this Court expressly determines under Rule 54(b) that there is no just reason for delay and expressly directs the entry of final judgment in favor of Foseco.

As to Fosbel, however, Northlake's Counts I through III remain alive. Accordingly this Court sets a status hearing for 8:45 a.m. August 18, 1994, at which time those remaining parties will be expected to discuss the necessary future proceedings in the case.

Milton I. Shadur

Senior United States District Judge

Date: August 4, 1994

End of Document

¹⁵ This may be somewhat more charitable than Northlake deserves. [Celotex, 477 U.S. at 325](#) teaches that:

the burden on the moving party [under [Rule 56\(c\)](#)] may be discharged by "showing"--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case.

And Foseco-Fosbel did just that when they said this in their May 26, 1993 memorandum opposing Northlake's motion to vacate this Court's earlier grant of summary judgment in favor of Foseco-Fosbel:

We are aware of no authority which allows Northlake, in response to summary judgment, to selectively avoid certain issues of proof. For example, there is no basis to avoid proof of the relevant market in an antitrust suit.

When this Court granted that motion to vacate, Northlake had clearly and specifically been placed on notice of its burden to prove the relevant market as part of its antitrust claim. It should really make no difference that Foseco-Fosbel did not advert to the issue on the current go-round, for the burden on Northlake never changed--and it was never met. All the same, this Court does not (though it well might) rest this opinion on that failure by Northlake.



Valley Disposal v. Central Vt. Solid Waste Management Dist.

United States Court of Appeals for the Second Circuit

February 14, 1994, Argued ; August 5, 1994, Decided

Docket No. 93-7818

Reporter

31 F.3d 89 *; 1994 U.S. App. LEXIS 20683 **; 1994-2 Trade Cas. (CCH) P70,680

VALLEY DISPOSAL, INC., PALISADES LANDFILL AND RECYCLING CORPORATION; ROBERT C. DOWDELL, JR., Plaintiffs-Appellants, v. CENTRAL VERMONT SOLID WASTE MANAGEMENT DISTRICT; C.V. LANDFILL, INC., Defendants-Appellees.

Prior History: [\[**1\]](#) Appeal from the judgment of the United States District Court for the District of Vermont (Franklin S. Billings, Jr., Judge).

Core Terms

Landfill, solid waste, Disposal, district court, Plaintiffs', ordinance, interstate commerce, Counts, Recycling, lined, antitrust claim, dormant, flow control, unlined, collateral estoppel, state court, preclusion, motion to dismiss, proceedings, regulations, Sherman Act, designated, municipal, facilities, res judicata, summary judgment, allegations, monopolize, antitrust, commerce

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

[**HN1**](#) [**\[down arrow\]**](#) **Standards of Review, De Novo Review**

The appellate court reviews de novo the lower court's granting of a motion to dismiss for failure to state a claim upon which relief can be granted.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

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

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

31 F.3d 89, *89L994 U.S. App. LEXIS 20683, **1

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN2 [down arrow] **Estoppel, Collateral Estoppel**

The appellate court reviews de novo the district court's ruling on summary judgment that claims are barred by res judicata and collateral estoppel.

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN3 [down arrow] **Standards of Review, De Novo Review**

The court reviews the grant of a motion for summary judgment de novo, construing all facts in favor of the nonmoving parties.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

HN4 [down arrow] **Sherman Act, Jurisdiction**

There are two ways to establish the interstate commerce component of jurisdiction under the Sherman Act, [15 U.S.C.S. §1](#). First, a 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.

Antitrust & Trade Law > Sherman Act > General Overview

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

HN5 [down arrow] **Antitrust & Trade Law, Sherman Act**

A plaintiff must allege sufficient facts concerning the alleged antitrust 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 substantial effect on commerce.

Antitrust & Trade Law > Sherman Act > General Overview

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

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

Mere bald assertions that activities restrain interstate commerce generally, along with references to statutory language, are not substitutes for concrete allegations from which a substantial effect on interstate commerce can be inferred.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

HN7 [down] **In Rem & Personal Jurisdiction, Constitutional Limits**

The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings shall have the same full faith and credit in every court within the United States as they have by law or usage in the courts of such state from which they are taken. [28 U.S.C.S. § 1738](#).

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN8 [down] **In Rem & Personal Jurisdiction, Constitutional Limits**

Vermont's preclusion law does not foreclose matters that another court lacked jurisdiction to entertain.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

HN9 [down] **Estoppel, Collateral Estoppel**

Issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent [42 U.S.C.S. § 1983](#) suit as they enjoy in the courts of the state where the judgment was rendered.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

31 F.3d 89, *89L994 U.S. App. LEXIS 20683, **1

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

[**HN10**](#) [↴] **Estoppel, Collateral Estoppel**

Collateral estoppel should be found only when the following criteria are met: (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

[**HN11**](#) [↴] **Estoppel, Collateral Estoppel**

The court must balance its desire not to deprive a litigant of an adequate day in court against a desire to prevent repetitious litigation of what is essentially the same dispute.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Pretrial Matters > General Overview

[**HN12**](#) [↴] **Estoppel, Collateral Estoppel**

In deciding whether essentially the same dispute is involved in earlier and later proceedings, several factors exist: (1) there is a substantial overlap in the evidence and argument between the two proceedings; (2) the same rule of law is involved in both proceedings; (3) the pretrial preparation and discovery in the first proceeding cover the issues in the second proceeding; and (4) the claims involved in the two proceedings are closely related.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Transportation Law > Interstate Commerce > Federal Powers

Constitutional Law > Congressional Duties & Powers > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Governments > Federal Government > US Congress

[**HN13**](#) [↴] **Commerce Clause, Dormant Commerce Clause**

The dormant [Commerce Clause](#) is a non-textual offshoot of the [Commerce Clause](#), which ascribes to Congress the power to regulate Commerce among the several States. [U.S. Const. art. I, § 8, cl. 3](#). Ascription of this power to Congress limits, by negative implication, the power of the states to interfere with interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Balancing Tests

HN14 [] **Congressional Duties & Powers, Commerce Clause**

Where the statute regulates evenhandedly 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. If a legitimate local purpose is found, then the question becomes one of degree. The extent of the burden that will be tolerated will 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.

Business & Corporate Law > Corporations > Corporate Finance > General Overview

Business & Corporate Law > Corporations > General Overview

Business & Corporate Law > ... > Corporate Governance > Shareholders > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Inadequate Capitalization

HN15 [] **Corporations, Corporate Finance**

To determine whether the separate existence of the corporation should be disregarded, courts examine a number of factors, including: (1) whether the shareholder sought to be charged owns all or most of the stock of the corporation; (2) whether the shareholder has subscribed to all of the capital stock of the corporation or otherwise caused its incorporation; (3) whether the corporation has grossly inadequate capital; (4) whether the shareholder uses the property of the corporation as his own; (5) whether the directors or executives of the corporation act independently in the interest of the corporation or simply take their orders from the shareholder in the latter's interest; and (6) whether the formal legal requirements of the corporation are observed.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Contracts Law > Breach > Breach of Contract Actions > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN16 [] **Estoppel, Collateral Estoppel**

The traditional test for privity is whether the parties have really and substantially the same interest in the property in issue.

Environmental Law > Solid Wastes > Disposal Planning

Environmental Law > Solid Wastes > Disposal Standards

HN17 [blue icon] **Solid Wastes, Disposal Planning**

Municipalities are responsible for the management and regulation of the storage and collection of solid wastes within their jurisdiction in conformance with the state solid waste management plan authorized under chapter 159 of [Vt. Stat. Ann. tit. 10, § 6601\(5\)](#).

Environmental Law > Solid Wastes > Disposal Standards

HN18 [blue icon] **Solid Wastes, Disposal Standards**

See [Vt. Stat. Ann. tit. 10, § 6605a\(c\)\(d\)](#) (Supp. 1992).

Environmental Law > Solid Wastes > Disposal Standards

HN19 [blue icon] **Solid Wastes, Disposal Standards**

See [Vt. Stat. Ann. tit. 10, § 6605e\(b\)\(1\)](#) (Supp. 1992).

Environmental Law > Solid Wastes > Disposal Standards

HN20 [blue icon] **Solid Wastes, Disposal Standards**

See [Vt. Stat. Ann. tit. 10, § 6601\(5\)](#) (Supp. 1992).

Counsel: JOHN L. FRANCO, McNeil & Murray, Burlington, Vermont, for plaintiffs-appellants.

MICHAEL B. ROSENBERG, Miller, Eggleston & Rosenberg, Burlington, Vermont, for defendant-appellee C.V. Landfill, Inc.

GLENN C. HOWLAND, JR., McKee, Guiliani & Cleveland, Montpelier, Vermont, for defendant-appellee Central Vermont Solid Waste Management Dis.

Judges: Before: Mahoney and Walker, Circuit Judges, and Campbell, * Senior Circuit Judge.

Opinion by: CAMPBELL

Opinion

[*90] CAMPBELL, *Senior Circuit Judge*:

In this appeal we review the district court's rulings (1) granting one defendant's motion to dismiss certain counts in the complaint for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction, and (2) holding that all claims are barred by the doctrines of res judicata and collateral estoppel.

* The Honorable Levin H. Campbell of the United States Court of Appeals for the First Circuit, sitting by designation.

BACKGROUND

Plaintiffs-appellants are Valley Disposal, Inc., a solid waste hauler, Palisades Landfill and Recycling Corporation ("Palisades **[**2]** Landfill"), operator of a lined landfill in Moretown, Vermont, and Robert C. Dowdell, Jr., president of Valley Disposal and Palisades Landfill. Dowdell and his wife are the sole shareholders and directors of Valley Disposal and Palisades Landfill. Dowdell is also the president, sole director, and sole shareholder of the now defunct Palisades Recycling Corporation, Inc. ("Palisades Recycling") -- operator of an *unlined landfill* in Moretown, Vermont -- which is not a party.

Defendants-appellees are Central Vermont Solid Waste Management District (the "District"), a Vermont union municipal district created by the Vermont General Assembly pursuant to [Vt. Stat. Ann. tit. 24, §§ 4861-4868](#) (1975), and C.V. Landfill, Inc., owner and operator of an unlined landfill in East Montpelier, Vermont.

In the spring of 1992, the District requested quotations from and negotiated Interim Disposal Agreements with both Palisades Recycling and C.V. Landfill for solid waste disposal for municipalities within the District. Although Palisades Recycling refused to enter into the District's proposed Interim Disposal Agreement, C.V. Landfill agreed, on June 1, 1992, to provide landfill services commencing **[**3]** July 1, 1992. The contract's terms provided, *inter alia*, that the District, "immediately upon the execution of these presents, . . . shall proceed to enact a District-wide solid waste flow control ordinance" that would, at a minimum, "contain solid waste hauler licensing and enforcement provisions, as well as a mechanism for designating [C.V. Landfill's] facilities as an authorized solid waste disposal site." On June 3, 1992, the District adopted the "Flow Control Ordinance" referred to in the Interim Disposal Agreement. The ordinance (1) regulated the collection, transportation, recycling, resource recovery, and disposal of solid waste within the District, (2) required licenses for the transportation of solid waste within the District, (3) directed the delivery of all solid waste generated within the District to facilities described in the ordinance, (4) prohibited the unlawful disposal of solid waste, and (5) provided for enforcement and penalties. The Flow Control Ordinance also established a District Regulatory Board, which, on July 29, 1992, adopted "Rules and Regulations Pertaining to the Collection, Transport and Disposal **[*91]** of Solid Waste Pursuant to the Waste Flow Control **[**4]** Ordinance."

Plaintiffs have alleged in their district court complaint that the Interim Disposal Agreement, the Flow Control Ordinance, and the rules and regulations adopted thereunder, operating in concert, provide C.V. Landfill with the exclusive right to provide solid waste facility services to municipalities located within the District, and prohibit haulers from exporting any and all solid waste generated within the District to any facility located outside of the District -- although C.V. Landfill is permitted to accept solid waste generated and brought in from outside of the District. In support of these allegations, Plaintiffs point out paragraph two of the District's Interim Disposal Agreement with C.V. Landfill, which states:

[C.V. Landfill] shall . . . have the exclusive right to receive solid waste for processing . . . and disposal from the District waste service areas as shown on the map which is attached hereto as Addendum (B); and District shall so designate [C.V. Landfill's] facilities as the exclusive destination of such solid waste. In addition, [C.V. Landfill] may receive waste from non-District towns that so designate [C.V. Landfill's] facilities[:]

paragraph **[**5]** thirteen of the Interim Disposal Agreement, which reads:

District, by ordinance, shall prohibit the exportation of District-generated solid waste for disposal at any facility not designated by the District[:]

and paragraph 5.1 of the Flow Control Ordinance, which provides:

Solid Waste collected or generated in the District shall be delivered to a transfer station or Facility designated by the District. No person shall deliver, or cause to be delivered, Solid Waste in the District except to such Facilities designated by the District.

Palisades Landfill's lined landfill in Moretown, Vermont, is, as of November 1992, located outside of the District, and is not a facility designated by the District for the receipt of solid waste generated or collected in the District.

On July 22, 1992, Palisades Recycling, Dowdell's wholly-owned corporation, reacting to the Interim Disposal Agreement between C.V. Landfill and the District, as well as to the Flow Control Ordinance and its rules and

regulations, sued the District in Washington County, Vermont, Superior Court. C.V. Landfill intervened as a defendant. Palisades Recycling sought to enjoin (1) the District from designating [**6] C.V. Landfill as the exclusive facility for all solid waste generated within the District if Palisades Recycling declined to execute the Interim Disposal Agreement as written, (2) the Flow Control Ordinance from taking effect on August 4, 1992, and (3) the District's contract with C.V. Landfill from continuing in effect. Palisades Recycling alleged, *inter alia*, that the District's actions infringed the dormant *Commerce Clause*, see *U.S. Const. art. I, § 8*, and were *ultra vires* under state law. After hearings in early September 1992, the Washington Superior Court denied Palisades Recycling's request for a preliminary injunction on September 21, 1992. The Vermont court found, among other things, that (1) the District's contract with C.V. Landfill and its proposed contract with Palisades Recycling "do not go beyond the District's grant of authority concerning its ability to assess and recover a surcharge on solid waste disposed of within the District"; (2) "the evidence does not establish that the Flow Control Ordinance[,] as applied, violates the *Commerce Clause of the United States Constitution*"; and (3) "the evidence does not establish irreparable harm to Plaintiff." On [**7] November 16, 1992, the Washington Superior Court entered summary judgment for the defendants -- the District and C.V. Landfill -- on all counts of the complaint. Palisades Recycling did not appeal from that decision.

A few months later, on February 23, 1993, Palisades Landfill, Valley Disposal, and Robert Dowdell brought the present complaint in the United States District Court for the District of Vermont against the District, C.V. Landfill, and Vermont Integrated Waste Solutions, Inc.¹ Plaintiffs charged that the District [*92] and C.V. Landfill had contracted, combined, and conspired to exclude Plaintiffs from competition in providing lined landfill disposal services to customers residing in the member municipalities that form the District. The five-count complaint alleged:

[I] the contract, ordinance and regulations are unconstitutional in that they violate the "dormant *Commerce Clause*" of the *U.S. Constitution Article I, Section 8*;[;]²

[II] the actions of defendants constitute an[] unlawful contract, combination or conspiracy in the form of a trust or otherwise in restraint of trade or commerce among the several states in violation of *15 U.S.C. § 1* [**8] [of the Sherman Act], damaging plaintiffs[;]

[III] the actions of the defendants constitute an unlawful monopolization, attempt to monopolize, or a combination or conspiracy to monopolize solid waste disposal of any municipal solid waste generated within the member towns of the District, thus monopolizing a part of trade or commerce among the states in violation of *15 U.S.C. § 2* [of the Sherman Act], damaging plaintiffs[;]

¹ On March 8, 1993, Plaintiffs voluntarily dismissed Vermont Integrated Waste Solutions, Inc.

² As amended on March 3, 1993, Count I came to read:

The contract, ordinance and regulations unconstitutionally discriminate facially and in effect against interstate commerce in violation of the "dormant" *Commerce Clause of the U.S. Constitution Article I Section 8*. Said discrimination on the part of the defendant District constitutes a deprivation under color of ordinance and regulation of the plaintiffs' rights, privileges and immunities secured by the U.S. Constitution in violation of *42 U.S.C. § 1983*.

On March 22, 1993, Plaintiffs, pursuant to *Fed. R. Civ. P. 15(a)*, moved to amend their complaint again primarily to seek declaratory and compensatory damages. See *infra* part II.A (setting forth the amended paragraph 2 of the complaint). The district court granted this motion. Then, on June 3, 1993, Plaintiffs sought leave for a further amendment. This request was followed on June 7, 1993, by yet a third motion to amend the complaint -- bringing the total number of amendments or requested amendments to four (including the initial amendment as a matter of course). On July 23, 1993, the district court, upon granting C.V. Landfill's motion to dismiss and the District's motion for summary judgment, ruled that Plaintiffs' second and third motions to amend were moot.

[IV] by designating the C.V. Landfill as the exclusive "designated facility" for the disposal of solid waste, the "District Regulatory Board's" actions are *ultra vires* and void[; and]

[V] there is no primary or overriding public municipal purpose in the District's grant of exclusive monopoly rights to receive solid waste to the unlined C.V. Landfill. Rather the primary purpose is to promote the private ends of the C.V. Landfill. Any public purpose is at best incidental, set up as a mere pretext to conceal a private purpose, and is therefore *ultra vires* and void.

Plaintiffs sought compensatory damages and requested preliminary and permanent injunctions against the "operation and [**9] enforcement of the 'flow control' provisions of the contract [between the District and C.V. Landfill], [the] ordinance, and [the] regulations." Following an evidentiary hearing on March 11, 1993, the district court, on March 16, 1993, denied Plaintiffs' motion for a preliminary injunction, finding that Plaintiffs had failed to demonstrate "they are likely to suffer irreparable harm if the injunction is not issued."

[**10] Before the March 11, 1993, hearing, C.V. Landfill, on March 8, 1993, moved to dismiss the antitrust claims (Counts II and III) for failure to state a claim upon which relief could be granted. [Fed. R. Civ. P. 12\(b\)\(6\)](#). C.V. Landfill also moved to dismiss Plaintiffs' supplemental state law claims (Counts IV and V), as well as their [§ 1983](#) claim (Count I), for lack of subject matter and/or personal jurisdiction. [Fed. R. Civ. P. 12\(b\)\(1\), \(2\)](#). At the same time, the District moved to dismiss all counts and for summary judgment. The District contended that the claims in Counts I, IV, and V were barred by collateral estoppel (issue preclusion), having been earlier decided by the Washington Superior Court. The District joined in C.V. Landfill's motion to dismiss the antitrust claims (Counts II and [*93] III) for failure to state a claim, and additionally argued that Counts II and III were barred by res judicata (claim preclusion). Plaintiffs submitted memoranda in opposition to the motions to dismiss and for summary judgment. Then, on April 2, 1993, Valley Disposal filed a cross-motion for partial summary judgment on Counts I and IV.

The district court heard argument on all motions on May 26, 1993. [**11] ³ On July 23, 1993, the court issued an opinion and order in which it (1) granted C.V. Landfill's motion to dismiss Plaintiffs' antitrust claims (Counts II and III) *with prejudice*, (2) found that Count I of Plaintiffs' complaint stated a claim only against the District, (3) declined to retain jurisdiction over Plaintiffs' state law claims (Counts IV and V) against C.V. Landfill, and (4) granted the District's motion for summary judgment, ruling that Counts I, IV, and V were barred by collateral estoppel and that Counts II and III were barred by res judicata. Plaintiffs filed a notice of appeal on August 10, 1993.

DISCUSSION

I.

Standards of Review

HN1 We review de novo the lower court's granting of C.V. Landfill's motion to dismiss [**12] Counts II and III (the antitrust claims) for failure to state a claim upon which relief can be granted.⁴ [Sykes v. James, 13 F.3d 515,](#)

³ The district court heard, among other things, (1) Plaintiffs' motion to amend their complaint, (2) C.V. Landfill's motion to dismiss, (3) the District's motion to dismiss and for summary judgment, and (4) Valley Disposal's cross-motion for summary judgment on Counts I and IV.

⁴ Whether a motion to dismiss an antitrust claim such as that brought by C.V. Landfill is more properly considered under [Fed. R. Civ. P. 12\(b\)\(1\)](#) or [Fed. R. Civ. P. 12\(b\)\(6\)](#) is an issue that has divided courts and commentators. See, e.g., [Seglin v. Esau, 769 F.2d 1274, 1278-79 \(7th Cir. 1985\)](#) (observing that "at least two commentators and one federal district court have argued persuasively that a failure to allege an effect on interstate commerce is a failure to state a claim and not a failure to allege subject matter jurisdiction"). Regardless of which rule is preferable, our review is de novo because "the trial court dismissed on the basis of the complaint alone." [Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 594 \(2d Cir. 1993\)](#).

519 (2d Cir. 1993), cert. denied, 114 S. Ct. 2749, 129 L. Ed. 2d 867, 1994 WL 122993 (1994). In so doing, "we accept as true the factual allegations of the complaint, and draw all inferences in favor of the pleader." Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993) (citing IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1052 (2d Cir. 1993), cert. denied, 1994 U.S. LEXIS 5612 (U.S. 1994).

[**13] HN2[↑] We also review de novo the district court's ruling on summary judgment that Counts II and III (the antitrust claims) are barred by res judicata and that Counts I, IV, and V (the dormant Commerce Clause claim and the supplemental state law claims) are barred by collateral estoppel. Sundance Cruises Corp. v. American Bureau of Shipping, 7 F.3d 1077, 1080 (2d Cir. 1993) HN3[↑] ("We review the grant of a motion for summary judgment *de novo*, construing all facts in favor of [Plaintiffs], the nonmoving parties."), cert. denied, 128 L. Ed. 2d 72, 114 S. Ct. 1399 (1994).

II.

Dismissal of Antitrust Claims (Counts II & III)

5

[**14] A.

In dismissing the antitrust claims, the district court agreed with C.V. Landfill that Plaintiffs had not established federal jurisdiction, having failed to plead facts sufficient to show that the District's and C.V. Landfill's activities had "a not insubstantial effect on the interstate commerce involved." McLain v. Real Estate Bd., 444 U.S. 232, 246, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980).⁶

[**15] [*94] Plaintiffs now challenge that ruling. They argue that the complaint's bare allegations of an effect on commerce, general and conclusory as they were, nonetheless satisfied minimum notice pleading requirements. Plaintiffs further assert that the testimony they presented at the March 11, 1993, preliminary injunction hearing adequately demonstrated that the District's and C.V. Landfill's conduct had "a not insubstantial effect" on interstate commerce, and that this sufficed. The testimony indicated, they say, that the defendants' activities adversely affected Plaintiffs' ability (1) to pay for out-of-state equipment and supplies, consultants, engineers, and contractors used to build and operate the lined landfill run by Palisades Landfill, and (2) to secure out-of-state permanent financing for that facility.

Like the district court, we think the complaint failed to meet standards enunciated by the Supreme Court in *McLain* and by this court in Furlong v. Long Island College Hospital, 710 F.2d 922 (2d Cir. 1983) (affirming district court's dismissal of antitrust claim for failure adequately to plead antitrust jurisdiction). In *McLain*, the plaintiffs [**16] filed a complaint in the United States District Court for the Eastern District of Louisiana, alleging that real estate brokers in the Greater New Orleans area had "engaged in a price-fixing conspiracy in violation of § 1 of the Sherman Act." McLain, 444 U.S. at 234. After considering briefs, deposition testimony, documents, and oral argument on the issue, the district court dismissed the complaint "for failure to establish the interstate commerce component of

⁵The District joined in C.V. Landfill's motion to dismiss, adopting and incorporating its memoranda in support thereof on all issues. Similarly, on appeal, "the District specifically adopts and incorporates . . . the arguments made by . . . C.V. Landfill . . . as to the propriety of the district court's dismissal of the [antitrust] counts."

⁶This court has said HN4[↑] there are two ways to establish the interstate commerce component of Sherman Act jurisdiction.

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, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (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, 74 S. Ct. 452, 454, 98 L. Ed. 618 (1954).

Furlong v. Long Island College Hosp., 710 F.2d 922, 925 (2d Cir. 1983).

Sherman Act jurisdiction.⁷ *Id.* The Fifth Circuit affirmed. Although the Supreme Court vacated the decision below, holding that, "on the record thus far made, it cannot be said that there is an insufficient basis for petitioners to proceed at trial to establish Sherman Act jurisdiction," *id. at 245*, it also stated that jurisdiction under the Sherman Act may not be invoked "unless the relevant aspect of interstate commerce is identified; 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," [**17] *id. at 242*. In this vein, the Court continued: "To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings." *Id.* (emphasis added); see *Furlong, 710 F.2d at 926*. Only when allegations in the complaint are controverted did the Court place a further duty upon the plaintiff to "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." *McLain, 444 U.S. at 242*; see Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* P 232.1, at 295 (1993 Supp.). Nowhere did the Court suggest that this latter burden was a substitute for minimally adequate allegations in the complaint of a relationship with some delineated aspect of interstate commerce.

[**18] While this court has said, "we are mindful of the generous approach to pleading [*95] outlined in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957)*, which has been applied in the antitrust context," *Furlong, 710 F.2d at 927* (citing *McLain, 444 U.S. at 246*), neither *Conley* nor *McLain* allows "conclusory statements to substitute for minimally sufficient factual allegations," *id.* Rather, **HN5**[↑] "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." *710 F.2d at 926*. We went on to say in *Furlong*,

a more detailed pleading requirement . . . obliges a plaintiff to give some thought to the theory of his case, thought that may 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 [**19] the "good ground" standard of *Fed. R. Civ. P. 11* when he endeavors to plead factual allegations.

Id. at 928.

Against these standards, Plaintiffs' original complaint, their complaint amended once as a matter of course, their complaint amended by leave of court, and their proposed amended complaints, are all plainly lacking. None of these pleadings asserts "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 [interstate] commerce." *Id. at 927*. Plaintiffs' original complaint asserts:

[(1)] defendants . . . have contracted, combined, and conspired to restrain trade and . . . have formed an unlawful combination to monopolize a part of trade or commerce among the states in violation of the dormant *Commerce Clause of the U.S. Constitution* and of *15 U.S.C. §§ 1, 2*. By such activities defendants have acted

⁷ The complaint in *McLain* contained the following allegations pertinent to establishing federal jurisdiction:

- (1) that the activities of the respondents are "within the flow of interstate commerce and have an effect upon that commerce";
- (2) that the services of respondents were employed in connection with the purchase and sale of real estate by "persons moving into and out of the Greater New Orleans area";
- (3) that respondents "assist their clients in securing financing and insurance involved with the purchase of real estate in the Greater New Orleans area," which "financing and insurance are obtained from sources outside the State of Louisiana and move in interstate commerce into the State of Louisiana through the activities of the [respondents]"; and
- (4) that respondents have engaged in an unlawful restraint of "interstate trade and commerce in the offering for sale and sale of real estate brokering services."

to exclude the plaintiffs from competition in providing lined landfill disposal services to customers residing in the member municipalities which form the Central Vermont Solid Waste Management District[.]

[(2)] the actions [**20] of defendants constitute an unlawful contract, combination or conspiracy in the form of a trust or otherwise in restraint of trade or commerce among the several states in violation of 15 U.S.C. § 1; and]

[(3)] the actions of defendants constitute an unlawful monopolization, attempt to monopolize, or a combination or conspiracy to monopolize solid waste disposal of any municipal solid waste generated within the member towns of the District, thus monopolizing a part of trade or commerce among the states in violation of 15 U.S.C. § 2⁸

Even after the District and C.V. Landfill, on March 8, 1993, had moved to dismiss the antitrust claims for failure to allege facts sufficient to support an inference of a not insubstantial effect upon interstate commerce, Plaintiffs did not seek to amend their complaint so as to remedy this deficiency. All they did, on March 22, 1993, along these lines was amend introductory paragraph 2 of the complaint to read:

Accordingly, the plaintiffs seek a *declaratory judgment declaring unlawful and/or unconstitutional, and an order to prevent the defendants from enforcing* [**21], relevant provisions of a contract, ordinance, and rules and regulations by which this unlawful restraint of *interstate commerce* and of competition is effectuated, plus damages, treble damages, and reasonable litigation costs and attorney's fees.

(amendments emphasized).⁹ [**23] But, as we have indicated, HN6[[↑]] mere bald assertions that defendants' [*96] activities restrain interstate commerce generally, along with references to statutory language, are not substitutes for concrete allegations from which a not insubstantial effect on interstate commerce can be inferred.¹⁰ E.g., Furlong, 710 F.2d at 926-27; see Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987) ("The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts 'do not at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs 'will get nowhere merely by dressing them up in the language of antitrust.'" (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (quoting Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984)), [**22] cert. denied, 470 U.S. 1054, 105 S. Ct. 1758, 84 L. Ed. 2d 821 (1985))). We agree with the district court's finding that, "despite the fact that plaintiffs have amended their complaint twice and seek to amend it again, they have never sought to amend so as to plead facts sufficient to support an antitrust claim."

Notwithstanding this basic deficiency, Plaintiffs argue that they established antitrust jurisdiction by introducing, during the March 11, 1993, hearing on their motion for preliminary injunction, evidence that the District's and C.V. Landfill's activities have had a not insubstantial effect on interstate commerce.¹¹ At [**24] that hearing, Plaintiffs

⁸ The district court viewed this third allegation, paragraph thirty-two of the complaint, as the sole suggestion that the District's and C.V. Landfill's activities have any nexus to interstate commerce. The district court found, however, and we agree, that

this . . . allegation does no more than identify a relevant local activity and "presume an interrelationship with some unspecified aspect of interstate commerce." McLain, 444 U.S. at 242. It does not support and plaintiffs have not pleaded any facts to support an inference that the local activity has a "not insubstantial effect" on interstate commerce.

⁹ Nor did Plaintiffs' subsequent proposed amended complaints of June 3 and June 7, 1993, add any factual allegations that would satisfy antitrust jurisdictional requirements.

¹⁰ The inadequacy of Plaintiffs' allegations here becomes even more apparent when compared with the jurisdictional allegations made by the plaintiffs in *McLain*, see *supra* note 7, and by the plaintiff in *Furlong*. In the latter case,

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, [Long Island Anesthesiology Associates'] receipt of such payments, LIAA's practice of purchasing goods and services in interstate commerce, and [Long Island College Hospital's] receipt of federal subsidies.

Furlong, 710 F.2d at 924.

called Scott Bennett, General Manager of Palisades Landfill, to testify. He stated, *inter alia*, that the lined landfill, in its daily operations, (1) uses equipment manufactured outside of the State of Vermont, (2) purchases fuel from New Hampshire suppliers, and (3) obtains credit from sources in Georgia and Kentucky. Furthermore, he testified that, in constructing the lined landfill, (1) the native Vermont soil was mixed with bentonite -- pursuant to contracts with Illinois and New York companies -- which is a naturally occurring clay found in Wyoming, (2) the plastic liner for the landfill was provided by an Illinois company, and (3) quality control was handled by a company out of New Hampshire. According to Bennett, the lined landfill does not generate sufficient revenues to pay the approximately \$ 2,500,000 owed to out-of-state suppliers, contractors, and financiers who participate in the operation and assisted in the development of the lined landfill. He attributed the revenue shortfall to the inability of trash haulers in the District -- who are subject to the Flow Control Ordinance and the rules and regulations adopted thereunder -- to take solid [**25] waste generated within the District to facilities located outside of the District, such as Palisades Landfill's lined landfill. Moreover, Bennett testified that, because of the revenue shortfall, the lined landfill has been unable to secure additional credit, which could be used to satisfy the \$ 2,500,000 obligation.

Why Plaintiffs never amended their complaint to refer tersely to these matters is a mystery. Enough could easily have been asserted concerning the alleged violation and its effect on interstate commerce to withstand a motion to dismiss for failure adequately to plead antitrust jurisdiction. See, e.g., *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, [425 U.S. 738, 744, 96 S. Ct. 1848, 48 L. Ed. 2d 338 \(1976\)](#) [**26] (holding that acts that affect an intrastate business's ability to purchase out-of-state supplies, generate out-of-state revenues, and secure out-of-state financing provide a sufficient basis for establishing Sherman Act jurisdiction). But, for reasons already discussed, the complaint, as it now stands, does not satisfy jurisdictional [*97] pleading requirements. Nor was the complaint's deficiency cured by the testimony at the March 11, 1993, hearing. While once allegations of an effect on interstate commerce are controverted, "the plaintiff must 'demonstrate' an interstate effect by evidence," Areeda & Hovenkamp, *Antitrust Law* P 232.1, at 295 (1993 Supp.), the Supreme Court has nowhere indicated that plaintiffs have the option of omitting proper factual allegations from the complaint, tendering the relevant assertions, instead, at some later hearing of their own choosing.¹² The Court's statement in *McLain* -- that "to establish jurisdiction a plaintiff must allege the critical relationship in the pleadings," [444 U.S. at 242](#) -- cannot be ignored.

[**27] We cannot say, therefore, that the court erred in dismissing Counts II and III when, after having ample opportunity, Plaintiffs did not amend their complaint to plead facts indicating the "critical relationship" between the defendants' activities and some aspect of interstate commerce. Still, we are loath to sustain the dismissal with prejudice of the two counts where the record so obviously reflects the means to remedy the pleading deficiency. We vacate the district court's [Rule 12\(b\)\(6\)](#) dismissal of Counts II and III, and allow Plaintiffs thirty (30) days from the issuance of mandate to file with the district court an amended complaint that is consistent with the principles discussed herein. Should the district court thereafter determine that Plaintiffs have still failed to comply, it may reenter its order dismissing Counts II and III *with prejudice*.

B.

The district court concluded that Plaintiffs' antitrust claims (Counts II and III) were barred by the doctrine of res judicata -- also referred to as claim preclusion. The district court was unimpressed by Plaintiffs' argument, which they repeat on appeal, that they should be permitted to bring their Sherman Act claims in federal [**28] court

¹¹ Plaintiffs asserted in their March 11, 1993, Memorandum in Opposition to Defendants' Motions to Dismiss that they would show at the March 11, 1993, "preliminary injunction hearing that the jurisdictional threshold for the application of the [Sherman Act] is met here."

¹² Plaintiffs have not argued that they can gain relief from [Fed. R. Civ. P. 15\(b\)](#). [Rule 15\(b\)](#) provides that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." In any event, we would reject such an argument under present circumstances. The case has yet to go to trial, and we do not think a district court must accept evidence submitted by a plaintiff at a preliminary hearing as automatically amending an inadequate complaint. Cf. Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1494, at 53 (1990) ("If the issue in fact has not been tried with the consent of the parties, then an amendment to conform to the pleadings will not be permitted no matter when made.").

because the state court, in the earlier proceeding, did not have subject matter jurisdiction over those claims. In response, the district court ruled that, when Dowdell and Palisades Recycling initially decided to challenge the District's actions, they, being in the offensive position, had the choice of proceeding in either state or federal court. Because they made a strategic decision to proceed in state court rather than federal court, the district court determined that Dowdell should not be entitled subsequently to bring his Sherman Act claims in federal court simply because the state court was not the proper forum for his antitrust claims.

Whatever might be said for the district court's approach as an initial proposition, it would seem to be foreclosed by Supreme Court precedent. In *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985), the United States Supreme Court considered "whether a state court judgment may have preclusive effect on a [subsequent] federal antitrust claim that could not have been raised in the [earlier] state proceeding." *470 U.S. at 379*. [**29] There, as here, plaintiffs filed their initial suit in state court, but did not allege violations of state **antitrust law**; nor did they bring contemporaneous federal antitrust actions. Plaintiffs' claims were dismissed. "In March 1980, [plaintiffs] filed a federal antitrust suit in the United States District Court for the Northern District of Illinois based on the same events underlying their unsuccessful state court actions." *Id. at 376*. Following proceedings in the district court, the Seventh Circuit, sitting en banc, held, in a plurality opinion, "that a state court judgment bars the subsequent filing of a federal [*98] antitrust claim if the plaintiff could have brought a state antitrust claim under a state statute 'materially identical' to the Sherman Act." *Id. at 377*. The plurality found the Illinois Antitrust Act, Ill. Rev. Stat., ch. 38, P 60-3(2) (1981), to be sufficiently similar to the Sherman Act to bar plaintiffs' federal antitrust claims. The Supreme Court granted certiorari and reversed.¹³

[**30] The Court first observed:

HNT [↑] The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." *28 U.S.C. § 1738*. This statute directs a federal court to refer to the preclusion law of the State in which judgment was rendered.

Marrese, 470 U.S. at 380 (emphasis added). The Court further noted that, "with respect to matters that were not decided in the state proceedings, . . . claim preclusion generally does not apply where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts' *Restatement (Second) of Judgments* § 26(1)(c) (1982)." *Id. at 382*. Against this backdrop, the Court held that, "if state preclusion [**31] law includes this requirement of prior jurisdictional competency, which is generally true, a state judgment will not have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts." *Id.* (emphasis in original).

In accordance with *Marrese*, we must determine whether Vermont's doctrine of res judicata, which might otherwise bar claims asserted in a subsequent proceeding, applies when the court that rendered the earlier judgment did not have subject matter jurisdiction over such claims. In *Town of Waterford v. Pike Industries*, 135 Vt. 193, 373 A.2d 528 (Vt. 1977), "the Town of Waterford petitioned the Caledonia County (now Superior) Court to permanently enjoin Pike Industries, Inc. . . . from operating its plant facilities within the town because of its violation of the town's zoning ordinance, and for the recovery of a fine of \$ 25 for each day during which the defendant had been in violation." *Pike Indus.*, 373 A.2d at 529. In response, Pike "asserted as an affirmative defense that the town could not rely upon the zoning ordinance for its [**32] permanent injunction," *id.*, because it was invalid. The trial court, however, "invoking the doctrine of res judicata, . . . held that Pike was barred from raising the claim of invalidity." *Id.* It decided

¹³ For a thorough discussion of *Marrese*, see 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4470, at 443-49 (1993 Supp.).

that Pike could have litigated the validity of the ordinance previously when the company, in 1970 and 1971, "petitioned the local zoning board of adjustment for a variance for its plant facilities."¹⁴ *Id.*

The Supreme Court of Vermont, in striking the Caledonia Superior Court's decision, allowed Pike to assert its affirmative defense that the zoning ordinance was invalid. It ruled:

The challenge [**33] of the validity of the ordinance for failure to comply with statutory procedures of necessity involved the adjudication of factual issues. Since the board could not adjudicate the validity of the ordinance, ¹⁵ [**34] the county court, with its limited appellate jurisdiction, could not properly make determinations with respect to these factual matters.¹⁶ We therefore hold [**99] that, *inasmuch as Pike has not had a proper forum in which to challenge the validity of the ordinance, the trial court erred in barring the defendant from raising this issue in the present case.*

[373 A.2d at 530](#) (emphasis and footnotes added). We read *Pike Industries* as indicating that [HN8](#) Vermont's preclusion law does not foreclose "matters that [another] court lacked jurisdiction to entertain," [Marrese, 470 U.S. at 383](#). We hold, therefore, that Plaintiffs are not barred by res judicata from bringing their federal antitrust claims in federal district court.

III.

Dismissal of Plaintiffs' Dormant Commerce Clause Claim Brought Pursuant to 42 U.S.C. § 1983 (Count I)

A.

The district court ruled that Count I of the complaint, seeking relief only from the District, did not state a claim against C.V. Landfill. Plaintiffs conceded as much in their Supplemental Points of Authority in Support of Preliminary Injunction and in their Memorandum in Opposition to Defendants' Motions to Dismiss. They have not assigned error on appeal to the district court's ruling, which accordingly stands.

B.

The district court held that Plaintiffs' dormant *Commerce Clause* claim against the District, brought pursuant to [42 U.S.C. § 1983](#), is barred by collateral estoppel (*i.e.*, issue preclusion). In [Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 \(1980\)](#), [**35] the Supreme Court "made clear that [HN9](#) issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal [§ 1983](#) suit as they enjoy in the courts of the State where the judgment was rendered." [Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 83, 104 S. Ct. 892, 79 L. Ed. 2d 56 \(1984\)](#); see [Kremer v. Chemical Constr. Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 \(1982\)](#); [Anderson v. City of New York, 611 F. Supp. 481, 486 \(S.D.N.Y. 1985\)](#) ("There is no question that state court judgments can have collateral estoppel effect in subsequent [section 1983](#) proceedings. . . . To determine the preclusive effect of a state court judgment, we look to the law of the state where the judgment was rendered."). As the allegedly preclusive proceeding here was in a Vermont state court, we must look to the law of Vermont to determine whether Plaintiffs' claim is barred by the judgment entered in the 1992 state court proceeding brought by Palisades Recycling against the District and C.V. [**36] Landfill.

¹⁴ "This variance request was denied by the board and an appeal was taken to the Caledonia County Court which affirmed the board's decision." [Pike Indus., 373 A.2d at 529](#). In [L. M. Pike & Son, Inc. v. Town of Waterford, 130 Vt. 432, 296 A.2d 262 \(Vt. 1972\)](#), the Supreme Court of Vermont affirmed the county court's decision.

¹⁵ By virtue of [Vt. Stat. Ann. tit. 24, § 4473](#), "the board is precluded . . . from invalidating any development plan or bylaw of any municipality or the implementation or enforcement thereof." [Pike Indus., 373 A.2d at 529](#).

¹⁶ Although [Vt. Stat. Ann. tit. 24, § 4472\(a\)](#) "currently provides for a de novo hearing before the superior court, at the time that Pike took its appeal to the county court this provision was not in effect." [Pike Indus., 373 A.2d at 530](#).

In [Trepanier v. Getting Organized, Inc., 155 Vt. 259, 583 A.2d 583 \(Vt. 1990\)](#), the Supreme Court of Vermont held that

[HN10](#) [collateral estoppel] should be found only when the following criteria are met: (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

[Trepanier, 583 A.2d at 587](#). Plaintiffs argue that, under this test, they should not be collaterally estopped from proceeding with their [§ 1983](#) claim. They assert, *inter alia*, that the constitutional issue in this case, while brought under the dormant [Commerce Clause](#), differs from the [Commerce Clause](#) claim addressed by the Washington Superior Court because circumstances have changed. We agree.

It has been recognized that "one of the most difficult problems in the application of [collateral estoppel] is to delineate [**37](#) the issue on which litigation is, or is not, foreclosed by the prior judgment." [Restatement \(Second\) of Judgments § 27 cmt. c](#) (1982). [HN11](#) We must "balance our 'desire not to deprive a litigant of an adequate day in court' against 'a desire to prevent repetitious litigation of what is essentially the same dispute.'" [Berlin Convalescent Ctr., Inc. v. Stoneman, 159 Vt. 53, 615 A.2d 141, 145-46 \(Vt. 1992\)](#) (quoting [Restatement \(Second\) of Judgments § 27 cmt. c](#) (1982)). [HN12](#) In deciding whether "essentially the same dispute" is involved in earlier and later [*100](#) proceedings, the Supreme Court of Vermont has examined several factors set out in the Restatement, namely, whether

(1) . . . there [is] "a substantial overlap" in the evidence and argument between the two proceedings[]; (2) . . . the "same rule of law" [is] involved in both proceedings[]; (3) . . . the "pretrial preparation and discovery" in the first proceeding cover the issues in the second proceeding[]; and (4) ". . . the claims involved in the two proceedings [are closely related.]"

[Stoneman, 615 A.2d at 146](#) (quoting [Restatement \(Second\) of \[Judgments § 27 cmt. c\]\(#\) \(1982\)](#)).

Starting with the second and fourth factors first, we observe that the "same rule of law" is involved in both the state and federal proceedings -- that is, the principles of the dormant, or negative, [Commerce Clause of the United States Constitution](#) -- and the claims involved in the two proceedings are closely related. Nevertheless, in view of the changed circumstances since the state court case, we do not think "there is 'a substantial overlap' in the evidence and argument between the two proceedings," *id.*, or that "the 'pretrial preparation and discovery' in the first proceeding cover the [dormant [Commerce Clause](#)] issues in the second proceeding," *id.*

[HN13](#) The dormant [Commerce Clause](#) is a nontextual offshoot of the [Commerce Clause](#), which "ascribes to Congress the power 'to regulate Commerce . . . among the several States.' [U.S. Const. art. I, § 8, cl. 3](#). Ascription of this power to Congress limits, by negative implication, the power of the States to interfere with interstate commerce." [New York State Trawlers Ass'n v. Jorling, 16 F.3d 1303, 1307 \(2d Cir. 1994\)](#) (citing [Fort Gratiot Sanitary Landfill, Inc. v. Michigan](#) [**39](#) [Dep't of Natural Resources, U.S. , , 112 S. Ct. 2019, 2023, 119 L. Ed. 2d 139 \(1992\)](#)). In [City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 \(1978\)](#), the United States Supreme Court, in discussing the dormant [Commerce Clause](#), observed that its opinions "through the years have reflected an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." [437 U.S. at 623-24](#). In this context, the Court explained that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. . . . But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in [Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 \(1970\)](#)." [**40](#) " [437 U.S. at 624](#). In [Pike](#), the Court ruled:

[HN14](#) Where the statute regulates evenhandedly 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. . . . If a legitimate local purpose is found, then the question becomes 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.

Pike, 397 U.S. at 142; see Jorling, 16 F.3d at 1307 ("Provided a state does not discriminate against non-residents, . . . it may impose incidental burdens on interstate commerce when exercising its police power to promote safety or general welfare." (citing Laurence H. Tribe, *American Constitutional Law* § 6-5, at 408 (2d ed. 1988) ("State regulation affecting interstate commerce will be upheld if (a) the regulation is rationally related to a legitimate state end, and (b) [**41] the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation."))).

These principles were relevant when the Washington Superior Court considered Palisades Recycling's dormant Commerce Clause claim and the arguments opposing it. Hence C.V. Landfill, in its state court memorandum in opposition to Palisades Recycling's motion [*101] for a preliminary injunction, maintained that any incidental burden placed on interstate commerce by provisions of the Flow Control Ordinance and the Interim Disposal Agreement was "clearly justified" by the District's need to achieve "health, safety and public welfare objectives." C.V. Landfill explained that the Flow Control Ordinance and the Interim Disposal Agreement gave the District the power to guaranty that facilities with which it contracts will receive a certain quantity of waste. This, in turn, provides those facilities with a steady stream of revenues, which may be used to develop solid waste facilities (e.g., *lined* landfills) needed by the District.¹⁷ Accordingly, in deciding that "the evidence does not establish that the Flow Control Ordinance[,] as [**42] applied, violates the Commerce Clause of the United States Constitution," the Washington Superior Court may very well have concluded that, notwithstanding any incidental burdens placed on interstate commerce, there were indeed local benefits to be achieved by allowing the District to require member towns to send trash to one particular *unlined* landfill as opposed to another *unlined* landfill.

In the [**43] present case, however, the district court's focus would not be the same because the circumstances are different. First, as Plaintiffs point out, they now operate a *lined* landfill, which they say is environmentally superior to the *unlined* landfill operated by Palisades Recycling. This difference is significant, they contend, because the District and C.V. Landfill can no longer argue that there is any local benefit -- that would justify any encumbrance on interstate commerce -- to designating C.V. Landfill as the exclusive recipient of solid waste generated within the District.¹⁸ Plaintiffs submit that, while C.V. Landfill and the District could, in the state case, argue that an ordinance that directs the flow of solid waste to one unlined landfill as opposed to another unlined landfill provides local benefits that justify any incidental burden on interstate commerce, they cannot make that same argument here when solid waste is being directed to one facility to the exclusion of a new and adequate lined landfill. This arrangement, argue Plaintiffs, does not provide local benefits justifying the incidental burden on interstate commerce.

[**44] Plaintiffs further point to recent changes in the contract between C.V. Landfill and the District, as well as the Supreme Court's May 1994 decision in C & A Carbone, Inc. v. Town of Clarkstown, U.S. , 114 S. Ct. 1677, 128

¹⁷ Indicative of the District's intent that C.V. Landfill would construct a lined landfill was paragraph 3 of the Interim Disposal Agreement, which read:

During the initial term of this agreement, Operator shall provide disposal capacity (until exhausted or prohibited) for District waste, only at its unlined facility. In anticipation of exhaustion of unlined capacity, Operator will commence to permit and prepare for construction [of] materials processing and long-term disposal facilities consisting of a source separated organic waste composting process and *lined landfill cell*

(emphasis added).

¹⁸ The district court did not find this distinction compelling. It held that "the fact that the state court action pertained to the unlined landfill and this action pertains to a lined landfill does not alter the Court's opinion that the issues before us, i.e., the legality of the District's actions under state law and the Commerce Clause, are identical to the issues previously contested in state court."

L. Ed. 2d 399 (1994) (holding that a flow control ordinance that required all solid waste to be processed at a designated transfer station before leaving the municipality violated the dormant Commerce Clause).¹⁹ Because of these, the Flow Control Ordinance and Interim Disposal Agreement are said to violate *per se* the dormant Commerce Clause: that is, Plaintiffs contend that the ordinance and the agreement operating in conjunction do not merely burden interstate commerce incidentally, but "facially" discriminate against it. In support of this argument, Plaintiffs point to evidence in the record indicating that the State of Vermont shut down C.V. Landfill's unlined landfill as of August 6, 1993, and C.V. Landfill, pursuant to a 1993-94 renewal of the Interim Disposal Agreement, now acts as the exclusive transfer station for solid waste generated within [*102] the District.²⁰ [**46] Moreover, although there is no [**45] evidence in the record to this effect, Plaintiffs say they can prove that C.V. Landfill, in its capacity as a transfer station, ships all solid waste generated within the District to a lined landfill in Bethlehem, New Hampshire. According to Plaintiffs, because this new arrangement requires C.V. Landfill to process solid waste generated by the District prior to out-of-state shipment -- to the exclusion of all other in-state or out-of-state entities -- the Flow Control Ordinance and the Interim Disposal Agreement are protectionist measures that directly violate the dormant Commerce Clause.²¹

Having considered Plaintiffs' current position, the described changed circumstances, and the Supreme Court's ruling in *C & A Carbone*, we do not think the evidence introduced and the arguments made in the state court proceeding can be said to have adequately addressed Plaintiffs' present dormant Commerce Clause claim. Pretrial preparation and discovery in the state case would not have covered the key issues here. We hold that Plaintiffs' present dormant Commerce Clause claim relies on facts that differ so materially from the ones before the Washington Superior Court that Plaintiffs must be allowed to proceed with their claim. See 18 Charles A. Wright, Arthur R. Miller, Edward [**47] H. Cooper, *Federal Practice and Procedure* § 4417, at 153 (1981) (stating that preclusion is inappropriate when the facts of the second suit are "separable" from the facts of the first suit, and the new facts are distinguishable from the facts found in the first suit "for purposes of the substantive rules applied in the first suit"). We reverse the district court's ruling that Plaintiffs' § 1983 claim is barred by collateral estoppel.

We add that it is also doubtful -- although we do not decide this point -- whether there was privity between the state plaintiff, Palisades Recycling, and two of the three present Plaintiffs. The district court found privity because "[Palisades Recycling, Palisades Landfill, and Valley Disposal] are all alter egos of Robert Dowdell."

We have no doubt the district court was correct in finding that Robert Dowdell was in privity with Palisades Recycling. He owned and controlled the company, and freely admitted to initiating and controlling the state court action brought by Palisades Recycling, in which he had a financial stake. Whether, however, Palisades Landfill and Valley Disposal, the current corporate plaintiffs, were also in privity with Palisades [**48] Recycling, the state court plaintiff, by virtue of their alter ego relationships with Robert Dowdell is much more dubious.

¹⁹ The Supreme Court had not yet decided *C & A Carbone* when Plaintiffs submitted their briefs. They cited it, however, as a case that involves facts very similar to those here, and as a decision that could potentially strengthen their dormant Commerce Clause claim.

²⁰ Indeed, the renewal agreement states:

Paragraph 3. is deleted and is replaced by the following Paragraph 3.:

3. During the first renewed term of this Agreement, Operator shall provide disposal capacity (until exhausted or prohibited) for District waste, only at its unlined facility. In anticipation of exhaustion or prohibition of unlined capacity, Operator will continue its efforts to permit and prepare for construction of a materials processing and long-term disposal facility consisting of a lined landfill cell If Operator is prohibited by law from disposal of solid waste at its unlined facility, and in any event at a time no later than October 9, 1993, Operator will provide the District transfer services to a lined facility, effective immediately upon closure of the unlined facility. . . .

²¹ Plaintiffs described these new events and this new claim, among others, in their proffered amended complaint of June 7, 1993. The district court disallowed the amendment, apparently believing that its dismissal of the complaint as earlier amended rendered the new claim moot. Upon remand, the district court is instructed to allow Plaintiffs' to amend their complaint to include their updated allegations and claims.

"The rationale behind the alter ego theory is that if the shareholders themselves, or the corporations themselves, disregard the legal separation, distinct properties, or proper formalities of the different corporate enterprises, then the law will likewise disregard them so far as is necessary. . . ." 1 Charles R. P. Keating & Gail O'Gradney, *Fletcher Cyclopedia of the Law of Private Corporations* § 41.10, at 614 (1990). [HN15](#)[↑] To determine whether the separate existence of the corporation should be disregarded, courts have examined a number of factors, including:

(1) whether the shareholder sought to be charged owns all or most of the stock of the corporation; (2) whether the shareholder [\[*103\]](#) has subscribed to all of the capital stock of the corporation or otherwise caused its incorporation; (3) whether the corporation has grossly inadequate capital; (4) whether the shareholder uses the property of the corporation as his own; (5) whether the directors or executives of the corporation act independently in the interest of the corporation or simply take their orders [\[**49\]](#) from the shareholder in the latter's interest; and (6) whether the formal legal requirements of the corporation are observed.

Id. § 41.10, at 616. As to the first consideration, the record reveals that Robert Dowdell solely owns Palisades Recycling and jointly owns Palisades Landfill and Valley Disposal. But as to the remaining factors, the record is relatively silent. While additional evidence might reveal that the corporate plaintiffs here and Palisades Recycling are indeed the alter egos of Robert Dowdell, we doubt whether the record, in its present state, supports such a finding.²² We need not, however, rule finally, as, even assuming privity, the issues are, as we have found, too dissimilar to support a determination of collateral estoppel.

[**50] IV.

Dismissal of Plaintiffs' State Law Claims (Counts IV & V)

A.

The district court thought it was unclear from Plaintiffs' complaint whether they were bringing their supplemental state law claims (Counts IV and V) against C.V. Landfill or solely against the District. To the extent that the claims were brought against C.V. Landfill, the district court declined to retain jurisdiction, having already dismissed the federal antitrust claims. See [United Mine Workers of Am. v. Gibbs](#), 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966) ("Certainly, if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well."). By vacating the district court's decision to dismiss Plaintiffs' federal antitrust claims, however, see *supra* part II.A, we have eliminated the grounds upon which the district court dismissed Plaintiffs' supplemental state law claims. Accordingly, we vacate the judgment dismissing Plaintiffs' state law claims against C.V. Landfill so that the district court may, in its discretion, exercise supplemental jurisdiction. See [Block v. First Blood Assocs.](#), 988 F.2d 344, 351 (2d Cir. 1993) [\[**51\]](#) ("The decision whether to exercise pendent jurisdiction is within the discretion of the district court.").

B.

²² Were the district court free to write on a clean slate, it might have relied on a theory other than the alter ego doctrine to satisfy the first element of Vermont's *Trepanier* test (*i.e.*, "preclusion is asserted against one who was a party or in privity with a party in the earlier action," [583 A.2d at 587](#)). While [HN16](#)[↑] the traditional test for privity -- "whether the parties have really and substantially the same interest in the property in issue," [First Wis. Mortgage Trust v. Wyman's, Inc.](#), 139 Vt. 350, 428 A.2d 1119, 1124 (Vt. 1981) -- might not have yielded any clear result one way or the other, the district court might have looked to "some recent decisions [that] have stretched traditional doctrine and allowed collateral estoppel to be used against nonparties in some situations," Hiroshi Motomura, *Using Judgments as Evidence*, [70 Minn. L. Rev. 979, 1026 \(1986\)](#). The "virtual representation" doctrine, for example, which says "that a nonparty is bound if a party who had the same interests litigated the prior case, even though the nonparty was neither a participant nor in privity with a party in the prior proceeding," *id.* at 1029, might apply if it were found "that . . . two corporations were taking advantage of their corporate separateness in order to sue [the same defendant] twice," [American Renaissance Lines, Inc. v. Saxis S.S. Co.](#), 502 F.2d 674, 678 (2d Cir. 1974).

Finding that Palisades Recycling brought the same claims in the earlier state court proceeding, the district court dismissed Plaintiffs' supplemental state law claims (Counts IV and V) against the District on the grounds that they were barred by collateral estoppel. Plaintiffs argue that the district court's decision must be reversed because the issues involved in the supplemental state law claims in this case are not the same as the questions put before the Washington Superior Court. Although Plaintiffs conceded below in their Memorandum in Opposition to Issue Preclusion that "there is [a] similarity in some of [the] issues at bar with those [*104] brought in the earlier litigation such as claims that the District's actions are *ultra vires*," they maintain that the *ultra vires* analysis changes when the claimant is an operator of a lined landfill as opposed to an operator of an unlined landfill. We agree with Plaintiffs.

Pursuant to Vermont law, [HN17](#) "municipalities are responsible for the management and regulation of the storage and collection of solid wastes within their jurisdiction [**52] in conformance with the state solid waste management plan authorized under chapter 159 of Title 10." ²³ [Vt. Stat. Ann. tit. 24, § 2202a\(a\)](#) (Supp. 1991). Chapter 159 of Title 10 contains several provisions pertaining to lined and unlined landfills. While we do not describe them all, one provision, for instance, states that "new landfills placed in operation after July 1, 1987[,] shall be lined and shall collect and treat leachate." [Vt. Stat. Ann. tit. 10, § 6605\(d\)](#) (Supp. 1992). Others provide:

[HN18](#) (c) No later than July 1, 1991[,] the operating portion of each landfill shall be lined, if required under the provisions of [10 V.S.A. § 6605\(d\)](#), except that those in operation as of July 1, 1987[,] that are certified to receive or actually receive less than 1,000 tons of municipal waste per year may be exempted from this requirement according to the provisions of subsection (d) of this section, or if, considering the factors established in subdivision (a)(3) of this section, the secretary finds that they will not create a significant risk to public health and that they will not cause irreparable harm to the environment.

(d) The secretary [of the agency of natural resources] may [**53] authorize continued operation of a municipally owned unlined landfill which is in operation on July 1, 1992[,] and which will receive less than 1000 tons per year of waste for disposal

[Vt. Stat. Ann. tit. 10, § 6605a\(c\), \(d\)](#) (Supp. 1992). Another provision requires the secretary, under certain circumstances, to "extend to July 1, 1992[,] the period for operating and closing an unlined landfill that has capacity available through July 1, 1992." [Vt. Stat. Ann. tit. 10, § 6605c\(b\)](#) (Supp. 1992). Moreover, the secretary could, upon making certain findings, issue, until December 31, 1992, landfill extension orders "for the purpose of extending the July 1, 1992[,] landfill closure date for existing, operating, unlined landfills receiving waste as of January 1, 1992. This extension [could] run until October 9, 1993." [Vt. Stat. Ann. tit. 10, § 6605e\(a\)](#) (Supp. 1992). The prerequisite findings for such an extension order includes, *inter alia*, a determination

[HN19](#) (1) that the continued use of the unlined facility is necessary. Before finding that continued use of an unlined facility is necessary, with respect to a facility qualifying for an exemption under subdivision (a)(2) [**54] of this section, *the secretary shall first find that the planning entity lacks a lined landfill alternative that is reasonably available*.

Vt. Stat. Ann. [§ 6605e\(b\)\(1\)](#) (Supp. 1992) (emphasis added).

²³ Chapter 159 is entitled "Waste Management," and its purpose is to

[HN20](#) provide technical and financial leadership to municipalities for the siting of solid waste management facilities and the implementation of a program for the management and reduction of wastes that over the long term is sustainable, environmentally sound, and economically beneficial, and that encourages innovation and individual responsibility. The program should give priority to reducing the waste stream through recycling and through the reduction of nonbiodegradable and hazardous ingredients.

[Vt. Stat. Ann. tit. 10, § 6601\(5\)](#) (Supp. 1992).

These statutes indicate that the Vermont General Assembly wished to promote the development and operation of lined landfills. A court deciding Plaintiffs' present claims must, therefore, consider whether [**55] the District's actions, which allegedly adversely affect Dowdell's and Palisades Landfill's *lined* landfill, are *ultra vires*; that is, whether they exceed the powers conferred upon it by the Vermont laws cited above and others. The Washington Superior Court, which considered the impact of the District's action on *unlined* landfills, did not address this same issue. Indeed, the state court concluded that the District's actions were not *ultra vires* because its "contract with C.V. Landfill, Inc. . . . does not go beyond the District's grant of authority concerning its ability to [*105] assess and recover a surcharge on solid waste disposed of within the District." Therefore, because the issues underlying Plaintiffs' supplemental state law claims in this case differ from those presented in the previous state case, the district court's decision that Plaintiffs are barred by collateral estoppel from asserting Counts IV and V of their complaint must be reversed.

V.

Are Plaintiffs Entitled to Partial Summary Judgment on Count I for Declaratory and Injunctive Relief?

In the proceedings below, Plaintiffs²⁴ countered the District's motion for summary judgment, which sought dismissal [**56] of Plaintiffs' claims on the grounds of res judicata and collateral estoppel, with their own cross-motion for partial summary judgment on Count IV and on their § 1983 -- dormant *Commerce Clause* -- claim (Count I). The district court, having decided to grant the District's motion, did not reach the merits of Plaintiffs' cross-motion, dismissing it as moot. Now that we have reversed the district court's preclusion rulings, Plaintiffs ask us to enter summary judgment in their favor on their dormant *Commerce Clause* claim. We decline to do so. Instead, we remand the issue to the district court so that it may decide the merits of Plaintiffs' motion. Cf. *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 568 (2d Cir. 1993) (observing that, where a plaintiff's motion for summary judgment was denied as moot in light of the district court's dismissal of the complaint for lack of subject matter jurisdiction, the ordinary procedure, upon reinstatement of the complaint, is to remand the issue to the district court so that it may "have an opportunity to rule on the merits of the motion" (citing *Cruden v. Bank of New York*, 957 F.2d 961, 978 (2d Cir. 1992) [**57] and *Goetz v. Windsor Central School District*, 698 F.2d 606, 610 (2d Cir. 1983))).

CONCLUSION

In accordance with the discussion herein, we (1) vacate the district court's decision granting C.V. Landfill's motion to dismiss Counts II and III (i.e., the federal antitrust claims) for failure to state a claim upon which relief can be granted, and we remand these claims for further proceedings consistent with this opinion; (2) do not disturb the district court's ruling that C.V. Landfill's motion to dismiss Count I (i.e., the dormant *Commerce Clause* claim brought pursuant to § 1983) is moot because Count I asserts a claim only against the District; (3) vacate the district court's decision granting C.V. Landfill's motion to dismiss Counts IV and V (i.e., the state law claims) for lack of subject matter jurisdiction; (4) reverse the district court's decision granting the District's motion for summary judgment as to Counts [**58] II and III on res judicata grounds; (5) reverse the district court's decision granting the District's motion for summary judgment as to Counts I, IV, and V on collateral estoppel grounds; and (6) vacate the district court's ruling that Plaintiffs' cross-motion for partial summary judgment as to Count I is moot so that the district court may have an opportunity to rule on the merits of this motion.

So ordered.

End of Document

²⁴ Valley Disposal was actually specified as the moving party.

United States v. Airline Tariff Publ'g Co.

United States District Court for the District of Columbia

August 10, 1994, Decided ; August 10, 1994, Filed, Entered

Civil Action: No. 92-2854 (SSH)

Reporter

1994 U.S. Dist. LEXIS 11904 *; 1994-2 Trade Cas. (CCH) P70,687

UNITED STATES OF AMERICA, Plaintiff, v. AIRLINE TARIFF PUBLISHING COMPANY, et al., Defendants.

Subsequent History: Petition granted by [United States v. Am. Airlines, Inc., 2004 U.S. Dist. LEXIS 27052 \(D.D.C., Sept. 22, 2004\)](#)

Core Terms

fare, final judgment, airline, ticket, disseminating, compliance, Antitrust, airport, pair, visible, changes, distributing, advertising, designated, documents, modify, certification

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN1[Sherman Act, Jurisdiction

The United States district court has jurisdiction of the subject matter of an action under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), and over the parties thereto.

Judges: [*1] Harris

Opinion by: STANLEY S. HARRIS

Opinion

FINAL JUDGMENT

Plaintiff, United States of America, filed its Complaint on December 21, 1992. Plaintiff and defendants, by their respective attorneys, have consented to the entry of the Final Judgment without trial or adjudication of any issue of fact or law. This Final Judgment shall not be evidence against or an admission by any party with respect to any issue of fact or law. Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties, it is hereby

ORDERED, ADJUDGED, AND DECREED, as follows:

I.

JURISDICTION

HN1[] This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Sherman Act, 15 U.S.C. § 1.

II.

DEFINITIONS

As used herein, the term:

(A) "airline" means any scheduled air passenger carrier as defined in 49 U.S.C. § 1301(3), its officers, directors, employees, agents, and any other persons acting on its behalf;

(B) "ATP" means the Airline [***2**] Tariff Publishing Company;

(C) "change" means abandon, add, alter, modify, discontinue, drop, exchange, replace, substitute, switch, or transform;

(D) "coupon" means a coupon or similar voucher offering either a discount off existing fares or a special fare not otherwise available;

(E) "CRS" means computer reservation system;

(F) "defendant airlines" means Alaska Airlines, Inc., American Airlines, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., and Trans World Airlines, Inc.;

(G) "defendants" means ATP, Alaska Airlines, Inc., American Airlines, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., and Trans World Airlines, Inc.;

(H) "document" means all "writings and recordings" as that phrase is defined in Rule 1001(1) of the Federal Rules of Evidence;

(I) "fare" means the price charged for domestic U.S. passenger transportation by any airline, and any ticket dates, restrictions, rules, terms or conditions governing the availability or use of any such price, but does not include any contract or other negotiated price or any coupon;

(J) "fare class" means a group of fares treated similarly for seat allocation purposes;

[***3**] (K) "first ticket date" means the first date that a fare is available for sale;

(L) "footnote" means the mechanism used by ATP to store and transmit first ticket dates, last ticket dates, and other limitations on the use of a fare;

(M) "footnote designator" means an alphanumeric designator used to identify a footnote;

(N) "including" means including but not limited to;

(O) "last ticket date" means the last date that a fare is available for sale;

(P) "matching city or airport pair" means a city or airport pair whose origin and destination points, respectively, are the same or within 100 miles of the origin and destination points, respectively, of the city or airport pair as to which the other airline's fare is applicable;

(Q) "new fare" means a fare that is different from an airline's existing fares in regard to price or any restrictions, rules, terms or conditions;

(R) "person" means any natural person, corporation, firm, company, sole proprietorship, partnership, association, institution, governmental unit, or other legal entity;

(S) "promotional fare" means a new fare that, in conjunction with its first being offered for sale, is advertised as being available for purchase for a [*4] specified and limited period of time;

(T) "relate to" means discuss, refer to, reflect, evidence, concern, or pertain to, in whole or in part;

(U) "sale fare" means a new fare that has a last ticket date at the time it is first offered for sale;

(V) "tag" means a code used by an airline solely to identify a group of fares for similar processing by ATP; and

(W) "travel date" means a date that limits when a passenger may travel on a fare.

III.

APPLICABILITY

(A) This Final Judgment applies to the defendants and to each of their successors, assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment by personal service or otherwise.

(B) Nothing herein contained shall suggest that any portion of this Final Judgment is or has been created for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

IV.

PROHIBITED CONDUCT

(A) Each of the defendant airlines is enjoined and restrained from:

(1) agreeing with any other airline to fix, establish, raise, stabilize, or maintain any fare;

(2) disseminating any first ticket dates, last ticket dates, [*5] or any other information concerning the defendant's planned or contemplated fares or changes to fares;

(3) making visible or disseminating its own tags or any other similar designating mechanism to any other airline;

(4) making visible or disseminating to any other airline any fare that is intended solely to communicate a defendant's planned or contemplated fares or changes to fares;

(5) making visible or disseminating two or more footnote designators that identify footnotes that contain identical information, or making visible or disseminating any footnote designator that identifies a footnote that contains no information; and

(6) using fare codes that convey information other than fare class or terms and conditions of sale or travel. (B) ATP is enjoined and restrained from:

(1) disseminating or conveying any fare with a first ticket date;

(2) making visible or disseminating an airline's tags or any other similar designating mechanism to any person other than that airline;

- (3) making visible or disseminating two or more footnote designators for any airline that identify footnotes that contain identical information, or making visible or disseminating any footnote designator that identifies [*6] a footnote that contains no information;
- (4) making visible or disseminating to any airline changes to any other airline's fares prior to disseminating or conveying such changes to the domestic CRSs; and
- (5) after reasonable inquiry, knowingly making visible or disseminating any changes to fares more frequently than the number of times a day that at least one domestic CRS updates its fare data base with such changes to fares.

V.

LIMITING CONDITIONS

(A) Nothing in this Final Judgment shall prohibit any defendant airline from submitting its fare changes to ATP for processing, or disseminating to CRSs or other reservations systems rules that do not contain or describe any first ticket date, last ticket date, or planned or contemplated fare level.

(B) Nothing in this Final Judgment shall prohibit any defendant airline from engaging in communications with another airline when such communications are reasonably necessary to establish, implement, or modify: (i) a joint, code share, commuter, or other interline fare with that airline; or (ii) an otherwise lawful transaction involving the provision of management services which may include pricing and yield management services.

(C) (1) [*7] Nothing in this Final Judgment shall prohibit any defendant airline from advertising that a promotional fare shall cease to be available for purchase on a specified date or after a specified period of time, or that a last ticket date on a fare shall be extended to a later date, and in conjunction therewith otherwise disseminating such information, provided that such advertising occurs (i) in media of general circulation or through mass mailings, and (ii) in a manner designed to directly reach a meaningful number of potential consumers likely to purchase such fare, provided further that, where a group of fares is being so advertised, it shall be sufficient to provide a general description of included city or airport pairs and fare levels without specifically identifying each city or airport pair and fare level.

(2) After any defendant airline, United Air Lines, Inc. or USAir, Inc. has disseminated a fare with a last ticket date or extended a last ticket date, or any non-defendant airline has disseminated a sale fare or extended the last ticket date on a sale fare, in any city or airport pair, nothing in Section IV(A)(1)-(3) and (5)-(6) of this Final Judgment shall prohibit a defendant [*8] airline from promptly thereafter, in matching city or airport pairs, (i) disseminating a new fare with the same price, restrictions, and last ticket date as that airline's fare, or (ii) extending to the same date, the last ticket date on a fare with the same price and restrictions as that airline's fare, provided that no defendant airline shall extend the last ticket date on any fare more than one time pursuant to Section V(C)(2).

(3) The dissemination of a last ticket date in accordance with Section V(C), in and of itself, does not constitute a violation of this Final Judgment.

(D) Nothing in this Final Judgment shall prohibit any defendant airline from disseminating public statements regarding contemplated changes in fares, provided such statements describe neither effective dates nor the particular amounts or rules relating to particular city or airport pairs or sets of city or airport pairs.

(E) Nothing in this Final Judgment shall prohibit any defendant from advocating or discussing, in accordance with the doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L.Ed. 2d 464, 81 S.Ct. 523 (1961)*, [*9] and its progeny, legislative, judicial or regulatory actions, or governmental policies or actions.

(F) The dissemination of travel dates, in and of itself, does not constitute a violation of this Final Judgment.

(G) Nothing in this Final Judgment shall be construed to prohibit any defendant airline, in unilaterally determining its own fares, from considering all publicly available information relating to the fares of other airlines.

(H) Regardless of what fares any airline offers in any city or airport pair, offering any fare in the same or any other city or airport pair, in and of itself, does not constitute a violation of this Final Judgment.

VI.

COMPLIANCE PROGRAM

(A) Each defendant is ordered to maintain an antitrust compliance program which shall include designating, within 30 days of entry of this Final Judgment, an Antitrust Compliance Officer with responsibility for accomplishing the antitrust compliance program and with the purpose of achieving compliance with this Final Judgment. The Antitrust Compliance Officer shall, on a continuing basis, supervise the review of the current and proposed activities of his or her defendant company to ensure that it complies with this [*10] Final Judgment.

(B) The Antitrust Compliance Officer for a defendant airline shall be responsible for accomplishing the following activities:

(1) distributing, within 60 days from the entry of this Final Judgment, a copy of this Final Judgment to all officers and employees who have any responsibility for approving, disapproving, analyzing, monitoring, studying, recommending, or implementing any fares, or disseminating any fares to ATP, CRSs or any airlines;

(2) distributing in a timely manner a copy of this Final Judgment to any officer or employee who succeeds to a position described in Section VI(B)(1);

(3) briefing annually those persons designated in Section VI(B)(1) on the meaning and requirements of this Final Judgment and the antitrust laws and advising them that the defendant's legal advisors are available to confer with them regarding compliance with the Final Judgment and the antitrust laws;

(4) obtaining from each officer or employee designated in Section VI(B)(1) an annual written certification that he or she: (1) has read, understands, and agrees to abide by the terms of this Final Judgment; and (2) has been advised and understands that his or her failure to comply [*11] with this Final Judgment may result in conviction for criminal contempt of court; and

(5) maintaining a record of recipients to whom the Final Judgment has been distributed and from whom the certification in Section VI(B)(4) has been obtained.

(C) The Antitrust Compliance Officer for ATP shall be responsible for accomplishing the following activities:

(1) distributing, within 60 days from the entry of this Final Judgment, a copy of this Final Judgment to all officers of ATP;

(2) distributing in a timely manner a copy of this Final Judgment to any person who succeeds an officer;

(3) briefing annually all officers on the meaning and requirements of this Final Judgment and the antitrust laws and advising them that the defendant's legal advisors are available to confer with them regarding compliance with the Final Judgment and the antitrust laws;

(4) obtaining from each officer an annual written certification that he or she: (1) has read, understands, and agrees to abide by the terms of this Final Judgment; and (2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court; and

(5) maintaining [*12] a record of recipients to whom the Final Judgment has been distributed and from whom the certification in Section VI(C)(4) has been obtained.

(D) At any time, if a defendant's Antitrust Compliance Officer learns of any past or future violations of Section IV of this Final Judgment, that defendant shall, within 45 days after such knowledge is obtained, take appropriate action to terminate or modify the activity so as to comply with this Final Judgment.

(E) For each last ticket date a defendant airline disseminates through ATP or a CRS pursuant to Section V(C), that defendant airline (1) shall retain a record of the dates that such last ticket date was disseminated in the system and

the specific fares and city or airport pairs to which the last ticket date was attached, and (2) shall retain either (a) a representative copy or transcript of its advertisement that was used in conjunction with any such last ticket date and a record of the use of any such advertising or (b) a representative record of the fare to which the defendant was responding. Such records and representative copies or transcripts shall be maintained in a manner that facilitates prompt retrieval and review of the documentation [*13] required by this section. These documents shall be retained for a period of three years from the first date any such advertising appeared or the first date any such last ticket date appeared in ATP or a CRS.

VII.

CERTIFICATION

(A) Within 75 days after the entry of this Final Judgment, each defendant shall certify to the plaintiff whether it has designated an Antitrust Compliance Officer and has distributed the Final Judgment in accordance with Section VI above.

(B) For 10 years after the entry of this Final Judgment, on or before its anniversary date, each defendant shall file with the plaintiff a statement as to the fact and manner of its compliance with the provisions of Section VI.

VIII.

PLAINTIFF ACCESS

(A) To determine or secure compliance with this Final Judgment and for no other purpose, duly authorized representatives of the plaintiff shall, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege:

- (1) access during such defendant's office hours to inspect and copy all documents in the possession or under [*14] the control of such defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and
- (2) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers, employees or agents of such defendant, who may have counsel present, regarding such matters.

(B) Upon the written request of the Assistant Attorney General in charge of the Antitrust Division made to any defendant's principal office, such defendant shall submit such written reports, under oath if requested, relating to any matters contained in this Final Judgment as may be reasonably requested, subject to any legally recognized privilege.

(C) No information or documents obtained by the means provided in Section VIII shall be divulged by the plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by any defendant to plaintiff, such defendant [*15] represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under *Rule 26(c)(7) of the Federal Rules of Civil Procedure*, and such defendant marks each pertinent page of such material, "Subject to claim of protection under *Rule 26(c)(7) of the Federal Rules of Civil Procedure*," then 10 days notice shall be given by plaintiff to such defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant is not a party.

IX.

FURTHER ELEMENTS OF THE FINAL JUDGMENT

- (A) This Final Judgment shall expire ten years from the date of its entry.
- (B) Section IV(B) of this Final Judgment shall become effective three months from the date of entry of this Final Judgment.
- (C) If, subsequent to the entry of this Final Judgment, it or a previously entered stipulated final judgment in this matter is modified in any respect, any defendant, in its sole discretion, may move this Court, and the Court shall grant such a motion, to substitute such modified stipulated final judgment for this Final Judgment.
- (D) Jurisdiction is retained by this Court for the purpose of enabling [*16] any of the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.
- (E) Entry of this Final Judgment is in the public interest.

DATED: August 10, 1994

Stanley S. Harris

UNITED STATES DISTRICT JUDGE

End of Document



Allen-Myland, Inc. v. IBM Corp.

United States Court of Appeals for the Third Circuit

January 24, 1994, Argued ; August 12, 1994, Filed

No. 93-1586

Reporter

33 F.3d 194 *; 1994 U.S. App. LEXIS 21368 **; 1994-2 Trade Cas. (CCH) P70,685

ALLEN-MYLAND, INC., Appellant V. INTERNATIONAL BUSINESS MACHINES CORPORATION

Subsequent History: [\[**1\]](#) Certiorari Denied December 11, 1994, Reported at: [1994 U.S. LEXIS 8975](#).

Prior History: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. (D.C. Civil Action No. 85-06166).

Core Terms

upgrades, district court, mainframes, pricing, installation, leasing company, relevant market, market power, inventory, antitrust, large-scale, smaller, lease, machines, software, manufacturers, peripherals, costs, market share, technology, users, customers, submarket, percent, memory, tied product, terms, tying product, compete, reconfiguration

LexisNexis® Headnotes

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

[HN1](#) [↓] Tying Arrangements, Sherman Act Violations

In a tying arrangement, the seller sells one item, known as the tying product, on the condition that the buyer also purchases another item, known as the tied product.

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

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

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

HN2 Tying Arrangements, Clayton Act

Section 1 of the Sherman Act, [15 U.S.C.S. § 1](#), declares only contracts in restraint of trade illegal. The antitrust concern over tying arrangements is limited to those situations in which the seller can exploit its power in the market for the tying product to force buyers to purchase the tied product when they otherwise would not, thereby restraining competition in the tied product market. Market power is defined as the ability to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market.

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

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

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

HN3 Tying Arrangements, Defenses

The first inquiry in any tying case under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), is whether the defendant has sufficient market power over the tying product, which requires a finding that two separate product markets exist and a determination of precisely what the tying and tied product markets are. If the defendant is found to have sufficient market power in the tying product market, then the tie may be a "per se" violation of the Sherman Act. This tie is condemned if the probability that the contractual arrangement improperly restrains trade is so high that a judicial inquiry into the actual prevailing market conditions, including possible pro-competitive justifications for the tie, is deemed unprofitable.

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

HN4 Price Fixing & Restraints of Trade, Tying Arrangements

Assuming the court finds sufficient market power, it must then decide whether a substantial amount of interstate commerce has been affected by the tie. The United States Supreme Court has defined "substantial" in absolute dollar terms as an amount which is not de minimis in terms of the total volume of sales tied by the sales policy under challenge.

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

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

HN5 Private Actions, Standing

To have standing to bring a private antitrust action, the plaintiff must show "fact of damage," defined as some harm flowing from the antitrust violation. The amount of the damage is not important for antitrust standing; it is sufficient that some damage has occurred. There must, however, be some causal link between the damage and the violation of the antitrust laws. Put another way, the harm must be one that the antitrust laws were designed to prevent.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN6 Standards of Review, De Novo Review

To the extent that the court's alleged errors were in formulating or applying legal principles, a court's review is, of course, plenary.

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

HN7 Standards of Review, Clearly Erroneous Review

Courts review a court's findings of fact under the clearly erroneous standard of review.

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

HN8 Regulated Practices, Market Definition

The relevant product market is composed of products that have reasonable interchangeability for the purposes for which they are produced: price, use and qualities considered.

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

HN9 Regulated Practices, Market Definition

The key test for determining whether one product is a substitute for another is whether there is a cross-elasticity of demand between them: in other words, whether the demand for the second good would respond to changes in the price of the first.

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

HN10 Regulated Practices, Market Definition

When a business allows its own important judgments constantly to be affected by a statistical survey unflaggingly made, diligently kept current, and repeatedly consulted at least by subordinate advisers to the officers, then the statistical material may be used by a court to some degree as reliable evidence against the business.

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

HN11 Regulated Practices, Market Definition

Market share is just a way of estimating market power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them.

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

HN12 Regulated Practices, Market Definition

Notwithstanding the extent of an antitrust defendant's market share, the ease or difficulty with which competitors enter the market is an important factor in determining whether the defendant has true market power, the power to raise prices.

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

HN13 [Regulated Practices, Market Definition]

Rapid technological progress may provide a climate favorable to increased concentration of market power rather than the opposite. Moreover, a decline in prices does not necessarily imply an absence of monopoly power; a fair profit might have been made at even lower cost to users.

Counsel: ROBERT G. LEVY, ESQUIRE (Argued), WILLARD K. TOM, ESQUIRE, JOEL E. HOFFMAN, ESQUIRE, JAMES H. CLINGER, ESQUIRE, Sutherland, Asbill & Brennan, 1275 Pennsylvania Avenue, N.W. Washington, DC 20004-2404, CARL A. SOLANO, ESQUIRE, Schnader, Harrison, Segal & Lewis, 1600 Market Street, Suite 3600, Philadelphia, PA 19103, Attorneys for Appellant.

ROBERT N. FELTOON, ESQUIRE, Conrad, O'Brien, Gellman & Rohn, 1515 Market Street, 16th Floor, Philadelphia, PA 19102, EVAN R. CHESLER, ESQUIRE (Argued), PETER T. BARBUR, ESQUIRE, Cravath, Swaine & Moore, 825 Eighth Avenue, Worldwide Plaza, New York, NY 10019-7415, HOWARD WEBER, ESQUIRE, Davis, Scott, Weber & Edwards, P.C. 100 Park Avenue, New York, NY 10017, Attorneys for Appellee.

ALAN J. WEINSCHEL, ESQUIRE, ROBERT P. STEFANSKI, ESQUIRE, LUCIA MANDARINO, ESQUIRE, Weil, Gotshal & Manges, 767 Fifth Avenue, New York, NY 10153, Attorneys for Amici-Appellants.¹

Judges: Before: **[**2]** MANSMANN and NYGAARD, Circuit Judges and SEITZ, Senior Circuit Judge.

Opinion by: NYGAARD

Opinion

[*198] OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

Allen-Myland, Inc. ("AMI") appeals from the district court's judgment in favor of IBM in this intricate antitrust tying case. We conclude that the district court erred and will vacate its judgment and remand the cause for further proceedings.²

[3] I. FACTS and PROCEDURE**

¹ Amici consist of the Computer Dealers and Lessors Association, Inc. Digital Dealers Association, and National Association of Telecommunications Dealers.

² Although upon review we concentrate on errors, it is well to say at the outset that in a case that has been litigated as vigorously as this one, either finding facts or reviewing those findings for clear error is no easy task. The thirty-volume record on appeal contains 17,469 pages of court filings, trial and deposition transcripts, and exhibits. The district court, of course, was in even a more difficult position. Over 3.5 million pages of discovery documents were produced and 65 days of deposition testimony were taken. The trial transcript alone fills 1,750 pages, there were 2,750 pages of deposition testimony admitted, and there were no fewer than 734 trial exhibits.

A. Mainframes and Upgrades

The facts underlying this nine-year-old dispute are minutely detailed and quite voluminous. The district court has set forth these facts in great detail in its forty-four page opinion, [Allen-Myland, Inc. v. IBM Corp., 693 F. Supp. 262 \(E.D. Pa. 1988\)](#), and we will present only a brief summary here.

IBM is the world's largest manufacturer of large-scale mainframe computers. These machines have the capacity to process millions of records at a time and manage a tremendous volume of information, making modern operations possible for large corporations, public utilities and government agencies. Without them, business would soon slow or halt. Mainframes are physically large machines, generally occupying significant floor space and requiring a full-time staff to keep them in operation. Needless to say, they are quite expensive, with prices commonly in excess of \$ 1 million.

Mainframes are available in a wide range of computing capacities, to fit the needs of each individual customer. One common measure of capacity is computing speed, measured in millions of instructions per second ("MIPS"). IBM mainframes **[**4]** may also be upgraded, as its customers' computing needs change over time, in what is known as a MIPS upgrade.

Many IBM mainframes are not purchased outright from IBM by their end users, but **[*199]** are instead leased through third-party leasing companies such as CMI and Comdisco.³ A mainframe will typically be leased to several end users during its life cycle, and then when obsolete will be scrapped. Often, when the lease term expires and the mainframe returns to the lessor, the computer will need to be reconfigured to meet the needs of the next lessee.

Companies like AMI found a profitable market reconfiguring mainframe computers such as the IBM 303X series.⁴ Lessors could not afford to have their machines idle and generating no revenue while waiting for a reconfiguration, yet IBM often took months to install an upgrade. AMI, on the other hand, would turn the **[**5]** job around in a matter of only a few days. Either AMI or the leasing company would buy the required parts outright from IBM for inventory on what were known as SWRPQ terms, meaning that IBM installation was not included. It would then install the parts in the user's computer, set up the appropriate software and test the system. Old parts could often then be used on another computer. Because the 303X series of computers was based on "MST" circuit board technology, which required significant technical skill and time to reconfigure, AMI was in a position to add considerable value in terms of its labor. As a result, AMI grew into a company with \$ 50 million in annual revenue.

In 1980, however, IBM introduced its next generation of mainframe computers, the 308X series, which caused a major erosion in AMI's reconfiguration business. These machines used a new technology, the thermal conduction **[**6]** module, or TCM. A TCM is essentially a water-cooled can containing a much greater density of circuits than the system it replaced. Because more circuitry can be placed in a TCM, there are fewer TCMs to replace; hence, there is much less labor involved in performing an upgrade on a TCM-based computer than on earlier models.

In marketing its 308X series, IBM used a policy known as net pricing. Under this policy, IBM installation labor was bundled in with the price of the parts for TCM-based MIPS upgrades; SWRPQ pricing was either eliminated or was priced prohibitively high. In addition, any old TCMs recovered from a mainframe during reconfiguration became IBM's property. As a result, customers desiring non-IBM installation of upgrades were required to pay IBM's labor charge anyway. And because the net pricing policy limited the supply of the TCMs on the open market, acquiring parts from sources other than IBM became impractical.

IBM contended that net pricing's purpose was to insure that the old TCMs recovered from reconfigured machines were returned to IBM. TCMs are extremely durable and can easily be refurbished to "equivalent to new" condition.

³ IBM itself is barred from leasing computers to end users under the terms of a 1956 consent decree entered into with the United States in another antitrust case.

⁴ An "X" in an IBM model number indicates that several numerical designators may be used in that position, e.g., 3031, 3033.

IBM, faced with a manufacturing capacity [**7] shortage, stated that it merely wanted to refurbish TCMs that were returned for later reuse in a future upgrade or in a brand-new machine. As for bundling the labor charge, IBM contended its purpose was to ensure that it got its TCMs back, which was enhanced when IBM personnel performed the labor.

B. Procedural History

AMI, however, soon found that much of its reconfiguration business was drying up and filed this action. AMI's four-count complaint alleged that IBM violated [sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2](#), and also asserted state law unfair competition and tortious interference claims. IBM counterclaimed for copyright infringement of its software programs and documentation manuals; IBM also asserted state law counterclaims for breach of contract and tortious interference.

AMI's [section 1](#) claim was tried in a bench trial, contending that IBM had tied its upgrade installation services to the parts needed to perform the upgrades.⁵ AMI [*200] alleged that this tying arrangement constituted a per se violation of the Sherman Act; alternatively, it asserted that the tie was still a [section 1](#) violation under the rule of reason.

[**8] The district court found that IBM's net pricing structure did not constitute a per se [section 1](#) violation, for two reasons: first, that IBM's share of the relevant market was not high enough to impose per se liability, [id. at 270-83](#); and second, that net pricing did not foreclose AMI from a "viable business opportunity," [id. at 283-93](#). The court also found that net pricing did not violate [section 1](#) under a rule of reason analysis because sufficient procompetitive reasons existed for it.⁶ [Id. at 293-98](#).

Later, the district court tried most of the remaining claims and counterclaims, and concluded that AMI was liable to IBM for copyright infringement and violations of the Lanham Act. [Allen-Myland, Inc. v. IBM Corp., 746 F. Supp. 520 \(E.D. Pa. 1990\)](#).⁷ The court also entered judgment for IBM on AMI's Sherman Act [section 1](#) claim, concluding that such a claim could not possibly succeed unless its earlier ruling on market power were reversed. [Id. at 525 n.1, 559](#).

Meanwhile, IBM had filed another Lanham Act action against AMI in the United States District Court for the Northern District of Illinois, which was transferred to the Eastern District of Pennsylvania. Moreover, certain issues concerning IBM's relief against AMI on its counterclaims remained unresolved. On AMI's motion, the district court issued an order under [Fed. R. Civ. P. 54\(b\)](#) declaring that its 1988 opinion resolving the antitrust issues constituted a final judgment. [Allen-Myland, Inc. v. IBM Corp., 1993-1 Trade Cas. \(CCH\) P 70,244, 25 Fed. R. Serv. 3d](#)

(Callaghan) 1353, 1993 WL 169849 (E.D. Pa. May 14, 1993). This appeal followed.

II. OVERVIEW [**10] of the LAW of TYING ARRANGEMENTS

The overarching issue in this appeal is AMI's claim that the district court erred when it found that net pricing was not a per se violation of [section 1](#) of the Sherman Act. [HN1](#)⁸ In a tying arrangement, the seller sells one item, known as the tying product, on the condition that the buyer also purchases another item, known as the tied product. [Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 475 \(3d Cir.\)](#) (in banc), cert. denied, 121 L. Ed. 2d 139, 113 S. Ct. 196 (1992). [HN2](#)⁹ [Section 1](#) of the Sherman Act declares only contracts in restraint of trade illegal. Thus, the antitrust concern over tying arrangements is limited to those situations in which the seller can

⁵ In addition, AMI alleged that IBM's Installation and Warranty Service Charge (IWSC) constituted an unreasonable restraint of trade. The district court found for IBM on this theory, and AMI has not appealed from that finding.

⁶ The district court's decision under the rule of reason has not been appealed.

⁷ AMI later moved for reconsideration, but that motion was denied. [Allen-Myland, Inc. v. IBM Corp., 770 F. Supp. 1004 \(E.D. Pa. 1991\)](#).

exploit its power in the market for the tying product to force buyers to purchase the tied product when they otherwise would not, thereby restraining competition in the tied product market. Market power is defined as the ability "to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." *United States Steel Corp. v. Fortner Enters., Inc.* ("Fortner II"), [429 U.S. 610, 620, 97 S. Ct. 861, 867-68, 51 L. Ed. 2d 80 \(1977\)](#). [**11]

On the other hand, if the seller does not have sufficient power in the tying product market, buyers wanting to purchase the tied product from another source will simply avoid the tie by buying the tying product from another supplier. See [Town Sound, 959 F.2d at 476](#) (discussing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 11-14, 104 S. Ct. 1551, 1558-59, 80 L. Ed. 2d 2 (1984)*). Such a tie will not restrain an appreciable amount of trade, and accordingly, will not constitute an antitrust violation.

HN3[] The first inquiry in any [section 1](#) tying case is whether the defendant has sufficient market power over the tying product, which requires a finding that two separate product markets exist and a determination of precisely what the tying and tied product markets [*201] are. See [Jefferson Parish, 466 U.S. at 21, 104 S. Ct. at 1562-63](#). If the defendant is found to have sufficient market power in the tying product market, then the tie may be a "per se" violation of the Sherman Act. This tie is condemned if the probability that the contractual [**12] arrangement improperly restrains trade is so high that a judicial inquiry into the actual prevailing market conditions, including possible procompetitive justifications for the tie, is deemed unprofitable. [Id. at 15-18](#) & n.25, [104 S. Ct. at 1560-61](#) & n.25; [Town Sound, 959 F.2d at 477](#).

HN4[] Assuming the court finds sufficient market power, it must then decide whether "a substantial amount of interstate commerce" has been affected by the tie. See, e.g., [Town Sound, 959 F.2d at 477](#). The Supreme Court has defined "substantial" in absolute dollar terms as an amount which is not de minimis in terms of the "total volume of sales tied by the sales policy under challenge . . ." *Fortner Enters., Inc. v. United States Steel Corp.*

("Fortner I"), [394 U.S. 495, 501-02, 89 S. Ct. 1252, 1257-58, 22 L. Ed. 2d 495 \(1969\)](#) (\$ 190,000 sufficient).

Finally, **HN5**[] to have standing to bring a private antitrust action, the plaintiff must show "fact of damage," defined as some harm flowing from the antitrust violation. [Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 1571-72 n.9, 23 L. Ed. 2d 129 \(1969\)](#); [**13] [Pitchford v. Pepsi, Inc., 531 F.2d 92, 98-99 \(3d Cir. 1975\)](#), cert. denied, 426 U.S. 935, 96 S. Ct. 2649, 49 L. Ed. 2d 387 (1976). The amount of the damage is not important for antitrust standing; it is sufficient that some damage has occurred. There must, however, be some causal link between the damage and the violation of the antitrust laws. Put another way, the harm must be one that the antitrust laws were designed to prevent. [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 \(1977\)](#).

III. SCOPE of the RELEVANT MARKET

A. Introduction

AMI asserts that the tying product is the "large-scale mainframe computer," defined as computers that are "among the largest in memory capacity, the fastest in computing speed, and the most expensive of computers available." [Allen-Myland, 693 F. Supp. at 270-71](#). Alternatively, it sets forth two submarkets consisting of the parts and services required for the conversion and upgrade of either IBM mainframes or all [*14] manufacturers' mainframes. AMI defines the tied product as the labor required to install upgrades.

The district court found AMI's proposed market definition and submarkets to be too narrow. When the court broadened the market to include various substitutes that it believed shared cross-elasticity of demand ⁸ with large-

⁸ "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." [Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 1523-24, 8 L. Ed. 2d 510 \(1962\)](#).

scale mainframes, IBM's market share dropped from as high as 79% to under 34.4%, too low to impose per se liability. See [Jefferson Parish, 466 U.S. at 26-27, 104 S. Ct. at 1566](#) (30% market share insufficient); [Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611-12, 73 S. Ct. 872, 882, 97 L. Ed. 1277 \(1953\)](#) (33-40% market share insufficient). The court stated:

[**15]

Standing alone, AMI's market share evidence tends to show that IBM enjoys substantial economic power. However, AMI's definitions of large scale mainframes and the relevant market are flawed in several respects and tend to overstate IBM's market share and power.

[Allen-Myland, 693 F. Supp. at 271](#). The district court defined the relevant market to include not only large-scale mainframes, but also added upgrades to large-scale mainframes, leased and smaller capacity computers, peripheral products and software, "box swaps," and upgrades using customer-provided parts to the relevant market. [HN6](#) To the extent that the district court's alleged errors were in formulating or applying legal principles, our review is, of course, plenary. [HN7](#) We review the district court's findings of fact, however, under the clearly erroneous standard of review.

[*202] B. Leasing Companies

The district court first added leasing companies into AMI's proposed market definition. It reasoned as follows:

Leasing companies, such as Comdisco and CMI, purchase computer equipment from manufacturers and lease it to users. From a consumer's standpoint, they are an alternative source [**16] of computer equipment. They compete with IBM. Leasing companies own approximately 40 percent of all large scale mainframe computers, as defined by AMI. Prof. Levin testified that IBM's share of the market would be reduced by an amount he was unable to determine if leasing companies were taken into account in AMI's market definition. If leasing company transactions involving computers comparable and in many cases identical to the large scale mainframes marketed by IBM are included in the relevant market, and the market is measured on a "transaction basis," IBM's share of the market, according to Prof. Almarin Phillips, who testified for IBM as an expert economist, drops to 34.4 percent. Prof. Phillips testified that such a share would not reflect "overwhelming" activity in the market on IBM's part.

[Allen-Myland, 693 F. Supp. at 273-74](#) (footnote and record citations omitted). We cannot affirm the district court's finding that leasing companies form a part of the relevant market.

First, the district court relied on the testimony of Professor Levin, AMI's own expert, as an admission that IBM's market share would have to be reduced if leasing companies [**17] were added to the relevant market. This reliance is misplaced. Although Professor Levin did affirmatively answer the tautological question whether "leasing companies are competitors of IBM when they market IBM manufactured equipment in competition with IBM," this and our review of the trial transcript indicate

that he neither addressed the issue of market share reduction nor made an admission about it.

More importantly, we think that the opinion reveals an analytical flaw. Leasing companies lease both new and used computers. They purchase new mainframes from IBM and lease them to end users; when the lease term is up, if the mainframe is not obsolete and can be leased again, the leasing company will place it with another end user. In addition, leasing companies deal in both IBM and non-IBM computers. There are important legal and competitive distinctions between the various types of equipment in which the leasing companies deal, so they cannot be lumped together.

New computers are, of course, already in the relevant market as defined by AMI. It was therefore incorrect to add them in again when end users lease new computers rather than purchase them outright. In this situation, leasing [**18] companies provide nothing more than an alternate way of *financing* a new computer, but do nothing to increase the *supply* of new machines. See [Transamerica Computer Co. v. IBM Corp. \(In re IBM Peripheral EDP Devices Antitrust Litig.\), 481 F. Supp. 965, 979 \(N.D. Cal. 1979\)](#), aff'd, [698 F.2d 1377 \(9th Cir.\)](#), cert. denied, 464

U.S. 955, 104 S. Ct. 370, 78 L. Ed. 2d 329 (1983). They do not increase the number of new mainframes, as leasing companies still must purchase them from their manufacturers. Thus, to the extent that IBM had the power to set prices, that power would not be diminished, or at most would only be slightly diminished,⁹ by its sales to leasing companies rather than end users. Since these purchases are already in the relevant market, it was double counting to also include them as part of the leasing market. *Cf. id.*

[**19] With respect to leases of used computers, there is a significant difference whether those machines were made by IBM or by some other manufacturer. Where used IBM computers are leased, we think that *United States v. Aluminum Co. of America ("Alcoa")*, [148 F.2d 416 \(2d Cir. 1945\)](#)¹⁰ is [*203] apposite. There, Alcoa controlled 90 percent of the market for virgin aluminum ingot. It sought to reduce its market share for antitrust purposes by arguing that secondary ingot derived from scrap competed with virgin ingot for sales. The court held that because all secondary ingot was ultimately derived from virgin ingot, Alcoa, by properly exercising its power over the supply of virgin, could indirectly control the supply of secondary as well. [*Id. at 425*](#).

[**20] *Alcoa's* analysis is persuasive. Indeed, we think the case is even stronger here for excluding the secondary market. Refined aluminum can be melted down and reused repeatedly, and in any event, products made with it may last for decades before they are scrapped and the aluminum is recycled. It therefore may have been quite difficult for Alcoa to estimate future supply and demand for aluminum ingot over a long period of time with sufficient accuracy to maximize its profits by manipulating the supply of virgin ingot it produced. See 2 Phillip Areeda & Donald F. Turner, *Antitrust Law* § 530c (1978).

Computers, however, have considerably more limited lives than aluminum ingot. Technology and price/performance ratios have been advancing so rapidly in the computer industry that used machines cannot be re-leased indefinitely.¹¹ Accordingly, a powerful manufacturer like IBM was in a position to maximize its profits by carefully controlling the number of mainframes that would later appear on the used leasing market. This is particularly true when, as here, that control was enhanced by IBM's policy of recapturing old parts that could otherwise have been used to extend the useful [**21] service lives of existing used mainframes by allowing them to be upgraded and placed with new customers. We therefore conclude that the district court erred when it added leases of used IBM mainframes into the relevant market.¹²

⁹ Conceivably, a few large, sophisticated buyers could place certain limits on even a dominant seller's power to set prices. There is no evidence that such pressure was applied here.

¹⁰ Although *Alcoa* was decided by the United States Court of Appeals for the Second Circuit, the procedural circumstances under which it reached that court give it added weight as precedent. Under the then-existing version of [15 U.S.C. § 29](#), appeals from the decrees of district courts in antitrust cases where the United States was a complainant would lie only to the Supreme Court. In *Alcoa*, however, a sufficient number of justices were recused that a quorum could not be obtained; accordingly, the Supreme Court, pursuant to the above statute, remanded the case to the three most senior judges of the Second Circuit: Learned Hand (the author of *Alcoa*), Augustus N. Hand, and Swan. The Supreme Court itself has recognized the special weight of the *Alcoa* opinion. See [American Tobacco Co. v. United States, 328 U.S. 781, 811-13](#) & n.10, [66 S. Ct. 1125, 1140](#) & n.10, [90 L. Ed. 1575 \(1946\)](#).

¹¹ Moreover, IBM's net pricing and parts recapture policies further reduced whatever control the leasing companies might have had over the prices of used equipment. By recapturing old parts from upgraded mainframes, IBM effectively curtailed the leasing companies' ability to reconfigure their used machines into different models that could have competed against IBM's offerings over the medium term. This effect is similar to that caused by IBM's past practices of offering tabulating and computer equipment only for lease and not for sale. These practices also spawned antitrust litigation, resulting in a 1935 injunction and a 1956 consent decree. See *Control Data Corp. v. IBM Corp.*, [306 F. Supp. 839 \(D. Minn. 1969\)](#), aff'd, [430 F.2d 1277 \(8th Cir. 1970\)](#).

¹² We also disagree with the district court's view that AMI admitted that leasing companies "compete with IBM and constrain IBM's ability to set prices or exclude competition in the market for new large scale main frame computers." [Allen-Myland, 693 F. Supp. at 274](#). The district court cited AMI's proposed finding of fact 29 in support of its conclusion, but AMI asserted only that IBM and lessors compete in the placement of mainframes with end users; in other words, IBM installs computers, and so do Comdisco and CMI. This does not constitute an admission on market cross-elasticity or the scope of the relevant market.

[**22] On the other hand, to the extent that leasing companies deal in used, non-IBM mainframes that have not already been counted in the sales market, these machines belong in the relevant market for large-scale mainframe computers. Unlike IBM, there is no allegation that the manufacturers of these computers possess the market power to control prices, much less that they would do so in concert with IBM.¹³ When these computers are placed in service by leasing companies, they provide an alternative that limits IBM's power in the market.¹⁴

[**23] [*204] Accordingly, we conclude that the district court erred when it included all leasing company transactions in the relevant market. On remand, the court should include only leases of used, non-IBM mainframes and determine the extent to which those leases reduce IBM's market share.

C. Box Swaps

The district court also added "box swaps" -- replacing an existing computer with a more powerful, new or used computer -- into the relevant market, although it did not calculate the degree to which these box swaps eroded IBM's market share.

The analytical problem with this finding is similar to the error with respect to leasing companies. To the extent that a box swap involves purchasing a new IBM or a new or used non-IBM mainframe computer, it constitutes double counting to add box swaps to the market because those sales are already included in the market definition. On the other hand, if a used IBM computer is used in the swap, then to include that machine in the market is incorrect under *Alcoa* for the same reason it was error to include them in the leasing market.

D. Used Parts Upgrades

Including "used parts upgrades" in the relevant market was also error. A used parts upgrade [**24] is an upgrade performed with parts obtained from another computer, either one belonging to the organization needing the upgrade or one belonging to a leasing company. See [Allen-Myland, 693 F. Supp. at 277](#).

The district court correctly recognized that the viability of used parts upgrades could be limited by the scarcity of the necessary parts. It then relied on the many *memory* and *channel* upgrades and downgrades that had been performed with used parts not acquired from IBM. The record indicates, however, that most memory and channel upgrade parts are not based on TCM technology and were thus not subject to IBM's net pricing and parts recapture policies. The parts required for MIPS upgrades, however, were mostly TCM-based and subject to net pricing and recapture. Thus, that other non-net priced parts were readily available does not support the implicit conclusion that there was no scarcity of MIPS upgrade parts.

Even if used parts were available to perform MIPS upgrades, the record does not suggest any manufacturer of those parts other than IBM. Hence, the reasoning of *Alcoa* is as controlling here as it was for used IBM computers. To the extent [**25] that IBM controls the supply and price of the new mainframes from which upgrade parts must be salvaged, it has the power to indirectly control those upgrades as well. Accordingly, it would have been error to include used parts upgrades in the relevant market even if parts had been available.

E. Smaller Capacity Computers

¹³Indeed, the so-called "plug-compatible manufacturers" have built their businesses around providing mainframes and peripherals compatible with, but in competition with those of IBM.

¹⁴This holds most true for plug-compatible mainframes. There is actually a considerable question to what extent non-compatible computers are a realistic short-run alternative for a customer whose computer software and data are tailored to IBM mainframes. We do not reach the issue, however, as Allen-Myland is constrained by its own definition of the market as "large scale mainframe computers," regardless of manufacturer or compatibility. See [Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 117 \(3d Cir. 1980\)](#) (antitrust plaintiff held to theory advanced in district court), cert. denied, [451 U.S. 911, 101 S. Ct. 1981, 68 L. Ed. 2d 300 \(1981\)](#).

The district court considered AMI's proposed market definition to be too narrow because it failed to include "smaller capacity computers" -- computers below the size and sophistication of a large-scale mainframe that nevertheless would be reasonable substitutes, either singly or in combination. See [Allen-Myland, 693 F. Supp. at 274-75](#). AMI argues that it was error for the district court to include these smaller machines because there was not sufficient evidence of substitutability between these two types of computers. The district court rejected AMI's argument, citing evidence that smaller computers had effectively displaced mainframes in certain applications and noting a trend toward the replacement of large, centralized systems with "distributed" systems consisting of greater numbers of smaller capacity computers. *Id.*

AMI [**26] argues on appeal that this reasoning was flawed because it failed to consider the rapid development of technology over the life [*205] cycle of a typical computer. It agrees that some installations that initially required older generation mainframes might be satisfied with "smaller" machines when it came time to replace their mainframes, because the smaller machines would by then have all the power of the earlier mainframes. Nevertheless, AMI contends, the fact that some users of older mainframe computers might switch to smaller capacity machines proves nothing about whether those smaller machines effectively compete against IBM's current, more powerful mainframes, which are the focus of this litigation. AMI's argument is sound, but unavailing. There was testimony admitted at trial indicating that at least one smaller capacity computer, the Hewlett-Packard HP 3000 series, competed against the IBM 308X series "in many applications." The district court was entitled to, and did, credit this evidence. [Allen-Myland, 693 F. Supp. at 275](#).

The amici argue that the district court failed to consider the problem of "lock-in." Although mainframes and smaller capacity computers [**27] may be substitutable when a new computer application is being developed or when an existing application is no longer useful and must be rewritten anyway, they argue that there are significant switching costs that prevent this from happening in the short run. For example, to "port" an existing application from a mainframe to a smaller computer, the applications software may have to be rewritten, the data files may have to be converted to new formats, and personnel may have to be extensively trained on the new system. The costs of doing so and the delay involved could well cause the computer user to remain with a mainframe-based system rather than convert to a smaller computer; indeed, one court has noted that, for compatibility reasons, over 80 percent of users remain loyal to the manufacturer of their original systems. See [Transamerica, 481 F. Supp. at 980](#) & n.32.

Ordinarily, we would not consider this argument because it was not raised in the district court. This case, however, is unusual in that the district court reached its decision in 1988, but the antitrust issues did not become final and appealable until 1993. During that hiatus, the Supreme Court [**28] issued its decision in [Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. ___, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#). Because Kodak is directly relevant to the lock-in argument and the district court never had the opportunity to consider the effect of that case, we would be remiss if we did not analyze the issue now.

Eastman Kodak manufactured photocopying equipment that it sold in a competitive market. According to the plaintiffs, who provided service and repair to those copiers, Kodak sought to maintain control over service by restricting the availability of necessary repair parts. Although Kodak argued that it did not have sufficient market power to restrain trade because the market for new copiers was competitive, the Supreme Court held that, under certain circumstances, the fact that the buyer of such equipment was locked into a single supplier could give rise to a finding of market power:

If the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked-in," will tolerate some level of service-price increases before changing equipment brands. Under this scenario, a seller profitably could maintain supracompetitive [**29] prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers.

[112 S. Ct. at 2087.](#)

The situation may be analogous here. If it is prohibitively expensive to switch to a smaller capacity computer before the normal end of an application system's life cycle, then IBM, at least for those locked-in customers, would not face any realistic competition from smaller machines and would thus possess market power as if they did not exist.

The district court cited several anecdotes in the record suggesting that smaller machines are vigorously competing with large-scale mainframes and are often winning out over them. Our review of the record, however, shows that in none of the incidents mentioned was there a mainframe user with a significant base of applications software and data that would [*206] have to be rewritten and converted before the application could be moved to a smaller computer. Indeed, in the vast majority of cases, the customer was developing a new application and had an unfettered choice of which type of computer to purchase. In [**30] a few others, the system was approaching the end of its useful life and was slated for replacement. This evidence, then, does not support the conclusion that there was not a significant lock-in problem.

Nevertheless, this remains an issue of fact for the district court to resolve in the first instance. However, whether to consider new issues on remand is not for us to determine, but is properly a matter for the district court's discretion as presider over subsequent proceedings. Therefore, we express no view on whether the district court should permit a new argument to be pursued at this stage of the litigation. The district court may conclude, for example, that allowing AMI to pursue a new theory not raised until after discovery and the completion of an entire trial would result in undue prejudice to IBM. See *Habecker v. Clark Equipment Co.*, 942 F.2d 210, 218 (3d Cir. 1991). We hold only that the determination whether to consider the lock-in argument, to permit further discovery on the issue, and to hear additional evidence are all within the district court's sound discretion.¹⁵ See *id.*

[**31] F. Peripheral Devices and Software

AMI also argues that the district court erred when it added peripheral devices and software into the relevant market. The court found that these items, which provide data input, storage and output capabilities and direct the computer in its processing of information, "provided significant and reasonable alternatives to a wide variety of upgrades and modifications of large scale mainframes." *Allen-Myland*, 693 F. Supp. at 276.

Similar or substitute products are those that "have the ability -- actual or potential -- to take significant amounts of business away from each other." *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), cert. denied, 439 U.S. 838, 99 S. Ct. 123, 58 L. Ed. 2d 134 (1978). Thus, HN8¹⁶ the relevant product market "is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered." *Id. at 1062-63* (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S. Ct. 994, 1012, 100 L. Ed. 1264 (1956)) [**32] (*The Cellophane Case*); *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991), cert. denied, 120 L. Ed. 2d 903, 112 S. Ct. 3034 (1992).

"Interchangeability" implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively. A person needing transportation to work could accordingly buy a Ford or a Chevrolet automobile, or could elect to ride a horse or bicycle, assuming those options were feasible. HN9¹⁷ The key test for determining whether one product is a substitute for another is whether there is a cross-elasticity of demand between them: in other words, whether the demand for the second good would respond to changes in the price of the first. *Tunis Bros.*, 952 F.2d at 722.

¹⁵ If it does so, the district court should then proceed to determine the percentage of the mainframe market occupied by existing mainframe users who are locked in to that type of computer by prohibitively high switching costs; the greater that percentage is, the more power IBM has to maintain supracompetitive prices in the mainframe market. See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* P 521.1a, at 604-05 (1993 Supp.). The court can then determine if IBM's power in the large-scale mainframe market is constrained by the existence of smaller capacity computers, and if so, whether such computers should be included in the relevant market. It may be that the district court will conclude that, while smaller capacity computers cannot be fully excluded from the market, neither can they be fully included. The court may, after considering the evidence and the nature of the market, exercise its discretion and reduce IBM's market share by a number greater than zero percent but less than the full extent of the market for smaller capacity computers.

In the six years since the district court issued its opinion, the personal computer has consolidated its position in modern life, and what once seemed mired in impenetrable technical jargon is now within the vocabulary [*207] of the general public. Moreover, technology changes [*33] rapidly and if one has an older computer and wishes to use the latest software applications, one often must either upgrade the central processor -- the equivalent of a MIPS upgrade -- or buy a new computer. Increasing the size of the disk drive, buying more memory or installing the latest version of the operating system may help in some cases but in many others will be ineffective. It thus may be argued that the same situation obtains in the case of larger computers; that is,

peripherals and software are complementary goods but are not substitutes for mainframe computers.

The issue, nevertheless, remains a factual one for the district court to resolve. Here, if peripherals and software are reasonable substitutes for mainframes, we should expect to see an increased demand for them as the price of mainframes rises, but the district court cited no evidence of this type. Instead, it relied on the fact that IBM considers peripheral products and software when pricing its computer systems. *Allen-Myland*, 693 F. Supp. at 276. Pricing a large mainframe system on the basis of peripherals included with it against competitive offerings by other manufacturers, [*34] however, is simply not evidence that peripherals and mainframes are substitutes for one another.

The district court relied even more heavily on several anecdotes in which large mainframe users had upgraded memory, disks, software or other peripherals rather than perform a MIPS upgrade. *Id. at 276-77*. This testimony fell into two categories. First, some users testified that it was possible to delay a MIPS upgrade for a while by upgrading peripherals or software: akin perhaps to saying that installing new brakes may delay the necessity of purchasing a new car, but it is not sufficient evidence on which to conclude that the products are reasonably interchangeable in use. See *Kaiser Aluminum & Chemical Corp. v. Federal Trade Comm'n*, 652 F.2d 1324, 1331-32 (7th Cir. 1981) ("specialties," which delayed the necessity of replacing refractory bricks in furnaces, did not belong in the same relevant market).

Second, there was testimony to the effect that there are many ways to enhance the performance of a computer system, including MIPS upgrades and peripheral/software upgrades. Although it is doubtless true that improvements to peripherals [*35] or software will improve a computer's performance somewhat under certain circumstances, we find no evidence on how much or under what conditions improvement could be expected. There was thus no evidence from which to conclude whether peripheral and software upgrades were reasonably interchangeable with either a MIPS upgrade or a different mainframe computer in enough cases that those alternate upgrades could properly be termed substitutes. Nor was there evidence that, because of a price change in mainframes, there was a greater or lesser demand for peripheral/software upgrades. In sum, the evidence was insufficient to support the wholesale inclusion of peripherals and software into the relevant market for large-scale mainframes.

We emphasize, however, that we are not holding that peripheral and software must be excluded from the relevant market, only that, upon review, the evidence cited in the district court's opinion is insufficient to warrant including them. On remand, the district court will of course determine whether there is some degree of interchangeability or other evidence of cross-elasticity of demand. If there is, then the court is free to adjust IBM's share of the market [*36] by its best estimate of the true competition from peripherals and software.

G. AMI's Proposed Submarkets

As a separate ground for reversal, AMI argues that the district court erred by rejecting its two alternate submarkets: the parts and services required for the upgrade and conversion of all large-scale mainframes, and an even narrower submarket confined to parts for upgrading IBM mainframes. The district court rejected the larger submarket based on evidence that upgrades to large-scale mainframes competed with various alternatives, including large-scale mainframes themselves. *Allen-Myland*, 693 F. Supp. at 282-83. It rejected the narrow submarket because "courts have generally rejected [*208] market definitions limited to a defendant's products." *Id. at 282 n.43*.

In *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502, 1524, 8 L. Ed. 2d 510 (1962), the Supreme Court stated that within a broader product market "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."¹⁶ Thus, if upgrades and mainframes [**37] are not reasonably interchangeable with each other, a valid submarket would exist here. The district court, however, found that replacing the computer itself is an alternative to an upgrade. Moreover, it found that IBM priced upgrades and mainframes so that buyers would be indifferent whether to purchase an upgrade or install a more powerful computer. These factual findings are not disputed on appeal, and so the district court's conclusion on the larger submarket must stand. By implication, if the broader submarket fails, the narrower one would appear to fail as well.

[**38] Instead of arguing that the district court's factfinding was clearly erroneous, AMI attempts to revive its narrow submarket by relying on the testimony of its expert, Professor Levin, that certain IBM mainframe users were locked into upgrading their computers and lacked the alternative of replacing the whole machine. By so arguing, it attempts to bring this issue within the ambit of *Kodak*, which was decided four years after the district court's opinion in this case.

In *Kodak*, as we have already discussed, the Supreme Court held that when users are locked into a particular vendor by the sunk cost of the product, market power may exist in the aftermarket for parts even though the equipment market is competitive. Here, while the district court found that large-scale mainframes were generally reasonable substitutes for upgrades, its opinion did not address whether there was a subpopulation of IBM mainframe users who for economic reasons were locked into MIPS upgrades when they needed increased computing power. AMI's argument appears to be that if a sufficient number of users actually were locked into using upgrades rather than replacing their computers, then IBM may have had [**39] the power to set prices for MIPS upgrades, wholly separate from whether it possessed that power over the large-scale mainframe market, including upgrades. Under this reasoning, we should remand and allow the district court to determine the extent, if any, to which this was the case.

Such a remand would be futile, however, since if IBM had market power over upgrades with respect to a large number of mainframe users, we would expect it to charge supracompetitive prices for upgrades. Yet, the district court found that IBM prices its upgrades such that the user pays the same amount for an upgrade as the price differential between the prices of the more powerful and the existing computers if purchased new. *Allen-Myland*, 693 F. Supp. at 282. This belies any special power over an upgrade submarket; IBM's power is limited to whatever control it is able to maintain over the larger relevant market. Hence, we will affirm the district court's finding that a valid IBM-only parts submarket did not exist.

H. The "Significant Win/Loss Reports"

Additionally, AMI argues that the district court improperly rejected one of its strongest pieces of evidence in support of [**40] its proposed market definition, the "Significant Win/Loss Reports," also known as the SWLRs. These reports were prepared monthly for the top management of IBM and showed, for each competitive situation IBM faced, IBM's product offering, the offering of its competitors, and whether IBM won or lost the sale. See *Allen-Myland*, 693 F. Supp. at 272. According to the testimony of AMI's expert who reviewed the SWLRs (Professor Levin), in 97.6 percent of the reported cases in which the [*209] IBM offering was a large-scale mainframe, the competitor's offering was also a large-scale mainframe or an upgrade. AMI asserts that these reports proved that a distinct product market for large-scale mainframe computers exists.

The district court rejected this evidence for several reasons. First, it noted that IBM itself viewed the SWLRs as "poor and unrepresentative indicators of actual market activity" and eventually stopped using them. *Id. at 273*. In

¹⁶ The use of the term "submarket" is somewhat confusing, and tends to obscure the true inquiry: whether IBM is constrained by the prices of large scale mainframe computers when pricing its upgrades. If it is so constrained, then the relevant market consists of both mainframes and upgrades. If not, then it is simpler and more accurate to say that the relevant market itself, not some submarket of it, contains only upgrades. See Areeda & Hovenkamp, *supra*, P 581.1c, at 535-36 (1993 Supp.). Nevertheless, because the term has been commonly used in the reported cases over the years, we will also continue to use it, being nonetheless mindful that it is inaccurate and of the true question before us.

the alternative, it relied on the SWLRs themselves, which contained many examples in which *non-IBM* mainframes competed against IBM computers smaller than IBM mainframes. The district court believed [**41] that this additional competition undermined AMI's definition of the relevant market.

Reports such as the SWLRs, which are used by IBM's management, can be powerful evidence in an antitrust case. In *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 304 (D. Mass. 1953), aff'd per curiam 347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954), the court stated:

HN10 [↑] When a business allows its own important judgments constantly to be affected by a statistical survey unflaggingly made, diligently kept current, and repeatedly consulted at least by subordinate advisers to the officers, then the statistical material may be used by a court to some degree as reliable evidence against the business.

Nevertheless, notwithstanding the potentially probative value of this type of evidence, there is nothing that requires courts to credit such evidence. Here, as the district court pointed out, the record shows that IBM itself found the SWLRs were unreliable. As the trier of fact, the district court was entitled to credit that testimony and reject the SWLRs.¹⁷ Based on our conclusions about the relevant [**42] market and the various additions to it, however, it is possible that the district court may wish to reconsider the probative value, if any, of the SWLRs. On remand, of course, it is free to do so.

IV. OTHER FACTORS BEARING ON MARKET POWER

Market share, of course, [**43] is only one type of evidence that may prove the defendant has sufficient market power to impose *per se* antitrust liability. **HN11** [↑] "Market share is just a way of estimating market power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them." *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986). The district court, in addition to its findings on market share, also held that the lack of entry barriers and the rapid technological change of the computer industry independently precluded any finding of market power.

A. Ease of Entry Into the Relevant Market

HN12 [↑] Notwithstanding the extent of an antitrust defendant's market share, the ease or difficulty with which competitors enter the market is an important factor in determining whether the defendant has true market power -- the power to raise prices.

In many cases a firm's share of current sales does indicate power. . . . In other cases, however, a firm's share of current sales does not reflect an ability to reduce the total output in the market, and therefore it does not convey power over price. . . . The lower [**44] the barriers to entry, and the shorter the lags of new entry, the less power existing firms have. When the supply is highly elastic, existing market share does not signify power.

Id. at 1335.

The district court relied on three pieces of evidence that purportedly showed that competitors [*210] were relatively free to enter the relevant market. First, it noted:

A number of companies other than IBM manufacture a wide range of computers having the processing power of IBM large-scale mainframe computers. Several of these (including Digital Equipment Corporation, Data

¹⁷ We do not accept the district court's alternative reason for discrediting the SWLRs. Although it may well be true that in some circumstances non-IBM mainframes competed with smaller IBM computers, we must be aware of the true market inquiry in an antitrust tying case: can the defendant exercise market power over the tying product to restrain trade in the tied product market? Although the above evidence could lead to the conclusion that the relevant market here is somewhat broader than mainframes only, a user seeking to avoid IBM's tie needs an alternative to an upgrade or a computer of the type it currently has installed. To the extent that the user needs *more* computing power, a *smaller* IBM computer would not appear to be much of a substitute.

General, Hewlett Packard, Tandem, and NCR) were admittedly excluded from the report upon which Prof. Levin relied to determine what constitute large-scale mainframes.

[Allen-Myland, 693 F. Supp. at 278.](#)

This statement is somewhat ambiguous. First, we have already noted that the district court may wish to reconsider the issue of whether the relevant market includes the smaller capacity computers these manufacturers produce in light of the Supreme Court's opinion in *Kodak*. Thus, to the extent the court finds on remand that these computers do not belong in [\[**45\]](#) the relevant market, its conclusion will have to be re-evaluated. More importantly, the district court's reasoning conflates ease of entry into the market with what belongs in the relevant market in the first instance. Even if all the computers made by these manufacturers were properly included in the market, that would say nothing about how easy or difficult it currently is to enter the market. It is conceivable that all these firms have been in the market for many years and that there has been very little recent entry. To use an example from another industry, just because there may be a sizable number of steelmakers of various sizes and specialties, that does not necessarily make it easy to build a steel mill and enter the business today. Accordingly, the district court's finding of ease of market entry is not supported by the mere presence of these manufacturers of smaller capacity computers.

Second, the district court relied on the recent growth of leasing companies as evidence that the market was easy to enter. Again, we have already held that, except for certain leases of used, non-IBM computers, leasing companies do not belong in the relevant market. Because of this, the ease [\[**46\]](#) of entry into the leasing market is legally irrelevant; if IBM has market power over the supply of large-scale mainframes, the immediate entry into the market of these essentially financial intermediaries can do nothing to increase the supply of such computers. Accordingly, leasing companies prove nothing about ease of entry into the relevant market here.

Finally, the district court cited the relative ease of entry into the computer reconfiguration business itself as evidence of a lack of barriers to market entry. The question, however, in an antitrust tying case is whether the defendant can use its power over the tying product market to control the tied product market as well. If IBM has market power over large-scale mainframes (including upgrade parts), that power could not be curtailed even to the slightest degree by the fact that it is easy to enter the tied market of *installing* upgrades. Indeed, it seems likely that in most if not all tying cases, the tied product market will be competitive, otherwise the defendant would have no reason to impose the tie and restrain competition in the first place.

Accordingly, because the district court's reasons for finding ease of entry [\[**47\]](#) into the relevant market were erroneous, its finding that ease of entry vitiated IBM's market power cannot stand.

B. Technological Innovation and Declining Prices

The district court also believed that market power was inconsistent with the fact that technology in the computer industry was rapidly advancing.

Although the performance of computers has been rapidly increasing as costs for performance have plummeted, it proves too much to say that this improvement is inconsistent with market power. Indeed, in [Greyhound Computer Corp. v. IBM Corp., 559 F.2d 488, 497 \(9th Cir. 1977\)](#), cert. denied, 434 U.S. 1040, 98 S. Ct. 782, 54 L. Ed. 2d 790 (1978), another antitrust action brought against IBM and relied upon by the district court, the court stated:

[\[*211\]](#) IBM also contends that price reduction and product improvement are characteristics of the industry and are inconsistent with the existence of monopoly power. But [HN13](#) rapid technological progress may provide a climate favorable to increased concentration of market power rather than the opposite. Moreover, a decline in prices does not necessarily [\[**48\]](#) imply an absence of monopoly power; a fair profit might have been made at even lower cost to users.

[559 F.2d at 497](#) (footnote omitted) (citing *Alcoa*, 148 F.2d at 427). Indeed, were we to accept the district court's reasoning, a great many defendants with market power, such as Alcoa in the 1920s and perhaps even the former AT&T telephone monopoly, could be insulated from antitrust attack. Here, technology was improving and prices were steadily falling, but the district court cited no evidence that these changes had any connection with a decrease

in IBM's market power. We hold that the district court erred when it ruled that innovation and price reductions precluded a finding of market power.¹⁸

C. Conclusion

Accordingly, **[**49]** we will vacate the district court's finding that IBM lacked sufficient market power for per se antitrust liability and remand for further proceedings, during which the district court should re-examine the issue *de novo*.

V. "VIABLE BUSINESS OPPORTUNITY"

In addition to finding that IBM lacked sufficient market power for per se liability to be imposed on it, the district court also found that AMI had not been foreclosed from a "viable business opportunity" by IBM's net pricing policy. *Allen-Myland, 693 F. Supp. at 283*. The court found that the labor-saving advantages of TCM technology changed what had once been a lucrative reconfiguration business involving a great deal of added value into one whose labor content had become de minimis, averaging only 1.2 percent of the net upgrade price. *Id.* According to the district court, because AMI would be required to inventory a supply of upgrade parts in order to compete with IBM, its carrying costs would be so high in comparison to its projected revenues from performing upgrades that AMI would have actually lost over \$ 35 million if IBM had provided upgrades on non-net priced (SWRPQ) terms. *Id. at 288.* **[**50]** Accordingly, because the antitrust laws protect competition rather than competitors, the court held that net pricing was not worthy of condemnation under the antitrust laws.

There is no requirement that one be deprived of a "viable business opportunity" to recover under *section 1* of the Sherman Act. We instead interpret the district court as holding that AMI failed to prove the following two prongs of the orthodox framework for a *section 1* tying case: first, that two separate markets existed for the tying and tied products; second, that a substantial volume of interstate commerce was affected by the tie. Additionally, the district court's analysis appears to bear on the "fact of damage" issue of whether AMI has standing to bring a private antitrust suit against IBM.

A. Separate Product Markets

In *Jefferson Parish*, the Supreme Court said that, in a tying case, "the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *466 U.S. at 19, 104 S. Ct. at 1562*. It then went on to hold that a tying arrangement **[**51]** cannot exist unless there is a sufficient demand for the purchase of the tied product separate from the purchase of the tying product so as to identify a market structure in which it is efficient to offer the tied product separately from the tying product. *Id. at 21-22, 104 S. Ct. at 1563*. There, the tying product was hospital services and the tied product was anesthesiological services; because on the facts presented, there was evidence of separate patient demands for specific anesthesiologists, **[*212]** the Court held that separate markets existed. *Id. at 22, 24, 104 S. Ct. at 1564-65.*

At least at one time, there was a demand for third-party installations of upgrades separate from the demand for parts; the successful operation of AMI's business before IBM imposed its net pricing policy is conclusive evidence of that. The district court, however, believed that TCM technology, not net pricing, destroyed the separate market for AMI's labor, finding: (1) that customers would not be willing to have upgrades installed by AMI at any price higher than what IBM would charge if **[**52]** forced to provide the service; and (2) that, at the IBM price, AMI would lose massive amounts of money if it attempted to install upgrades in the same way as before net pricing. *Allen-Myland, 693 F. Supp. at 283-91.*

1. Customer Willingness to Pay Premium Prices

¹⁸ We do not, however, hold as a matter of law that price reductions and technological improvements can never evidence a lack of market power. Each case must be decided on its own facts, and facts must be found on the evidence presented.

The district court credited the testimony of end-user witnesses who said they had no interest in having upgrades installed by a third party such as AMI. It then went on to acknowledge that representatives of leasing companies did indicate an interest in third-party installation, but only at prices competitive with IBM's net price. [Id. at 290.](#)

The court properly found that, with a few adjustments, IBM would charge \$ 165 per hour for installing upgrades. [Id. at 287.](#) AMI takes strong exception to the next logical step in the court's reasoning: that AMI would not be able to charge its customers any more than IBM for its services. We are convinced by AMI's argument.

At trial, two leasing company witnesses testified that they would not be interested in paying AMI significantly more than IBM's effective hourly rate for installation of [**53] upgrades. Comdisco's Mr. Lewis said that he would use AMI installation service only if it were, at most, slightly more expensive than IBM's price. [Id. at 291.](#) On cross examination, however, he admitted that AMI had performed an "E to B" upgrade at an effective hourly rate of \$ 2,400 and admitted that such an amount (thought by counsel to be \$ 1,500 per hour) was more than slightly greater than IBM's price. See [id. at 291](#) & n.75. The district court, irrespective of this contradiction, opined:

Mr. Lewis of Comdisco explained that he would use AMI installation service only if it were "lesser than, the same as, or in rare exceptions, only a slight premium above the prevailing IBM list price." Using an E to B upgrade as an example, Mr. Lewis testified that he would not regard an AMI hourly rate of \$ 1500 for installation service as only slightly greater than an IBM hourly rate of \$ 180 or \$ 200.

[Id. at 291](#) (record citation omitted). In a footnote, the court continued:

Using customer-owned parts, AMI charged Comdisco between \$ 25,000 and \$ 30,000 for installing an E to B upgrade, requiring [**54] approximately 20 man hours. Based on Mr. Ross's calculations, the value of IBM installation service for an E to B upgrade, requiring about 13 man hours of labor, is \$ 2,400. Based on these facts and Mr. Lewis' assertions, it is fair to conclude that Comdisco would not select AMI over IBM to install a new E to B upgrade if it had the choice. In view of this evidence, I do not accept AMI's assertion at closing argument that leasing companies "don't care whether the service costs \$ 2400 or \$ 20,000."

[Id. at 291 n.75](#) (record citations omitted). We conclude that this finding, at least as supported by the district court's opinion, is clearly erroneous. The court did not adequately address why, if Comdisco was unwilling to pay anything more than a slight premium over IBM's rate, it paid not \$ 165 per hour, but a full \$ 2,400 hourly rate. Its statement, that Comdisco would never pay the \$ 2,400 rate if it "had the choice," is true enough, but explains nothing; we would all like to pay the lowest possible price whenever we purchase goods and services. On the other hand, AMI's explanation for its ability to charge a higher price is supported: IBM commonly [**55] took so long to price and perform upgrades that the leasing companies' losses from having their machines idle exceeded the [*213] premium charged by AMI -- which was often able to complete the job within a few days.¹⁹

In a similar vein, "Mr. Smith of CMI testified that, other things being equal, he did not wish to pay 10, 20 or 30 times more than necessary to obtain installation service." [Id. at 291.](#) For the reasons stated above, this does not show that CMI, under certain special circumstances such as the need for fast turnaround, would be unwilling to pay a considerable premium, even if under [**56] normal conditions it would pay only the IBM rate. This finding too cannot stand as presently supported.

2. Alleged Lack of Demand for Third-Party Installation

The district court additionally supported its finding of lack of demand for AMI-installed upgrades by referring to evidence that, in the few occasions in which IBM had made SWRPQ pricing available for MIPS upgrades, there were few such upgrades sold without IBM labor. The court reasoned as follows:

¹⁹ We again stress, however, that we cannot and will not substitute our view of the facts for that of the district court. We hold only that the district court's finding of fact is not adequately supported by the elaboration contained in its opinion. On remand, the court may of course re-examine this issue and again reach the same conclusion, if it is supported by sufficient evidence and findings of fact.

There is insufficient evidence of demand for upgrade labor at prices AMI would have to charge to support a conclusion that a competitive market for 308X upgrade labor does or could exist. Leasing companies have purchased virtually no 308X model, memory, or channel upgrades without IBM labor included (in order, for instance, to have AMI install the upgrade) when such upgrades were available on an SWRPQ basis (which roughly equals the price IBM would be entitled to charge for its parts). Every J to K upgrade purchased by CMI and Comdisco was bought with IBM installation service included even though IBM also sold the feature on an SWRPQ basis.

Id. at 290-91 (footnotes and record citations omitted). **[**57]** In a footnote, the court responded to AMI's argument that the reason there were so few SWRPQ orders was that the unbundled prices were not well-publicized:

Witnesses from CMI and Comdisco testified that neither company knew that IBM sold upgrades (including the J to K) without IBM labor included. I do not credit such testimony, as there was documentary evidence (requests for IBM "SW" prices) to the contrary. Further, the SWRPQ procedure has existed since 1975. SWRPQ prices are readily available from IBM. AMI acknowledged that SWRPQ prices are made available from IBM when specifically requested.

Id. at 291 n.74. (record cites omitted) AMI argues that this determination was based on insupportable impeachments of witnesses and was clearly erroneous.

Mr. Lewis, Vice-President of Comdisco, the largest leasing company, admitted that, *as of the trial date*, he knew that IBM installation was not mandatory. He was then cross-examined on the issue of one particular 308X MIPS upgrade, the J to K model conversion. He then stated that he acquired nine such upgrades in the past, all with IBM labor included. But when asked whether he knew that IBM installation **[**58]** was optional at the time he purchased the J to K upgrades, he said he did not. Quite simply,

Lewis' admission does not impeach his testimony that he was unaware of SWRPQ pricing during the relevant time period.

The district court then used certain documentary evidence to impeach Lewis. DX 2260 is a request from Lewis for SWRPQ pricing on three upgrades, J16-J24, K16-K24 and G16-G24. None of these are the J-K upgrade that Lewis testified about at trial. Moreover, their designations are consistent with *memory* upgrades, not MIPS upgrades.²⁰ DX 2266 is more explicit, specifically **[*214]** stating that memory upgrades are involved. 308X memory was usually neither TCM-based nor subject to net pricing and is thus not at issue. Accordingly, the conclusion to be drawn from this evidence is that Lewis was unaware that MIPS upgrades were SWRPQ-priced, although he had purchased some unrelated memory upgrades without IBM installation in the past. Lewis' testimony that he was unaware of SWRPQ pricing for 308X MIPS upgrades was not impeached. Therefore, nothing can be concluded from Comdisco's failure to purchase MIPS upgrades under SWRPQ terms other than it was unaware they were available.

[59]** The district court also noted the testimony of Mr. Loria, a CMI Vice-President. He testified that, to his knowledge, IBM would not sell upgrades without a labor charge. Much of this testimony centered on the year 1976, years before IBM introduced the 308X series of computers. He also stated that he thought that SWRPQ terms meant simply that IBM did not retain the old parts. Except for the J-K upgrade, the only SWRPQ upgrades he testified about were not MIPS upgrades.

The district court believed that this testimony was impeached by three exhibits, DX 2261, DX 2262 and DX 2263. DX 2261, however, is just a 1986 request for SWRPQ pricing on a 96 to 128 megabyte memory upgrade; Loria never testified that non-net priced memory upgrades did not exist. DX 2262 and DX 2263 are IBM's responses to CMI requests for SWRPQ-priced memory upgrades. None of these documents tend to show that Loria knew that a

²⁰ 308X model numbers appear to be classified as follows: 308X-YMM; where X is the CPU family, e.g., 3081, 3083, 3084; Y is the CPU power indicator within the family, e.g., 3081-J, 3081-K; and MM is the main memory in megabytes, e.g., 3081-J16, 3081-J24. This is consistent with the numbering scheme for memory upgrades in DX 2266.

few MIPS upgrades were available without IBM installation; accordingly, his testimony to the contrary was not impeached by this evidence.

Another Vice-President of CMI, a Mr. Smith, testified similarly to Loria, stating that he was not aware that the J to K MIPS upgrade was available without [**60] IBM installation. The district court found that DX 2265 impeached Smith's testimony. That document is a computer printout of requests for price quotations ("RPQs") with the name "Gary Smith" handwritten at the top. Some of these RPQs were for SWRPQ terms, but none were for MIPS upgrades. Once again, this evidence does not impeach Smith's testimony.

In short, that to which the district court refers does not bear out its conclusion that these witnesses were untruthful when they claimed not to know of a few MIPS upgrades without IBM installation.²¹ Thus, the fact that a few MIPS upgrades were sold under SWRPQ terms does not prove that there was no separate demand for installation services, particularly considering that IBM had every economic incentive to protect its revenues and avoid widely publicizing the existence of such upgrades.

[**61] 3. AMI's "Massive Losses" From Inventory Costs

In addition to finding that AMI would attract no customers at the price the court believed it would have to charge for its service, the district court also found that AMI would suffer massive losses at the IBM hourly rate. It based this conclusion on its belief that AMI would have to maintain an inventory of expensive upgrade parts to provide adequate turnaround time. Because IBM's revenues would average only 1.2 percent of the net price for the upgrade and its carrying costs for the parts inventory would average 3 percent, the district court concluded that AMI stood to lose over \$ 35 million by competing with IBM. *Id.* at 288. Although the court acknowledged that AMI's principal argument was that leasing companies inventoried their own parts and thus saved AMI the costs of doing so, it nevertheless included these carrying [*215] costs when calculating AMI's ability to make a profit, based on a purported admission by AMI.

It is, of course, true that AMI would have to carry an inventory of parts to give its customers fast turnaround on upgrade installations. This is exactly what AMI did for the earlier 303X [**62] series of computers. The exception would be if the customer itself maintained an inventory of parts. Thus, to the extent AMI intended to compete for the business of end-users, who typically do not inventory parts, AMI would have to maintain an inventory, which would be presumably unprofitable given the revenue generated by the installation. Leasing companies, on the other hand, constituted over 90 percent of AMI's business and were known to inventory their own parts. So, while the relatively minuscule end-user business may have been foreclosed from AMI by the low margins generated by TCM-based upgrades, the business from leasing companies was not.

It would be both a non-sequitur and clearly erroneous on its face to find that AMI's argument that leasing companies would inventory their own parts and relieve AMI of that cost is invalid solely because AMI admitted it will incur such costs on *its own* inventory. The district court, however, relied on its belief that Mr. Allen admitted that AMI would incur inventory costs if it were permitted to compete in the market of 308X net priced upgrades. *Id. at 288-89*. The record contains the following exchange: [**63]

Q. And according to Mr. Hamilton's report on damages, he indicates that you have told him that AMI must maintain a certain worth of inventory of upgrades and parts, and that a fair estimate of AMI's carrying costs for

²¹ In addition, the district court relied on the fact that the SWRPQ procedure has existed since 1975, that "SWRPQ prices are readily available from IBM," and that AMI acknowledged this fact. This all appears to be true, in general, but there is no indication in the portions of the record cited by the court below that these facts impeached the testimony of the Comdisco and CMI witnesses that they were unaware of SWRPQ-priced MIPS upgrades for 308X series computers. That these prices were available for memory upgrades and for earlier series of computers could not have reasonably put these witnesses on notice that a very small number of SWRPQ-priced MIPS upgrades were made available for the 308X series, given IBM's well-publicized policy of net pricing.

that inventory, just for the carrying costs of the interest involved is approximately three percent of IBM's price, whatever you happen to pay for those parts.

Did you tell Professor Hamilton that, sir?

A. I identified for Professor Hamilton, when he was doing a damage study, he asked me, if you were permitted to compete in this market of net priced MESs, what would be your costs?

I identified it would be AMI's intent, similar to the volume procurement agreement, to order many parts from IBM.

There was a question whether these parts would come from the parts center on a very rapid response or whether AMI would have to inventory, virtually millions of dollars of inventory.

From going on prior experience with the VPA, where we ordered large quantities for inventory and were not using the parts center, he said, wouldn't you have some type of carrying charges?

Now, that number that he picked of three percent was if the prime rate **[**64]** were 12 percent. . . .

I don't know further the -- all the economic data in regard to what -- Mr. Hamilton went further from that, but the question was asked.

On the next page of the transcript, Allen then stated that as long as upgrade parts could arrive quickly from the IBM Parts Center, there would be no need for AMI to maintain an inventory. This "admission," (Allen stated only that the question was asked), does not admit that AMI would be required to carry an inventory for all of its customers. It was therefore insufficient grounds upon which to conclude that inventory costs

must be included in every situation in which AMI does business.²²

[65] [*216] 4. Low Margins and Separate Markets**

The district court also found that the value of the labor content of 308X MIPS upgrades was de minimis for antitrust purposes. [Id. at 283](#). Later, it referred to another purported admission by AMI's counsel, to the effect that, if the labor content of upgrades was de minimis, then parts and labor would have to be considered a single market. [Id. at 289 n.71](#).

To the extent it might be argued that AMI admitted that a 1.2 percent margin caused parts and installation to fold into one market, as a matter of law we cannot agree. The record indicates that the total value of all 308X MIPS upgrades performed between 1981 and 1985 was over \$ 2 billion. 1.2 percent of a \$ 2 billion market amounts to over \$ 20 million. See [Allen-Myland, 693 F. Supp. at 292](#). This amount is not de minimis within the meaning of the antitrust laws. See *Fortner I*, 394 U.S. at 501-02, 89 S. Ct. at 1257-58 (\$ 190,000 not considered de minimis by the Supreme Court).

5. Conclusion

The district court's finding that **[**66]** no separate market existed for installations of upgrades cannot stand. We will accordingly vacate it and remand for further proceedings. On remand, the district should re-examine the issue *de novo*.

B. Substantial Volume of Commerce

²² Earlier in its opinion, the district court found that Allen had admitted that AMI could not make a profit on a labor value of 1.2 percent of the net upgrade price. [Allen-Myland, 693 F. Supp. at 284](#). The trial testimony shows that counsel for IBM asked Allen whether he would take on an upgrade for \$ 25,500 labor charge when the net price was \$ 2,090,000, a 1.2% margin. Allen replied that he would, and that he thought it was a viable business opportunity. Counsel then tried to impeach him with a letter he wrote to IBM in the context of settlement negotiations. On the witness stand, Allen admitted the existence of this letter but claimed that counsel was taking it out of context. We do not think this letter can be fairly read to concede that AMI could never make a profit on a 1.2 percent margin. Like the statement discussed in the above text, it admits no more than that, to the extent AMI must buy and inventory the parts, it cannot earn a profit on that margin.

As part of its "viable business opportunity" inquiry, the district court also found that AMI had not proved that IBM's tying arrangement foreclosed a substantial volume of commerce. *Allen-Myland*, 693 F. Supp. at 292-93. Although the court acknowledged that the \$ 20 million market for upgrade installations was quantitatively more than sufficient, it found that AMI had not shown "that it engaged in an activity foreclosed by IBM's net pricing." *Id.* The district court believed that it was the changes brought about by the 308X's TCM technology, not net pricing, that foreclosed AMI from the upgrade business. Thus, according to the court, competition with IBM in the installation of upgrades had become unprofitable because of advancing technology, quite apart from any anticompetitive effects of the tie.

First of all, to the extent the district court based this conclusion on its findings that AMI lacked a viable business **[**67]** opportunity, it necessarily erred. We have already pointed out the factual and analytical errors behind those conclusions. Although we do not decide those factual issues ourselves, it appears likely from this record on appeal that AMI could have successfully performed upgrades and made a profit in the absence of net pricing; at least, the district court's findings that no one would pay AMI any more than IBM and that AMI would be burdened with across-the-board inventory costs were not supported by the evidence it cited.

Second, and more importantly, there is no requirement that an antitrust plaintiff show profitability in addition to showing some foreclosure of commerce. If the competition foreclosed by a tying arrangement had to be profitable, then many anticompetitive tying arrangements would be immunized from antitrust attack. For example, a new competitor attempting to break into a dominated market might well lose money for a time, either because of aggressive introductory pricing or because its sales had not yet grown to the point where economies of scale made its production operations sufficiently inexpensive to turn a profit. Yet, the defendant could exploit its market power **[**68]** with impunity on the ground that the plaintiff could not profitably compete against it, and continue using that power to keep all new competitors out of the tied market. Such a result would be contrary to the purpose of the antitrust laws. Accordingly, we hold that the district court erred when it found that a substantial amount of commerce was not foreclosed.

C. Fact of Damage

An antitrust plaintiff must also prove what is known as "fact of damage," defined as harm of a type which the antitrust laws were designed to prevent. See *supra* typescript at 10. The district court declined to rule on this issue, but noted that its earlier findings that AMI was not deprived of a viable business opportunity seemed to preclude **[*217]** any finding that AMI suffered the requisite damage. *Allen-Myland*, 693 F. Supp. at 298. We, of course, make no finding, but observe that the district court's errors on what it termed the business opportunity issue call its tentative conclusion on fact of damage into question as well. The matter remains, however, an issue for that court to resolve in the first instance.

VI. CONCLUSION

We will accordingly vacate the **[**69]** district court's judgment in favor of IBM and remand for further proceedings consistent with this opinion.

American Ass'n of Cruise Passengers v. Cunard Line

United States Court of Appeals for the District of Columbia Circuit

December 13, 1993, Argued ; August 16, 1994, Decided

No. 92-7168

Reporter

31 F.3d 1184 *; 1994 U.S. App. LEXIS 21829 **; 308 U.S. App. D.C. 177; 1994 Trade Cas. (CCH) P70,684; 1995 AMC 263

AMERICAN ASSOCIATION OF CRUISE PASSENGERS, APPELLANT v. CUNARD LINE, LTD.; CARNIVAL CRUISE LINES, INC.; PRINCESS CRUISES COMPANY, ALSO KNOWN AS PRINCESS CRUISES; P&O, INC., ALSO KNOWN AS PRINCESS CRUISES; PAQUET CRUISES, INC.; OCEAN CRUISE LINE, INC.; SITMAR CRUISES, INC.; MARRIOTT CORPORATION, ALSO KNOWN AS SUN LINE CRUISES; ROYAL CARIBBEAN CRUISE LINE, INC.; REGENCY CRUISES, INC.; CRUISE LINES INTERNATIONAL ASSOCIATION; AMERICAN SOCIETY OF TRAVEL AGENTS, INC., APPELLEES

Subsequent History: [**1] As Amended November 3, 1994.

Prior History: Appeal from the United States District Court for the District of Columbia (86cv00571).

Core Terms

district court, cruise line, carriage, Clayton Act, proceedings, non-common, antitrust, Cruise, primary jurisdiction, common carrier, boycott

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

HN1[Federal & State Interrelationships, Abstention

Federal courts are generally assumed to have a virtually unflagging obligation to exercise the jurisdiction given them.

Administrative Law > Separation of Powers > Primary Jurisdiction

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Administrative Law > Separation of Powers > Jurisdiction

HN2 [down arrow] **Separation of Powers, Primary Jurisdiction**

A district court may dismiss a suit on the ground that an agency has primary jurisdiction over it, and that the agency is best suited to make the initial decision on the issues in dispute, even though the district court has subject matter jurisdiction. In cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by the U.S. Congress for regulating the subject matter should not be passed over.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Labor & Employment Law > ... > Employment Practices > Adverse Employment Actions > Discharges & Failures to Hire

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN3 [down arrow] **Procedural Matters, Jurisdiction**

Enforcement of the antitrust laws against a regulated industry insofar as it steps outside the regulated domain is part of the work of the district court. There is no per se exemption from antitrust law for activities of carriers beyond the control of the regulatory agency. Antitrust concerns are within the usual province of the court and require no special regulatory expertise.

Administrative Law > Separation of Powers > Jurisdiction

Governments > Legislation > Statute of Limitations > General Overview

Administrative Law > Separation of Powers > Primary Jurisdiction

Antitrust & Trade Law > Clayton Act > Jurisdiction

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Primary Jurisdiction

HN4 [down arrow] **Separation of Powers, Jurisdiction**

In general, when primary jurisdiction lies with an administrative agency, the district court should stay the proceedings in front of it, not dismiss the suit. Dismissal under the primary jurisdiction doctrine is not appropriate if dismissal would prejudice the plaintiff's right to obtain antitrust relief at the appropriate time.

Counsel: Stephen L. Snyder argued the cause for appellant. With him on the brief were Sheldon N. Jacobs and Amy B. Chappell.

J. Michael Kavanaugh argued the cause for appellees. With him on the brief were Dewey Ballantine, Saul P. Morgenstern, Jill D. Bicks, Burton A. Schwald, Edward Schmeltzer, Phillip H. Rudolph, and David L. Roll. Arnold B. Calmann, Mark E. Warren, Mary B. Denison, and Deana F. Dudley entered appearances.

Judges: Before GINSBURG and RANDOLPH, Circuit Judges, and WILL, Senior District Judge. * Opinion for the Court filed by Circuit Judge GINSBURG.

Opinion by: GINSBURG

Opinion

[*1185] GINSBURG, *Circuit Judge*: The American Association of Cruise Passengers appeals from the district court's order dismissing without prejudice its antitrust suit against the defendant cruise lines on the ground that the claims within the jurisdiction of the Federal Maritime Commission predominate over the claims within the court's Clayton Act jurisdiction. Because predominance [**2] is not the relevant standard, nor dismissal the appropriate response, we remand this matter for the district court to reinstate the suit insofar as it concerns non-common carriage.

I. BACKGROUND

In 1986 the AACP, a travel agency, sued a number of cruise lines and their two trade associations, alleging that the cruise lines had boycotted the plaintiff in violation of the federal and Maryland antitrust laws. The defendants moved to dismiss the case, asserting that a cruise line is a "common carrier" within the meaning of the Shipping Act of 1984, 46 U.S.C. App. § 1702(6), and that any agreement among cruise lines is therefore subject to the exclusive jurisdiction of the FMC. The district court dismissed defendant Cunard Line, holding that it is a common carrier, but denied the motion as to the other defendants on the ground that they are not common carriers.

The remaining defendants filed an interlocutory appeal pursuant to 28 U.S.C. App. § 1292, and this court reversed the district court's decision that they are not common carriers. On appeal, this court reversed. See *American Association of Cruise Passengers v. Carnival Cruise Lines, Inc.* ("Cruise Passengers I"), [286 U.S. App. D.C. 44, 911 F.2d 786 \(D.C. Cir. 1990\)](#). We held that a cruise line is a "common carrier" within the meaning of the Shipping Act of 1984 only to the extent that it operates between a United States port and a foreign port; "insofar as it travels only between foreign ports," it is not operating as a common carrier. *Id.* at 792. We therefore concluded that "to the extent [**3] that a cruise line is a common carrier, but to that extent only, a boycott agreement to which cruise lines are parties is subject to the prohibitions [*1186] and procedures of the Shipping Act, rather than to those of the Clayton Act." *Id.*

We remanded the case to the district court for further proceedings on the claim(s) within its jurisdiction under the Clayton Act. Recognizing that our decision "may potentially result in some parallel litigation" in the court and before the FMC, we left it to the district court "to consider whether, when the FMC has jurisdiction over some aspect of an agreement in suit before the court, there is a mechanism that would enable it to avoid proceedings duplicative of those before the Commission." *Id.* at 792, 793.

On remand the district court dismissed the case in its entirety. "The Court of Appeals," it said, "simply did not contemplate an all-or-nothing exercise of jurisdiction in situations where it is alleged that a boycott involving common and non-common carriage exists." Asserting that "here common carriage activity predominates the alleged agreement," the district court dismissed the suit "without prejudice in order to permit proceedings [**4] before the only body--the FMC--that may exercise jurisdiction over common carriage aspects of an alleged boycott agreement." [American Association of Cruise Passengers v. Carnival Cruise Lines, 1992 U.S. Dist. LEXIS 10759](#), No. 86-571 (D.D.C. July 21, 1992). The AACP appeals to this court.

* Of the United States District Court for the Northern District of Illinois, sitting by designation pursuant to 28 U.S.C. § 294(d).

II. ANALYSIS

The district court's order dismissing this suit was based upon its assertion that the aspects of the suit over which it has no jurisdiction "predominate" over the aspects of the suit over which it has exclusive jurisdiction, and upon the court's belief that dismissal would result in a more efficient use of its resources. As we recently noted, however, the [HN1](#) [↑] "federal courts are generally assumed to have a "virtually unflagging obligation ... to exercise the jurisdiction given them.' " *Reiman v. Smith*, 304 U.S. App. D.C. 196, 12 F.3d 222, 223 (D.C. Cir. 1993) (quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)) (omission in original). To be sure, the inefficiency of parallel or overlapping litigation should be minimized, but that [\[**5\]](#) is not a warrant for denying a suitor the access to court that the Congress gave it.

Having in mind both the district court's obligatory jurisdiction and our decision in *Cruise Passengers I*, the AACP's suit must be understood to consist of two distinct claims: one, which pertains only to the defendant cruise lines' common carriage operations, alleges that they violated the Shipping Act; the other, which pertains only to the defendants' non-common carriage operations, alleges that they violated the Clayton Act, [15 U.S.C. §§ 15, 26](#) (and the analogous provisions of Maryland law). Although there are issues of fact common to both claims, the claims are nonetheless legally distinct, and must be brought in separate fora--the FMC and the district court respectively. Hence, the district court ought presumptively to have retained jurisdiction over the Clayton Act claims involving non-common carriage.

There is an exception to this general rule which the district court did not specifically mention but which it must have had in mind. [HN2](#) [↑] A district court may dismiss a suit "on the ground that [\[**6\]](#) [an agency] has primary jurisdiction [over it], i.e., that [the agency] is best suited to make the initial decision on the issues in dispute, even though the district court has subject matter jurisdiction." *Allnet Communication Service, Inc. v. National Exchange Carrier Association, Inc.*, 296 U.S. App. D.C. 156, 965 F.2d 1118, 1120 (D.C. Cir. 1992). This doctrine is rooted in the teaching that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference v. United States*, 342 U.S. 570, 574, 96 L. Ed. 576, 72 S. Ct. 492 (1952); see also *Allnet Communication*, 965 F.2d at 1120 ("The primary jurisdiction doctrine rests both on a concern for uniform outcomes (which may be defeated if disparate courts resolve regulatory issues inconsistently) and on the advantages of allowing an agency to apply its expert judgment") (citations omitted).

This is not [\[**7\]](#) a case that implicates the primary jurisdiction of the FMC, however. There are common issues of fact between the two claims (e.g., whether the defendants boycotted the plaintiff), but there are no common regulatory issues. The Congress applied two different legal regimes to common [\[*1187\]](#) and non-common carriers, involving not only different fora but distinctly different remedies for a violation. Compare 46 U.S.C. App. § 1710(g) (permitting FMC to award up to double damages for violation of Shipping Act) and *id.* § 1710(h)(2) (permitting private party to petition district court to enjoin conduct in violation of Shipping Act during pendency of FMC proceedings) with [15 U.S.C. § 15](#) (requiring court to award treble damages for violation of Clayton Act) and *id.* [§ 26](#) (permitting court to enjoin future violation of Clayton Act). As we noted in *Cruise Passengers I*, the relationship between these two regimes does not involve:

the sort of jurisdictional overlap that the Congress sought to avoid when it passed the Shipping Act. Instead, the Congress was concerned about a carrier being subject to "parallel [\[**8\]](#) jurisdiction,' i.e., remedies and sanctions for the same conduct made unlawful by both the Shipping Act and the antitrust laws.

[911 F.2d at 792](#) (emphasis added). Because common and non-common carriage are distinct activities, there is no chance that a cruise line will be subject to different regulations and different sanctions for the same act. (An agreement to boycott the AACP with respect to common carriage is not the same as an agreement to do so with respect to non-common carriage, although of course one agreement may cover both.) Whether disparate legal treatment of the alleged boycott(s) is unwise from a policy perspective is not our concern; nor is the possibility that the boycott might be found illegal in one context but legal in the other a sufficient reason to dismiss the putative victim's suit. In addition, [HN3](#) [↑] enforcement of the antitrust laws against a regulated industry insofar as it steps

outside the regulated domain is part of the work-a-day world of the district court. See, e.g., *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 679 (9th Cir. 1985) ("There is no per se exemption [from antitrust ^{**9} law] for activities of carriers beyond the control of the [regulatory] agency") (citing *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 456, 89 L. Ed. 1051, 65 S. Ct. 716 (1945)); *American Telephone & Telegraph Co. v. Eastern Pay Phones, Inc.*, 767 F. Supp. 1335, 1343 (E.D. Va. 1991) ("Antitrust concerns are within the usual province of the Court and require no special regulatory expertise"). Therefore, the district court ought to have retained jurisdiction over that part of the suit within its exclusive jurisdiction.

Even were it not so clear that the doctrine of primary jurisdiction is inapplicable to this case, we would still be hesitant to see the case dismissed in its entirety. HN4[↑] In general, when primary jurisdiction lies with an administrative agency, the district court should stay the proceedings in front of it, not dismiss the suit. See, e.g., *Reiter v. Cooper*, 122 L. Ed. 2d 604, 113 S. Ct. 1213, 1220 (1993). Moreover, in this case in particular, the AACP notes that a new suit filed against the cruise lines after the completion of proceedings ^{**10} before the FMC might be barred by the Clayton Act statute of limitations. If so, then dismissal would have too harsh a consequence to impose upon the plaintiff merely because the FMC has jurisdiction over a distinct part of its suit, particularly where the district court could effortlessly hold the suit in abeyance pending the outcome of proceedings before the FMC. See *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 222-23, 15 L. Ed. 2d 709, 86 S. Ct. 781 (1966) (holding that dismissal under primary jurisdiction doctrine is not appropriate if "dismissal would ... prejudice the plaintiff's right to obtain antitrust relief at the appropriate time"). Further, the AACP informed the district court that in light of our earlier decision requiring it to proceed in two fora, it would likely not pursue any of its claims respecting the common carriage operations of the cruise lines and would instead pursue only its Clayton Act claims in the district court. The district court should certainly have explored that possibility, which would have left before it only a claim unarguably within its exclusive and obligatory jurisdiction.

[**11] III. CONCLUSION

To sum up, in *Cruise Passengers I*, we held that the district court has jurisdiction over the non-common carriage claims brought by the plaintiff AACP. Today we hold that the doctrine of primary jurisdiction being inapplicable, the district court must exercise that jurisdiction. We observe that [*1188] even where a court could justifiably stay its hand for proceedings to go forward before the agency with primary jurisdiction, it should hold the suit in abeyance if outright dismissal could impair the rights of a party.

Accordingly, we remand this case to the district court for further proceedings not inconsistent with this opinion. The order of the district court dismissing the suit is

Reversed.

New York v. Panex Indus.

United States District Court for the Western District of New York

August 16, 1994, Decided

94-CV-0400E(H)

Reporter

860 F. Supp. 977 *; 1994 U.S. Dist. LEXIS 11959 **; 25 ELR 20228

THE STATE OF NEW YORK and LANGDON MARSH, as Acting Commissioner of the New York State Department of Environmental Conservation and Trustee of the Natural Resources, Plaintiffs, v. PANEX INDUSTRIES, INC., PANEX INDUSTRIES, INC. LIQUIDATING TRUST, DANIEL ROSENBLOOM and PAUL LAZARE, as Trustees of Panex Industries, Inc. Liquidating Trust, ALPINE GROUP, INC., ROCHESTER BUTTON COMPANY, INC., TURBODYNE ELECTRIC POWER CORPORATION, MCGRAW-EDISON COMPANY, INC., DRESSER-RAND COMPANY, ABB AIR PREHEATER, INC. and VILLAGE OF WELLSVILLE, Defendants.

Core Terms

preliminary injunction, plaintiffs', defendants', freeze, injunction, circumstances, Winds, money judgment, settlement, decree, enjoin, cases

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN1](#) [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

The extraordinary remedy of a preliminary injunction will not issue unless the plaintiffs carry their burden of showing (a) irreparable harm, and (b) either (1) likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN2](#) [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

Preservation of the status quo pendente lite is the purpose of a preliminary injunction.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Damages > Monetary Damages

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3 **Grounds for Injunctions, Irreparable Harm**

A showing of irreparable harm is the sine qua non of a plaintiffs' burden in pursuing a preliminary injunction, and such harm must be neither remote nor speculative, but actual and imminent. Further, the harm must be one requiring a remedy of more than mere money damages -- i.e., the remedy at law must be inadequate.

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN4 **Preliminary Considerations, Equity**

The general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5 **Civil Actions, Injunctions**

A preliminary injunction is appropriate when it is necessary to preserve a fund or property which is the subject of the provisions of any final decree in a cause or to enjoin an action which would ultimately be subject to injunction by a final decree. Injunctions are warranted in those situations because a preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN6 **Injunctions, Preliminary & Temporary Injunctions**

A preliminary injunction concerning a matter lying wholly outside the issues in a suit -- i.e., property which in no circumstances could be dealt with in any final injunction that may be entered, is inappropriate.

Counsel: **[**1]** For Plaintiff: Roberta G. Gordon, Esq., Asst. Attorney General, Environmental Protection Bureau, 120 Broadway - 26th Floor, New York, NY 10271.

For Defendants: Richard G. Leland, Esq., Joseph Zuckerman, Esq., Rosenman & Colin, 575 Madison Ave., New York, NY 10022-2585, (Panex defendants). Daniel Riesel, Esq., Sive, Paget & Riesel, P.C., 460 Park Ave., New York, NY 10022, (Edison-McGraw). Richard A. Palumbo, Esq., Boylan, Brown, Code, Fowler & Wilson, 900 Midtown Tower, Rochester, NY 14604, (Village of Wellsville). Thomas Moore Griffin, Esq., 40 West 5th Street, New York, NY 10019, (Alpine Group). Morgan G. Graham, Esq., Kevin M. Hogan, Esq., Philips, Lytle, Hitchcock, Blaine & Huber, 3400 Marine Midland Center, Buffalo, NY 14203, (ABB Air Preheater). Laurie Styka Bloom, Esq., Nixon, Hargrave, Devans & Doyle, 1600 Main Place Tower, Buffalo, NY 14202, (Dresser-Rand and Turbodyne Electric). John Osnato, Esq., Kavanagh Peters Powell & Osnato, 415 Madison Avenue, New York, NY 10017, (Rochester Button).

Judges: Elvin

Opinion by: JOHN T. ELFVIN

Opinion

[*978] MEMORANDUM and ORDER

The plaintiffs brought this action pursuant to New York's common law and the Comprehensive Environmental Response, Compensation & Liability Act [**2] ("CERCLA"), [42 U.S.C. § 9601 et seq.](#), seeking from the defendants costs for the cleanup of the Wellsville-Andover landfill ("the Site") in which defendant Panex Industries Inc. ("Panex") -- a Delaware corporation -- allegedly disposed of chemicals that subsequently leached into the soil, groundwater, wells and springs near the Site. Before this Court is the plaintiffs' motion to enjoin preliminarily the Trustees of defendant Panex Industries, Inc. Liquidating Trust ("the Trust") from expending its assets until the Trustees shall have provided the plaintiffs with discovery re the current assets and expenditures of the Trust and set aside assets of the Trust for the plaintiffs' claims pursuant to a plan for the equitable distribution of such assets as allegedly is required by Delaware law. The motion will be denied. The facts as set forth in the defendants' papers and uncontested by the plaintiffs follow.

Panex, formerly known as Duplan, was a clothing manufacturer. One of its divisions -- Rochester Button Company, Inc. -- manufactured buttons in Wellsville, N.Y. and, along with others of the defendants, allegedly illegally disposed of in the [**3] Site chemical wastes which New York's Department of Environmental Conservation ("the DEC") estimates will cost \$ 14.6 million to eradicate.

In 1976 Duplan petitioned for reorganization under Chapter XI of the Bankruptcy Act and subsequently the bankruptcy judge appointed a trustee. Duplan emerged from bankruptcy in 1981 as the renamed, reorganized and recapitalized entity, Panex Industries, Inc.

After the sale of various of its assets, Panex's stockholders adopted a Plan of Liquidation September 21, 1984 and Panex filed a Certificate of Dissolution with Delaware's Secretary of State April 15, 1985. Thereafter it sold its manufacturing facilities, distributed specified assets to its shareholders and, on September 12, 1985, formed the Trust to wind up its affairs in compliance with Delaware law. Such was accomplished before the plaintiffs had asserted any of their instant claims.

The Trust was established

"for the sole purpose of holding the Assets transferred to it by Panex on behalf of the Beneficiaries [Panex's shareholders], enforcing the rights of the Beneficiaries thereto, collecting the income thereon, satisfying any and all liabilities of Panex which are not paid or otherwise [**4] discharged, distributing the Trust Property to the Beneficiaries, and taking such other action as is necessary to conserve and protect the Trust Property and to provide for the orderly liquidation of any and all of the Assets." Panex Industries Stockholders' Liquidating Trust Agreement ("the Agreement"), at Section 3.1 (see Affidavit of Roberta G. Gordon, Esq. in support of Plaintiffs' Motion for a Preliminary Injunction, at Exh. B, and Affidavit of Joseph Zuckerman, Esq. in Opposition to said Motion, at Exh. E.)

The Trust was to terminate after three years but was to continue for up to nine additional years "for the limited purpose of discharging any known liabilities of the Trust or of Panex or liabilities of the Trust or of Panex which the Trustees have reasonable grounds to believe may be asserted * * *." The Agreement, at Section 8.1. The Trust currently has approximately \$ 1.275 million in assets, together with the possibility of indemnification from liability insurers.

In 1988 the plaintiffs informed Panex that they were asserting a CERCLA claim against it and requested that it take remedial action to clean up the Site. Periodically thereafter the plaintiffs requested [**5] that Panex provide information to them but they did not file the instant suit until May 25, 1994 after they had learned of the existence of the [*979] Trust and that Panex and the Trustees were also defendants in other CERCLA suits -- namely, in two CERCLA actions brought in 1992 in the United States Virgin Islands because of Panex's alleged polluting of the "Tutu Aquifer" there. In one such action -- *Four Winds Plaza Partnership v. Texaco, Inc. et al.* ("Four Winds"), [1994 V.I. LEXIS 8](#), Civil Action No. 1989-224 -- Panex and the Trustees reached, in January 1994, a tentative settlement

wherein they agreed to pay \$ 890,000 of the \$ 35 million originally sought by that plaintiff. After further negotiations the parties presented a settlement agreement dated April 27, 1994 to United States District Judge Stanley S. Brotman ¹ who signed an Order and Decree stating that such was binding and effective and that payment was required. The other action -- [Harthman et al. v. Texaco et al., 1994 V.I. LEXIS 8](#), Civil Action No. 1989-220 -- is ongoing. Various of the defendants in both actions have asserted cross-claims for contribution. Additionally, the United States Environmental Protection Agency has begun an investigation [\[**6\]](#) of the Tutu Aquifer and has notified the Trustees that they are "potentially responsible parties."

Between the time the settlement was signed and Judge Brotman's effectuation of such, the plaintiffs filed the instant action and thereafter (on June 28th) the Trustees filed a petition with Delaware's Court of Chancery seeking an order approving the payment of the *Four Winds* settlement or, in the alternative, for instruction re the payment of the settlement as that Court determines is proper under Delaware law.

The plaintiffs first argue that section 281(b) of Title 8 of Delaware's Corporation Code ² [\[**8\]](#) and the Agreement itself require the Trustees to distribute ratably the Trust assets to contingent claimants such as the plaintiffs and thus that no payment should be made in the *Four Winds* (or any other) action until the [\[**7\]](#) Trustees devise a plan for such. However, section 281(b) was enacted two years after Panex had dissolved and the sparse relevant Delaware precedent is unclear as to whether it applies retroactively. Given that neither side disputes that Delaware law controls the Trust, this Court agrees with the defendants that Delaware is the proper forum in which to resolve this question and any other questions concerning the Trustees' duties under the Trust. Thus, because the defendants have petitioned the Delaware Court to resolve such questions and the plaintiffs will have a full opportunity to be heard there, and because the defendants have represented to this Court (during oral argument on July 8th) that, in the interim,³ no or "minimal"⁴ funds of the Trust would be expended to settle the *Four Winds* (or the other) action, the plaintiffs' arguments re the dictates of Delaware law are premature and need not be addressed.

HN1[↑] The extraordinary remedy of a preliminary injunction will not issue unless the plaintiffs carry their burden of showing

"(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the [\[*980\]](#) merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." [Jackson Dairy, Inc. v. H.P. Hood & Sons, 596 F.2d 70, 72 \(2d Cir. 1979\)](#).

HN2[↑] Preservation of the *status quo pendente lite* is the purpose of a preliminary injunction, [Guinness & Sons v. Sterling Pub. Co., 732 F.2d 1095 \(2d Cir. 1984\)](#).

¹ Judge Brotman is a United States District Court Judge for the District of New Jersey and was temporarily assigned to the United States District Court for the District of the Virgin Islands.

² "A dissolved corporation or successor entity * * * shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, or unmatured claims known to the corporation or such successor entity and all claims which are known to the dissolved corporation or such successor entity but for which the identity of the claimant is unknown. Such claims shall be paid in full and any such provision for payment made shall be made in full if there are sufficient funds. If there are insufficient funds, such claims and obligations shall be paid or provided for according to their priority and, among claims of equal priority, ratably to the extent of funds legally available therefor. Any remaining funds shall be distributed to the stockholders of the dissolved corporation."

³ According to counsel for the defendants, the Delaware hearing is set for October 4th.

⁴ Defense counsel Zuckerman stated at the July 8th oral argument that the defendants might expend some trust assets (not exceeding \$ 100,000 or so) if such were needed as a "deal closer" should the defendants' insurers agreed to pay most but not all of the \$ 890,000 *Four Winds* settlement. Trust funds also will be expended for ongoing attorneys' fees, but plaintiffs' counsel Gordon stated at the oral argument that the plaintiffs do not seek to enjoin the payment of such.

[HN3](#) A showing of irreparable harm is the *sine qua non* of the plaintiffs' burden, [*Citibank, N.A. v. Citytrust, 756 F.2d 273, 275 \(2d Cir. 1985\)*](#), and such harm must be "neither remote nor speculative, but actual and imminent." [*Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 \(2d Cir. 1989\)*](#). Further, the harm "must be one requiring a remedy of more than mere money damages" -- i.e., the remedy at law must be inadequate. *Ibid*; [*In re Feit & Drexler, Inc., 760 F.2d 406, 409 \(2d Cir. 1985\)*](#). Thus, [HN4](#) "the general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment." [*Mitsubishi Int'l v. Cardinal Textile Sales, 14 F.3d 1507, 1521 \(11th Cir. 1994\)*](#), petition for cert. filed (June 30, 1994), (quoting from [*In re Fredeman Litigation, 843 F.2d 821, 824 \(5th Cir. 1988\)*](#)); [**10](#) accord, [*Home-Stake Production v. Talon Petroleum, C.A., 907 F.2d 1012, 1021 \(10th Cir. 1990\)*](#). As was explained in [*De Beers Mines v. United States, 325 U.S. 212, 222-223, 89 L. Ed. 1566, 65 S. Ct. 1130 \(1945\)*](#) (the case upon which the just-cited cases relied), a contrary rule would create the situation where

"every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestering his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence."

Because the relief the plaintiffs [**11](#) seek -- enjoining the defendants to "set aside" assets of the Trust for the plaintiffs' claims pursuant to a plan for ratable distribution of such -- is closely analogous to (if not identical to) freezing assets to secure a potential money judgment, the issue before this Court is whether there exists an applicable exception to the abovementioned general rule that would permit such relief.

Analysis of this question begins with *De Beers*, which involved an antitrust prosecution wherein the government sought pretrial a preliminary injunction to freeze the defendants' assets to ensure that they would be able to satisfy any contempt sanction the district court might impose should the defendants disobey any order granting the relief (i.e., enjoining the defendants from future *antitrust law* violations) sought by the government from the district court. A preliminary injunction was reversed for the reasons noted above. Instructive (and ultimately dispositive of the instant motion) were the cited situations in which [HN5](#) preliminary injunctions would be appropriate -- viz., when it was necessary to preserve "a fund or property which would have been the subject of the provisions of any [**12](#) final decree in the cause, or [to enjoin] action which would ultimately have been subject to injunction by final decree." [*Id. at 220*](#). Injunctions are warranted in those situations because "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." *Ibid*. Contrarily, the district court's [HN6](#) injunction in *De Beers* concerned "a matter lying wholly outside the issues in the suit" -- i.e., "property which in no circumstances [could] be dealt with in any final injunction that may be entered," *ibid*. -- and thus was not appropriate.

With these principles in mind, the untenability of the plaintiffs' position becomes clear. The intermediate relief [**981](#) sought -- freezing the defendants' assets -- is not "of the same character as that which may be granted finally" because the ultimate relief sought is not equitable -- i.e., they do not seek to enjoin future illegal conduct or to freeze permanently the assets -- but legal -- i.e., a money judgment. Although there are other exceptions where a court may preliminarily freeze assets to ensure [**13](#) satisfaction of a money judgment, none is applicable here. (See discussion below.) Further, the plaintiffs are not seeking to preserve a specific fund or *res* whose ownership is contested and which would be "the subject of the provisions of any final decree in the cause." Rather, the defendants' assets are unrelated to their alleged CERCLA liability in the sense that the plaintiffs in no way premise their claims on the existence of the assets or the manner in which they came to be. That is, the assets were neither a cause nor an effect of the alleged illegality, and thus *De Beers* bars intermediate relief. See [*In re Fredeman Litigation, 843 F.2d at 827-828*](#).

The plaintiffs cite several cases for the proposition that "a preliminary injunction is proper to prevent a defendant from making a judgment uncollectible," Plaintiffs' Memorandum of Law in Support of a Preliminary Injunction and Order at 13, but this proposition needs to be qualified with the phrase "in exceptional circumstances." An

examination of these cases reveals that the exceptional circumstances upon which the respective courts relied to freeze defendants' assets preliminarily are inapposite [**14] to the instant circumstances. For example, in *In re Feit & Drexler, Inc., supra*, wherein the defendant had engaged in numerous and substantial efforts to hide and secrete its assets from the court and the plaintiff, the district court's preliminary injunction was upheld, the appellate court noting that, "even where the ultimate relief sought is money damages," a preliminary injunction would issue "where it has been shown that the defendant 'intended to frustrate any judgment on the merits' by 'transferring its assets out of the jurisdiction.'" *Id. at 416*, quoting from *Productos Carnic, S.A. v. Cent. Am. Beef, Etc.*, 621 F.2d 683, 686 (5th Cir. 1980). However, no such stealthy and disingenuous antics have been alleged herein. *Republic of Philippines v. Marcos*, 806 F.2d 344, 356 (2d Cir. 1986), is inapposite because the assets which were the subject of that preliminary injunction, unlike those at bar, were also the subject of the suit itself and thus the intermediate relief sought was "of the same character as that which [might] be granted finally," a situation [**15] "always appropriate for a preliminary injunction." *De Beers*, 325 U.S. at 220. Others of the plaintiffs' cases are inapposite because they involved situations where fraud or illegality was afoot or likely with respect to the assets at issue.⁵ See, e.g., *S.E.C. v. Unifund Sal.*, 910 F.2d 1028 (2d Cir. 1990); *Securities & Exchange Commission v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972).

[**16] The plaintiffs place greatest reliance on *Deckert v. Independence Corp.*, 311 U.S. 282, 85 L. Ed. 189, 61 S. Ct. 229 (1940). *Deckert* was a suit brought pursuant to the Securities Act of 1933 by purchasers of securities against a vendor of such for its alleged fraudulent misrepresentations concerning its sales of the securities. The issuance of a preliminary injunction restraining the transference or disposal of assets in a trust fund that consisted in part of payments made by the purchasers was upheld. In essence, the plaintiffs argue that the *Deckert* defendant's insolvency, that it was "threatened with many lawsuits, * * * that preferences to creditors [were] probable, and that its assets [were] in danger of dissipation and depletion," *id. at 285*, were the material facts upon which the preliminary injunction was upheld and thus, given the analogous circumstances, that *Deckert* controls [*982] the instant motion. This Court disagrees. First, the ultimate relief sought by the *Deckert* plaintiffs was equitable, *id. at 289*, [**17] and thus the preliminary relief sought was "of the same character as that which [might] be granted finally." Second and most telling, the trust fund, unlike the instant one, contained the very funds that were the subject of the lawsuit. That this (and not the defendant's insolvency, or the danger of depletion of assets, etc.) was the basis for the upholding of the preliminary injunction was made clear in *De Beers*, wherein *Deckert* was specifically cited as an example of an exceptional case where a freezing of assets was appropriate because it involved "a fund or property which would have been the subject of the provisions of any final decree in the cause." *De Beers*, 325 U.S. at 220. Third, *Deckert* concluded only that the trial judge did not abuse his discretion in granting the preliminary injunction, thus suggesting that a judge could also have reasonably ruled otherwise. See *Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 390 (7th Cir. 1984) (in reviewing a district judge's granting of a preliminary injunction, "the question for [an appellate court] is whether the [**18] judge exceeded the bounds of permissible choice in the circumstances, not what [the appellate court] would have done if [it] had been in his shoes.")

In summary, the plaintiffs have failed to establish an applicable exception to the general rule that a preliminary injunction may not issue to freeze a defendant's assets to protect a potential money judgment. The defendants' assets are unrelated to the underlying suit and the preliminary relief sought differs from what is ultimately sought (making the *De Beers* exceptions inapplicable) and there are no allegations either of fraud or of attempts to transfer

⁵ The plaintiffs argue that an expenditure of assets by the defendants in the *Four Winds* settlement would constitute an illegality because Delaware law requires that the assets of a dissolved corporation be ratably distributed but, as mentioned, whether Delaware law so requires in this instance is not clear and the defendants have assured this Court they will not act until this question shall have been decided in Delaware. However, if it is there ruled that ratable distribution is required and if the defendants thereafter manifest an intention to act contrary to that ruling, this Court would be willing, at the least, to entertain a renewed preliminary injunction motion.

assets out of the jurisdiction (making inapplicable *In re Feit, supra* and the securities fraud cases cited by the plaintiff).⁶

[**19] Assuming *arguendo* that the instant circumstances warranted an exception to this general rule, the plaintiffs' motion would still fail because they have not made the requisite showing that the purported irreparable harm (*i.e.*, the defendants' alleged inability to satisfy a money judgment) "is neither remote nor speculative, but actual and imminent." *Tucker, supra, 888 F.2d at 975*. For example, although the plaintiffs' claim that cleanup of the Site will cost \$ 14.6 million they have made no representations re the percentage for which the instant defendants are responsible.⁷ Given that there are five other named defendants which, for all this Court knows, may be responsible for most of the alleged pollution, that it is possible that the instant defendants' insurers will indemnify them for the *Four Winds* settlement, and that the defendants have \$ 1.275 million in assets plus possible partial indemnification from their insurers for liability in the instant action, it is speculation rather than an actuality that the defendants' assets will fall short of their liabilities. The defendants also have assured this Court that no or minimal assets [**20] (beyond attorneys' fees) will be expended before the Delaware Chancery Court rules [*983] on October 4th, and that they will comply with any order of that Court, including one mandating the very relief the plaintiffs seek -- *viz.*, a plan for ratable distribution of the trust assets -- thus attenuating further any assertions that the alleged harm is "actual and imminent."

As to the plaintiffs' motion that an injunction issue to expedite discovery, the proper route to accomplish such would be to make discovery requests and then, if the defendants are recalcitrant or dilatory, to move this Court to compel discovery.⁸

[**21] Accordingly, it is hereby **ORDERED** that the plaintiffs' motions are denied.

DATED: Buffalo, N.Y.

August 16, 1994

John T. Elfvin

U.S.D.J.

End of Document

⁶ Although the plaintiffs do not mention it, there is a split among the United States Courts of Appeal as to the extent of the exceptions allowable under *De Beers*. Compare, e.g., *ITT Community Development Corp. v. Barton, 569 F.2d 1351 (5th Cir. 1978)*, and *Rosen v. Cascade Intern., Inc., 21 F.3d 1520 (11th Cir. 1994)*, both of which narrowly read the exceptions allowable under *De Beers*, with *Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186 (3rd Cir. 1990)*, and *Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986)*, both of which expand the exceptions. *Teradyne* is particularly relevant to the plaintiffs' argument (although they did not cite it) because it characterized *Deckert, supra*, as holding that "a preliminary injunction, designed to freeze the status quo and protect the damages remedy is an appropriate form of relief when it is shown that the defendant is likely to be insolvent at the time of judgment." *Teradyne, 797 F.2d at 52*. However, as mentioned this is a misreading of *Deckert* in light of *De Beers*'s characterization of *Deckert* (*i.e.*, that insolvency *vel non* was not material to its decision), and we agree with the criticism of these cases by the United States Court of Appeals for the Eleventh Circuit that allowing such expansive exceptions "tortures the express language of *De Beers* and runs counter to established equitable principles." *Rosen, 21 F.3d at 1529*. Further, the United States Court of Appeals for the Second Circuit has never allowed such exceptions.

⁷ The plaintiffs do allege joint and several liability, but they have made no suggestion that the other defendants would be unable to satisfy their respective liabilities.

⁸ At oral argument, counsel agreed that there could be a cross-utilization of discovered evidence -- *viz.*, that what may be discovered herein may be used in the Delaware's Chancery Court and vice versa.

Vinci v. Waste Management

United States District Court for the Northern District of California

August 19, 1994, Decided ; August 23, 1994, Filed; August 25, 1994, Entered

No. C 94-1946 FMS

Reporter

1994 U.S. Dist. LEXIS 12071 *; 1994-2 Trade Cas. (CCH) P70,774

LEONARD G. VINCI, Plaintiff (s) v. WASTE MANAGEMENT, INC., an Illinois corporation, and WASTE MANAGEMENT OF ALAMEDA COUNTY, a California corporation, Defendant (s).

Core Terms

antitrust, antitrust violation, conspiracy, competitors, shareholder, alleges, recycling, Clayton Act, intentional infliction of emotional distress, anti trust law, Sherman Act, motion to dismiss, terminated, consumer, damages

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[Motions to Dismiss, Failure to State Claim]

A motion to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) tests only the sufficiency of the complaint. Dismissal of an action pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#) is appropriate only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. In reviewing the motion, the court must assume all factual allegations to be true and must construe them in the light most favorable to the nonmoving party. The court may dismiss the complaint, or any claims within it, for failure to state a claim if it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved. In considering a motion to dismiss, the district court must take all allegations of material fact as true and construe them in the light most favorable to the non-moving party.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN2 Clayton Act, Claims

Antitrust standing derives from § 4 of the Clayton Act which provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court for the United States and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fees. [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Clayton Act > Claims

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN3 Clayton Act, Claims

A plaintiff must prove more than injury causally linked to an illegal presence in the market. In order to recover threefold damages under the Clayton Act, [15 U.S.C.S. § 15](#), a plaintiff must prove the existence of 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. An injury will not qualify as an antitrust injury unless it is attributable to an anti-competitive aspect of the defendant's practices. The determination of antitrust standing is a question of law.

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

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

HN4 Private Actions, Standing

A shareholder of a corporation injured by antitrust violations has no standing to sue in his or her name. This rule is applicable even if the injured shareholder is the sole stockholder of the corporation.

Antitrust & Trade Law > Clayton Act > Claims

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

HN5 Clayton Act, Claims

There are various policy factors that the court considers in determining whether a class of plaintiffs should be allowed to bring suit under the Clayton Act, [15 U.S.C.S. § 15](#): (1) whether the alleged injury is of the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; (5) the complexity in apportioning damages. These factors favor antitrust standing for consumers of products or services and competitors in the market in which trade is restrained.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN6 **Regulated Practices, Private Actions**

The requirement that an alleged injury be related to anticompetitive behavior requires as a corollary, that the injured party be a participant in the same market as the alleged malefactors. In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market. This factor is of tremendous significance and weighs heavily against those who are neither competitors nor consumers.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN7 **Regulated Practices, Private Actions**

A plaintiff can satisfy the participant in the marketplace prong of the antitrust standing test if his injury is inextricably intertwined with the antitrust violation.

Antitrust & Trade Law > Sherman Act > General Overview

HN8 **Antitrust & Trade Law, Sherman Act**

The Sherman Act (Act) distinguishes between concerted and independent actions. [Section 1](#) of the Act reaches unreasonable restraints of trade effected by a conspiracy between separate entities. ([15 U.S.C.S. § 1](#)) Employees of a firm do not provide the plurality of actors imperative for a [§ 1](#) conspiracy, nor does the coordinated activity of a parent and its wholly owned subsidiary.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN9 **Sherman Act, Claims**

The Sherman Act, [15 U.S.C.S. § 1](#) requires a claimant to allege and prove three elements: (1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; (3) which actually injures competition.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

[HN10](#) [blue download icon] Sherman Act, Claims

In an antitrust action, the conduct of a single firm is governed by [15 U.S.C.S. § 2](#) and is unlawful only when the firm's conduct poses a danger of monopolization. An attempted monopolization claim has three essential elements: (1) specific intent to eliminate competition; (2) anticompetitive conduct directed at accomplishing this unlawful objective; and (3) a dangerous probability of success.

Civil Procedure > Parties > Real Party in Interest > General Overview

Civil Procedure > Parties > Joinder of Parties > General Overview

[HN11](#) [blue download icon] Parties, Real Party in Interest

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute. [Cal. Civ. Proc. Code § 367](#).

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

[HN12](#) [blue download icon] Statute of Limitations, Time Limitations

Personal injury torts are foreclosed, by statute, after one year. [Cal. Civ. Proc. Code § 340](#). This includes actions based on intentional infliction of emotional distress.

Judges: [*1] SMITH

Opinion by: FERN M. SMITH

Opinion

ORDER OF DISMISSAL

ISSUES

Defendant's motion to dismiss requires the Court to determine whether plaintiff can maintain a treble damages action against the defendant under the Clayton Act, [15 U.S.C. § 15 \(1994\)](#), for defendant's alleged violation of the Sherman Act, [15 U.S.C. §§ 1 and 2 \(1994\)](#). The Court must also decide whether plaintiff has standing to seek damages for breach of contract and whether his claim for intentional infliction of emotional distress is time-barred.

BACKGROUND

In 1989, plaintiff Leonard Vinci ("Vinci"), entered into a settlement agreement with defendant Waste Management, Inc. ("Waste Management"), involving his company, Vinci Enterprises, Inc. ("VEI"), and an acquired subsidiary of Waste Management, Oakland Scavenger (now known as Waste Management of Alameda County). Under the agreement, defendant allegedly promised to provide Vinci and/or VEI¹ substantial quantities of recyclable materials. Subsequently, Waste Management employed Vinci who was then terminated in December, 1992.

[*2] Vinci alleges that Waste Management breached the settlement agreement in order to drive Vinci out of business and to control competition in the recycling business. The alleged breach included: (a) encouraging other recycling haulers to solicit accounts from Waste Management to take business away from VEI; (b) refusing to deliver specific accounts to VEI; (c) diverting accounts from VEI; (d) intercepting and diverting materials destined for VEI; (e) procrastinating in procuring a lucrative account promised for VEI. Vinci further alleges that Waste Management employed Vinci in order to prevent him from providing relevant testimony in an alleged lawsuit involving Vinci's successor and Waste Management. Vinci alleges that, during the course of his employment, he was repeatedly asked to cooperate with Waste Management's predatory schemes and conspiracies designed to destroy competition in the recycling business. He further alleges that he was ultimately terminated for refusing to assist in these illegal activities.

Vinci filed an action in California Superior Court on January 12, 1994, alleging antitrust claims under the California Cartwright Act, Cal. B. & P. Code § 16,700, et [*3] seq, which were virtually identical to the claims made by Vinci here. The claims were dismissed by a demurrer.

Vinci filed this action against Waste Management and Waste Management of Alameda County for violation of the Sherman Act and for breach of contract and intentional infliction of emotional distress. Waste Management filed this motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#) based on Vinci's lack of antitrust standing and, alternatively, for Vinci's failure to allege a Sherman Act violation by Waste Management. Waste Management also seeks to dismiss Vinci's claim of intentional infliction of emotional distress as time-barred and Vinci's contract claim based on lack of standing and failure to allege the necessary elements for breach of contract.

DISCUSSION

I. The Legal Standard

HN1 [↑] A motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#) tests only the sufficiency of the complaint. [North Star Int'l v. Arizona Corp. Comm'n](#), 720 F.2d 578, 581 (9th Cir. 1983). Dismissal of an action pursuant to [Rule 12\(b\)\(6\)](#) is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him [*4] to relief." [Levine v. Diamanthuset, Inc.](#), 950 F.2d 1478, 1482 (9th Cir. 1991) (quoting [Conley v. Gibson](#), 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957)). In reviewing the motion, the Court must assume all factual allegations to be true and must construe them in the light most favorable to the nonmoving party. [North Star](#), 720 F.2d at 580. The Court may dismiss the complaint, or any claims within it, for failure to state a claim if it "appear[s] to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved." [Wool v. Tandem Computers, Inc.](#), 818 F.2d 1433, 1439 (9th Cir. 1987). In considering a motion to dismiss, the district court must take all allegations of material fact as true and construe them in the light most favorable to the non-moving party. *Id.*

II. Vinci Lacks Antitrust Standing to Sue Waste Management Under the Clayton Act

¹ Plaintiff did not include a copy of the settlement agreement with the complaint.

HN2 [↑] Antitrust standing derives from section 4 of the Clayton Act which provides that "any person who shall be injured in his business [*5] or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court for the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fees." [15 U.S.C. § 15 \(1994\)](#).

Although a literal reading of the statute arguably encompasses almost every conceivable harm remotely related to antitrust violations, "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might be traced to an antitrust violation." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters* ("AGC"), [459 U.S. 519, 103 S. Ct. 897, 906, 74 L. Ed. 2d 723 \(1983\)](#) (quoting *Hawaii v. Standard Oil Co.*, [405 U.S. 251, 92 S. Ct. 885, 891 n.14, 31 L. Ed. 2d 184 \(1972\)](#)). **HN3** [↑] A plaintiff "must prove more than injury causally linked to an illegal presence in the market." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, [429 U.S. 477, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 \(1977\)](#). [*6] In order to recover threefold damages under [15 U.S.C. § 15](#), "a plaintiff must prove the existence of '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." *Atlantic Richfield Co. v. USA Petroleum Co.*, [495 U.S. 328, 110 S. Ct. 1884, 1889, 109 L. Ed. 2d 333 \(1990\)](#) (quoting *Brunswick*, 97 S. Ct. at 697 (emphasis in original)). An injury will not qualify as an "antitrust injury" unless it is attributable to an anti-competitive aspect of the defendant's practices. *Id.* The determination of antitrust standing "is a question of law." *Bubar v. Ampco Foods, Inc.*, [752 F.2d 445, 449 \(9th Cir. 1985\)](#).

Vinci alleges that he was directly harmed as a result of Waste Management's efforts to eliminate his presence in the relevant marketplace. This was allegedly accomplished by first forcing him from the business of recycling and then firing him due to his refusal to cooperate in a predatory price plan. [*7] The Court must evaluate Vinci's antitrust standing under both scenarios.

At oral argument, counsel for plaintiff suggested that evaluating Vinci's antitrust claims separately (i.e. as shareholder of a competing corporation and as employee of defendant) disregards the teaching of *Continental Ore Co. v. Union Carbide*, [370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 \(1962\)](#). In *Continental Ore*, a series of acts performed in furtherance of a conspiracy by "defendants and others acting in concert with them" resulted in harm to a plaintiff corporation's business. *Id. at 1407-08*. The Supreme Court ruled that, in determining defendant's liability, the individual acts by the co-conspirators against the corporation should not be treated as "separate and unrelated lawsuits." *Id. at 1410*.

This Court's analysis does not run counter to the above principle. Vinci's claims allege separate harms to two distinct legal entities - harm to the corporation of which he is a shareholder and harm to Vinci personally, as a Waste Management employee. A separate analysis of these claims is essential in order to properly distill the legal issues [*8] involved in each, be fair to the litigants, and not threaten to obfuscate the presence of any alleged conspiracy.

A. Vinci Lacks Antitrust Standing as a Shareholder of an Injured Corporation

HN4 [↑] "A shareholder of a corporation injured by antitrust violations has no standing to sue in his or her name . . ." *Solinger v. A&M Records, Inc.*, [718 F.2d 298, 299 \(9th Cir. 1983\)](#). This rule is applicable even if the injured shareholder is the sole stockholder of the corporation. *Sherman v. British Leyland Motors, Ltd.*, [601 F.2d 429, 439 \(9th Cir. 1979\)](#).

Vinci's complaint alleges that Waste Management deprived VEI of recyclable material needed to continue operations through a variety of anti-competitive practices intended to drive Vinci out of business. As a competitor of Waste Management in the relevant marketplace, VEI would have standing to file suit under the Clayton Act for any alleged wrongdoing on the part of Waste Management. See AGC, 103 S. Ct. at 908. Vinci contends, however, that he should be given individual antitrust standing because Waste Management's practices [*9] were targeted directly at him and were intended to put Vinci himself out of business. This argument lacks merit.

In *Stein v. U.A. Corp.*, 691 F.2d 885 (9th Cir. 1982), the primary shareholder and officer of a corporation attempted to sue the defendant corporation for antitrust injuries. Like Vinci, Stein alleged that the defendant's actions were intended "to drive *him* out of the industry." *Id. at 897* (emphasis added). In denying standing to the individual shareholder, the court noted that regardless of whether the actions taken were focused on the corporation or the individual shareholder, the apparent wrongdoing was carried out against the corporation. *Id.*

As in *Stein*, Vinci alleges wrongful acts carried out against the injured corporation, VEI. Accordingly, the Court finds that Vinci lacks antitrust standing solely by virtue of his status as a VEI shareholder.

B. Vinci Lacks Antitrust Standing as an Employee that was Terminated by Waste Management

The Supreme Court has enunciated [HN5](#)¹ various policy factors that courts should consider in determining whether a class of plaintiffs should be allowed to bring suit [*10] under [15 U.S.C. § 15](#):

- (1) whether the alleged injury is of the type the antitrust laws were intended to forestall;
- (2) the directness of the injury;
- (3) the speculative measure of the harm;
- (4) the risk of duplicative recovery;
- (5) the complexity in apportioning damages.

Bubar, 752 F.2d at 448-49. These factors favor antitrust standing for consumers of products or services (see *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)) and competitors in the market in which trade is restrained (see *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)). AGC, 103 S. Ct. at 908-09.

In addition, the Ninth Circuit has allowed an employee that has been terminated by a corporation to sue his employer under the Clayton Act. *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739 (9th Cir. 1984). In *Ostrofe*, the plaintiff was forced to [*11] resign as marketing director for the defendant corporation because he refused to take part in a conspiracy to restrain trade in violation of [15 U.S.C. § 1](#). *Id. at 741-42*. The plaintiff violated the agreement between the defendant corporation and the co-conspirator corporations by soliciting accounts with businesses not involved in the conspiracy. The plaintiff was then forced to resign his position and boycotted from future employment in the industry. *Id.* The court held that conferring antitrust standing on this plaintiff was consistent with the purposes of the Clayton Act. *Id. at 747*.

As subsequent Ninth Circuit opinions have noted, the marketing director in *Ostrofe* was granted antitrust standing because (1) his injury was directly caused by an intentional boycott of his services; (2) his injury was of a type the antitrust laws were intended to prevent; and (3) he was the natural vindicator of the antitrust violation. *Lucas v. Bechtel Corp.*, 800 F.2d 839, 846 (9th Cir. 1986) (citing *Ostrofe*, 740 F.2d at 742-43).

Vinci [*12] maintains that *Ostrofe* is directly on point, compelling denial of Waste Management's motion to dismiss. *Ostrofe*, however, is readily distinguishable and its application to the facts of this case would unnecessarily expand a relatively narrow holding of the ninth circuit.²

² See, e.g. *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 96 (3d. Cir. 1986) (the view that discharged employees have antitrust standing generally rejected); *Rafferty v. Nynex Corp.*, 744 F. Supp. 324 (D.D.C. 1990) (most courts which have considered the issue in *Ostrofe* have rejected the holding); *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 805 (D. Utah 1988) ("Ostrofe's holding is . . . contrary to virtually all other decisions addressing the issue."); *Winther V. DEC Int'l, Inc.*, 625 F. Supp. 100, 103 (D. Colo. 1985) ("Nothing in Associated General Contractors supports [Ostrofe's] interpretation of the scope of *antitrust law*.").

[*13] 1. Vinci's Alleged Injury was not Caused by an Intentional Boycott of His Services

Vinci has not alleged in his complaint an intentional boycott of his services. This factor is of particular importance because the court in *Ostrofe* expressly based its holding on the presence of the boycott.³

[*14] 2. Vinci's Alleged Injury was not of a Type the Antitrust Laws Were Intended to Prevent

HN6[↑] "The requirement that the alleged injury be related to anticompetitive behavior requires as a corollary, that the injured party be a participant in the same market as the alleged malefactors." *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985). "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987). This factor is of "tremendous significance", *Bhan*, 772 F.2d at 1470 n.3, and weighs heavily against those who are neither competitors nor consumers. *Lucas*, 800 F.2d at 844.

Although the plaintiff in *Ostrofe* was neither a competitor nor a consumer, his position as marketing director was critical to the success of the price-fixing agreement, and his failure to participate in the conspiracy by his employer "stood as a clear impediment to its effectuation." *Exhibitors' Serv., Inc. v. American Multi-Cinema*, 788 F.2d 574, 580 (9th Cir. 1986) [*15] (citing *Ostrofe*, 740 F.2d at 745-46). "Ostrofe was an 'essential participant' in the scheme, which could not succeed without his active participation." *Id.* (quoting *Ostrofe*, 740 F.2d at 745-46). **HN7[↑]** A plaintiff can, therefore, satisfy the participant in the marketplace prong if his injury is "inextricably intertwined" with the antitrust violation. *Fallis v. Pendleton Woolen Mills, Inc.*, 866 F.2d 209, 211 (6th Cir. 1989).

Vinci is neither a consumer nor a competitor in the same market as Waste Management. This fact alone "weighs heavily" against Vinci but does not automatically preclude standing. *Id. at 211*. What does ultimately prove fatal to Vinci's claim of antitrust standing is his failure to allege facts showing that his injury is "inextricably intertwined" with Waste Management's alleged antitrust violation. Vinci has not alleged that he was an "essential participant" in Waste Management's alleged conspiracy or that the conspiracy could not succeed without his participation. He, therefore, has no standing to pursue the alleged antitrust violations.

This [*16] conclusion finds support in the state court's disposition of Vinci's claims against Waste Management under the Cartwright Act, Business & Professions Code § 16,700 et seq (analogous to the Sherman Act). *Vinci v. Waste Management, Inc.*, No. 957805 (Cal. Super. Ct. May 4, 1994) ("Vinci") (order sustaining defendant's demurrer in part and overruling it in part). The San Francisco Superior Court (Cahill, J.) sustained Waste Management's demurrer and specifically declined to extend antitrust standing to Vinci under *Ostrofe*, noting that "[Ostrofe] requires that a fired employee must show that the antitrust violation will be unremedied without the employee's lawsuit and that the Plaintiff is an essential participant in the alleged wrongful conduct and that the conduct could not succeed without his cooperation." *Id.*

3. Vinci is not the Natural Vindicator of Waste Management's Alleged Antitrust Violation

³ *Ostrofe* first reached the Ninth Circuit in 1982 where the court found standing. *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982) ("Ostrofe I"). The Supreme Court vacated this holding and remanded "for further consideration in light of [AGC]." **460 U.S. 1007 (1983)**. On remand, the ninth circuit noted that AGC did not dictate reversal even if the court had "expanded" the concept of "antitrust injury" too broadly. *Ostrofe*, 740 F.2d at 746. This conclusion was predicated on a footnote in the majority opinion of AGC which reserved the question "of 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." *Id.* (quoting AGC, 103 S. Ct. at 910 n.44).

"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 [*17] attorney general.'" *Atlantic Richfield*, 110 S. Ct. at 1895.

According to Vinci's complaint, Waste Management's alleged antitrust violation primarily involved an attempt to monopolize the garbage collection and recycling business through a series of acquisitions and the use of predatory means to destroy competitors. Vinci's injury is a byproduct of the alleged antitrust violation; the wrongful result Waste Management allegedly sought was the reduction of competition and competitors. See *Fallis*, 866 F.2d at 211. Waste Management's "competitors are much more immediate victims of the alleged conspiracy." *Lucas*, 800 F.2d at 844.

Ostrofe is distinguishable here as well. The court in *Ostrofe* noted that although others might have been more directly victimized by the alleged conspiracy, it was unlikely that anyone else would have "equal incentive to bring the antitrust violators to account" and would therefore leave a significant antitrust violation unremedied. *Ostrofe*, 740 F.2d at 747. In this case, however, Waste Management's competitors [*18] would be directly injured and would have ample incentive to seek relief under the Clayton Act, if their existence was threatened by Waste Management's practices. Any alleged antitrust violation would, therefore, not go undetected if Vinci is denied standing.⁴

III. Vinci Has Failed to Allege a Sherman Act Violation

HN8 [↑] The Sherman Act distinguishes between concerted and independent actions. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984). Section 1 of the Act reaches unreasonable restraints of trade effected by a conspiracy between separate entities. *Copperweld Corp. v. Independence Tribe Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 2740, 81 L. Ed. 2d 628. Employees of a firm "do not provide the plurality of actors imperative for a section 1 conspiracy," nor does "the coordinated activity of a parent and its [*19] wholly owned subsidiary." *Id. at 2741*. Vinci sued only Waste Management and its subsidiary, Waste Management of Alameda County, and failed to allege in his complaint a "contract, combination . . . or conspiracy between separate entities." *Id. at 2740* (emphasis in original). The only multi-party conduct alleged in Vinci's complaint is Waste Management's intentional encouragement of other recycling haulers to solicit accounts from Waste Management. Such encouragement is not necessarily a section 1 agreement; furthermore, Vinci fails to allege that anyone other than Waste Management ever had any wrongful intent. See, e.g. *Monsanto*, 104 S. Ct. at 1473.⁵

[*20] **HN10** [↑] The conduct of a single firm is governed by *15 U.S.C. § 2* and is unlawful only when the firm's conduct poses a danger of monopolization. *Copperweld*, 104 S. Ct. at 2739-740. An attempted monopolization claim has three essential elements: (1) specific intent to eliminate competition; (2) anticompetitive conduct directed at accomplishing this unlawful objective; and (3) "a dangerous probability of success." *Thurman Indus. v. Pay 'N Pak Stores*, 875 F.2d 1369, 1378 (9th Cir. 1989). Vinci has failed to allege in his complaint both specific intent and likelihood of success of an attempted monopoly. The absence of these elements in Vinci's complaint makes it susceptible to a motion for dismissal. See *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987).

For these reasons, the Court finds that Vinci has failed to allege a claim against Waste Management consistent with a violation of the Sherman Act.

⁴ See also *Vinci*, No. 957805 at 2.

⁵ **HN9** [↑] *15 U.S.C. § 1* requires a claimant to allege and prove three elements: "(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; (3) which actually injures competition." *Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir. 1989).

IV. Vinci Lacks Standing to File the Breach of Contract Claim Against Waste Management

HN11 [↑] "Every action must [*21] be prosecuted in the name of the real party in interest, except as otherwise provided by statute." [Cal. Code Civ. P. § 367](#). Vinci's breach of contract claim revolves around Waste Management's alleged breach of a settlement agreement between Waste Management and VEI. As a shareholder of VEI, Vinci does not have a cause of action for damages to the corporation. [Anderson v. Derrick, 220 Cal. 770, 773, 32 P.2d 1078 \(1934\)](#). It is VEI, not Vinci, that contracted with Waste Management; therefore, only VEI can seek judicial enforcement of the agreement.

V. Vinci's Intentional Infliction of Emotional Distress Claim is Time-Barred

HN12 [↑] Personal injury torts are foreclosed, by statute, after one year. [Cal. Code Civ. P. § 340](#). This includes actions based on intentional infliction of emotional distress. [Eisenberg v. Ins. Co. of North America, 815 F.2d 1285, 1292 \(9th Cir. 1987\)](#). Vinci was terminated by Waste Management on December 2, 1992, and his complaint was filed more than one year later, on June 1, 1994. Vinci's claim is time-barred.

Conclusion

For all the reasons herein set forth, the Court grants defendant's [*22] motion to dismiss this complaint. The claim for intentional infliction of emotional distress is dismissed with prejudice. For all remaining causes of action, the Court dismisses without prejudice and grants plaintiff fifteen days (15) from issuance of this Order to properly allege standing and a cognizable Sherman Act claim. Any amended complaint filed pursuant to this Order shall include a copy of the alleged settlement agreement.

SO ORDERED.

DATED: August 19, 1994

FERN M. SMITH

United States District Judge

End of Document

Leyba v. Renger

United States District Court for the District of New Mexico

August 23, 1994, FILED

No. CIV 90-0252 LH/LFG

Reporter

874 F. Supp. 1229 *; 1994 U.S. Dist. LEXIS 20157 **

LAWRENCE LEYBA, Plaintiff, -vs- HARTMUT RENGER, ANESTHESIA SPECIALISTS OF ALBUQUERQUE, a New Mexico partnership and ST. JOSEPH'S HEALTHCARE CORP., a New Mexico corporation, Defendants.

Subsequent History: Judgment entered by *Leyba v. Renger*, 874 F. Supp. 1229, 1994 U.S. Dist. LEXIS 21835 (D.N.M., 1994)

Prior History: *Leyba v. Renger*, 874 F. Supp. 1218, 1994 U.S. Dist. LEXIS 21826 (D.N.M., 1994)

Core Terms

anesthesiology, monopolization, osteopathic, tying arrangement, geographic, relevant market, Defendants', summary judgment, anesthesiologists, market share, percent, tying product, Memorandum, group boycott, entitled to summary judgment, metropolitan area, market power, staff privileges, horizontal, anesthesia, conspiracy, privileges, genuine issue of material fact, no evidence, allopathic, figures, summary judgment motion, matter of law, competitors, outpatient

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

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

HN1[] Summary Judgment, Motions for Summary Judgment

To prevail on their motions for summary judgment, the defendants must first demonstrate the absence of a genuine issue of material fact. Upon such a showing, the plaintiff may not rest upon mere allegations or denials of the defendants' pleadings, but must set forth specific facts showing that there is a genuine issue for trial. [Fed. R. Civ. P.](#)

56(e). If the plaintiff does not show that a genuine issue of material fact exists, then summary judgment shall be entered against him.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN2 [down arrow] **Price Fixing & Restraints of Trade, Tying Arrangements**

A so-called tying arrangement exists when a seller conditions the sale of one product or service, the tying product or service, on the buyer's purchase of another product or service, the tied product or service. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such forcing is present, competition on the merits in the market for the tied item is restrained and the antitrust laws are violated. No illegal tying arrangement can exist, however, unless the supplier of the tying product or service receives a direct economic benefit from the sale of the tied product or service.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN3 [down arrow] **Price Fixing & Restraints of Trade, Tying Arrangements**

Tying arrangements are said to run afoul of the antitrust laws when the seller has some special ability, usually called market power, to force a purchaser to do something that he would not do in a competitive market. Per se condemnation of a tying arrangement is therefore appropriate when the existence of forcing is probable. When the seller's share of the market is high, or when the seller offers a unique product that competitors are not able to offer, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate. When, however, the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market. Any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact.

Antitrust & Trade Law > Sherman Act > 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 > Sherman Act

HN4 [down arrow] **Antitrust & Trade Law, Sherman Act**

874 F. Supp. 1229, *1229LÁ1994 U.S. Dist. LEXIS 20157, **20157

Section 2 of the Sherman Act addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize.

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

[**HN5**](#) **Monopolies & Monopolization, Actual Monopolization**

To prove monopolization, a plaintiff must show that defendants have possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. In this context, plaintiff has the burden of proving the "relevant market." In defining the scope of the relevant market, both the product market and the geographic market must be considered.

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

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

[**HN6**](#) **Monopolies & Monopolization, Actual Monopolization**

A relevant product market is composed of products that have reasonable interchangeability for the purposes for which they are produced, price, use, and qualities considered. A product market is defined to include interchangeable products or services. The interchangeability between substitutes is measured by a consumer's disposition to substitute a product in response to a price change.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

[**HN7**](#) **Amendment of Pleadings, Leave of Court**

A motion to amend may properly be denied when there has been undue delay in moving for leave to amend or when amendment would be futile.

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 > 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

Antitrust & Trade Law > Sherman Act > Claims

[**HN8**](#) **Horizontal Refusals to Deal, Boycotts**

A concerted, horizontal refusal to deal, which is often referred to as a group boycott, is an agreement among competitors not to deal with a third party or parties. To prove that a conspiracy exists which violates Section 1 of the Sherman Act, a plaintiff must show either that the conspiracy results in an unreasonable restraint on competition, referred to as the rule of reason, or that the conduct falls into one of the categories of "per se" illegality.

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 > General Overview

HN9 [down arrow] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

For the plaintiff to establish that a group boycott is per se illegal, he must prove the existence of an agreement among conspirators whose market positions are horizontal to each other. The offending competitors need not be at the same market level as the plaintiff, but plaintiff must show concerted activity between two or more competitors which are positioned at the same market level with each other.

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

HN10 [down arrow] **Price Fixing & Restraints of Trade, Vertical Restraints**

A vertical restraint on trade is said to occur when persons or firms at different market levels in the chain of distribution of a specific product conspire to restrain trade.

Counsel: **[**1]** For Plaintiff: Joseph Goldberg, Raymond G. Sanchez, Freedman, Boyd, Daniels, Peifer, Hollander, Guttmann & Goldberg, Albuquerque, New Mexico.

For Defendant Renger: Peter H. Johnstone, Thomas C. Bird, Russell Moore, Keleher & McLeod, P. A., Albuquerque, New Mexico. E. W. Shepherd, Hatch, Allen & Shepherd, Albuquerque, New Mexico. For Defendant ASA: Ranne B. Miller, Miller, Schlenker, Torgerson & Schlenker, P. A., Albuquerque, New Mexico. For Defendant SJH: D. James Sorenson, Sorenson & Rhoades, Albuquerque, New Mexico.

Judges: C. LeROY HANSEN, UNITED STATES DISTRICT JUDGE

Opinion by: C. LeROY HANSEN

Opinion

[*1231] MEMORANDUM OPINION

THIS MATTER is before the Court on the following three motions filed by Defendants on February 18, 1992: 1) Joint Motion for Partial Summary Judgment Dismissing Plaintiff's Tying Arrangement Claim (Docket No. 171); 2) Joint Motion for Partial Summary Judgment Dismissing Plaintiff's Monopolization Claim (Docket No. 173); and, 3) Joint Motion for Partial Summary Judgment Dismissing Plaintiff's Group Boycott Claim (Docket No. 177).

Having reviewed the memoranda of the parties and their exhibits, and being fully apprised of the applicable law, the Court finds that **[**2]** Defendants are entitled to summary judgment on the tying arrangement claim, that

defendants are entitled to summary judgment on the monopolization claim, and that defendants are entitled to summary judgment on the group boycott claim.¹

This case arises out of St. Joseph's Healthcare Corp.'s (hereafter "St. Joseph") acquisition of Heights General Hospital ("Heights") in the Spring of 1988. St. Joseph is staffed predominantly by allopathic physicians while Heights had been staffed by osteopathic physicians. Plaintiff, Dr. Lawrence Leyba, is an osteopathic anesthesiologist who had practiced at Heights for approximately twelve years prior to the acquisition. Defendant Anesthesiology Specialists of Albuquerque (hereafter "ASA") had **[**3]** an exclusive contract with St. Joseph whereby it was agreed that ASA would be the sole provider of anesthesiology services at all St. Joseph hospitals. Defendant, Dr. Hartmut Renger, was the managing partner of ASA at the time.

Plaintiff commenced this lawsuit on March 13, 1990, claiming that the actions of Defendants violate state and federal antitrust laws.² **[**4]** The factual basis for Plaintiff's claims is that he was denied staff privileges at St. Joseph after the acquisition of Heights and that he was denied acceptance into ASA. Plaintiff claims that these denials were improperly motivated for anticompetitive purposes and resulted in him being excluded from practicing anesthesia in New Mexico. Plaintiff specifically claims that the exclusive agreement between ASA and St. Joseph created an illegal tying arrangement, that the defendants attempted to and did monopolize the provision of anesthesiology services in the Albuquerque metropolitan area, and that defendants engaged in a group boycott in an attempt to exclude Plaintiff from the market. **[*1232]** After a brief discussion of the facts, each of these claims is addressed below.³

Factual Background

In the Spring of 1988, St. Joseph, a predominantly allopathic health care provider, acquired the Heights hospital, which was then known as an osteopathic hospital. As a result of the acquisition, St. Joseph mandated that all physicians with staff privileges at Heights be required to reapply for privileges under the St. Joseph system. With regard to any Heights' anesthesiologists who wished to continue practicing at Heights, there were two requirements. First, because of the exclusive agreement between ASA and St. Joseph, anesthesiologists wishing to practice at any of the three St. Joseph facilities would need to be a member of the ASA group. Second, because ASA exclusively provided anesthesiology services for St. Joseph, an anesthesiologist who wished to practice at St. Joseph needed to have staff privileges at all three hospitals.

When Plaintiff first learned that St. Joseph intended to acquire Heights and that ASA's exclusive agreement would be extended to cover Heights, he became concerned that **[**5]** he would no longer be allowed to practice at that hospital. Plaintiff's concern stemmed from his belief that Dr. Renger, managing partner of ASA, held negative views of osteopathic physicians and would not allow Plaintiff to join ASA. Apparently, prior to even seeking membership in ASA, Plaintiff applied for staff privileges at all three St. Joseph hospitals. In March of 1988, the credentials committees of the three hospitals met to consider Plaintiff's application and voted to deny him privileges.

There is no indication from the record that St. Joseph's agreement with ASA played any part in the denials of privileges. Instead, the decisions were based upon Plaintiff's alleged inadequate training and upon adverse letters of recommendation. In June of 1988, Plaintiff was eventually granted privileges at Heights and at St. Joseph's West Mesa hospitals. It was not until November of 1988, however, that Plaintiff was finally granted privileges at St.

¹ Plaintiff brought his antitrust claims under both state and federal statutes. The New Mexico antitrust statute, [NMSA 1978, § 57-1-15](#), is construed in harmony with the federal law. Hence, the Court's conclusions as to the federal antitrust claims apply equally to the state claims.

² Plaintiff also brought claims of defamation and tortious interference with contractual relations. Those claims were addressed in an opinion dated May 18, 1994.

³ Additional facts are contained in the May 18, 1994 opinion.

Joseph's downtown facility. By that time, Plaintiff claims, his practice had been destroyed. Based upon the initial denials and the subsequent delays in granting of privileges, Plaintiff brings his claims.

Standard for Summary Judgment [\[**6\]](#) [HN1](#)

To prevail on their motions for summary judgment, the defendants must first demonstrate the absence of a genuine issue of material fact. Upon such a showing, the plaintiff may not rest upon mere allegations or denials of the defendants' pleadings, but must set forth specific facts showing that there is a genuine issue for trial. [Fed. R. Civ. P. 56\(e\)](#). If the plaintiff does not show that a genuine issue of material fact exists, then summary judgment shall be entered against him. *Id.*

I. TYING ARRANGEMENT CLAIM.

Counts II and III of Plaintiff's complaint allege that Defendants, Dr. Renger, ASA and St. Joseph, "have contracted, combined and conspired with others in an unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act" and "in violation of [N.M. Stat. Section 57-1-1](#) (1987)." Complaint PP 43, 48. These allegations encompass Plaintiff's federal and state tying arrangement claims.

In essence, Plaintiff claims that the exclusive contract between ASA and St. Joseph resulted in an illegal tying arrangement. Defendants contend that they are entitled to summary judgment on the tying arrangement claim because no illegal tying arrangement [\[**7\]](#) exists between St. Joseph and ASA and because the arrangement between St. Joseph and ASA is not per se illegal.

A. Existence of a Tying Arrangement.

[HN2](#) "A so-called tying arrangement exists when a seller conditions the sale of one product or service, the tying product or service, on the buyer's purchase of another product or service, the tied product or service." [Beard v. Parkview Hosp., 912 F.2d 138, 140 \(6th Cir. 1990\)](#) (*citing Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)).

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and [the antitrust laws are] violated.

[Jefferson Parish Hosp. Dist. No. 2 v. Hyde](#), 466 U.S. 2, 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984).

No illegal tying arrangement can exist, however, unless the supplier of the tying product [\[**8\]](#) or service receives a direct economic benefit from the sale of the tied product or service. See [Beard v. Parkview Hosp., 912 F.2d 138 \(6th Cir. 1990\)](#); [White v. Rockingham Radiologists, Ltd.](#), 820 F.2d 98 (4th Cir. 1987). Defendants contend that, pursuant to the exclusive agreement, St. Joseph receives no part of the revenues earned by ASA and thus receives no economic benefit.

In an attempt to controvert that statement of fact, Plaintiff states as follows:

The St. Joseph administration believes it benefits from the exclusive contract it has with its anesthesiologists. The St. Joseph-ASA contract requires that ASA charge reasonable and customary fees, which protects St. Joseph from losing patients because of outrageous fees being charged by the physicians on its medical staff. The contract provides St. Joseph some desirable 'leverage' over its anesthesiologists, and provides what the hospital administration perceives to be more reliable coverage than would be provided by anesthesiologists practicing independently.

Plaintiff's Counterstatement of Material Facts, P 1. Such indirect benefits are insufficient to create a genuine issue of material fact as to whether [\[**9\]](#) St. Joseph received direct economic benefits from ASA as a result of the exclusive agreement. [Scara v. Bradley Memorial Hosp.](#), 1993 U.S. Dist. LEXIS 19908, 1993-2 Trade Cases 70,353,

1993 WL 404150 (W.D. Tenn. 1993). Hence, as a matter of law, Defendants are entitled to summary judgment on Plaintiff's federal and state tying arrangement claims.

B. Per Se Illegality.

Even if the direct benefits rule did not apply here, Defendants contend that the contractual arrangement between St. Joseph and ASA is not per se illegal under the Sherman Act because St. Joseph does not enjoy a sufficient market share with regard to the tying product or service--that is, medical procedures provided at the hospital which require the services of an anesthesiologist.

HN3 Tying arrangements are said to run afoul of the antitrust laws "when the seller has some special ability - usually called 'market power' - to force a purchaser to do something that he would not do in a competitive market." Jefferson Parish, 466 U.S. 2, 13-14, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (citations omitted). "Per se condemnation" of a tying arrangement is therefore appropriate when the existence of forcing is probable. Id. at 15.

As stated by **[**10]** the Supreme Court,

When the seller's share of the market is high, or when the seller offers a unique product that competitors are not able to offer, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate. . . . When, however, the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.

Any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact.

Id. at 17-18.

In sum, if patients are forced to purchase ASA's services because of St. Joseph's market **[*1234]** power, then the arrangement would be said to have anticompetitive consequences. Conversely, if no forcing is present, and patients are free to enter a competing hospital and utilize another anesthesiology group, then **[**11]** there has been no antitrust violation. Id. at 25. The tied product in this instance is anesthesiology services provided by ASA. The focus, therefore, is upon St. Joseph's market power in the relevant product market for the tying product; *i.e.*, those hospital services provided by St. Joseph to its patients which require the anesthesiology services of ASA.⁴

It is uncontested that the Albuquerque, New Mexico, metropolitan area is the relevant geographic market in which St. Joseph competes. Plaintiff's Memorandum on Monopolization Claim, P 14. In that geographic market there are seven hospital systems available to the consumer. They are Lovelace Medical Center, Southwest Community Health Services ("Presbyterian"), St. Joseph, UNM Hospital, the New Mexico Federal Medical Center ("VA Hospital"), Indian Health Service Hospital, **[**12]** and the United States Air Force Hospital at Kirtland. Of those seven, the VA Hospital, Indian Health Service Hospital, and the United States Air Force Hospital, serve limited segments of the consumer population and Plaintiff concedes that they are not a part of the relevant market in this case. Plaintiff's Memorandum on Monopolization Claim, PP 13, 14.

In their motion for summary judgment on the tying arrangement claim, Defendants contend that as a matter of law St. Joseph lacks market power in the relevant market for the tying product, and that the arrangement is therefore not per se illegal. In support of this contention, Defendants have put forth the following:

Market share for anesthesiology services can best be measured by hospital discharges in the areas of hospital services most related to surgical procedures (which are medical-surgical, obstetrics, and pediatrics). This

⁴ In this case, just as in *Jefferson Parish*, the provision of anesthesia services at the hospital is a medical service which is separate from the other services provided by St. Joseph.

information has been compiled by the New Mexico Hospital Association. This data has been analyzed by Dr. McCarthy, the Defendants' expert in antitrust economics. Dr. McCarthy concluded that, relying on the relevant discharge and outpatient surgery data, at no time during the relevant period of time [**13] has St. Joseph and ASA controlled more than 23% of the market for anesthesiology services in the Albuquerque area.

Defendants' Memorandum on Tying Arrangement Claim, P 5.

In essence, Defendants' statement of fact is that those hospital services most related to surgical procedures, and thus, necessitating anesthesiology services, are medical-surgical, obstetrics, pediatrics, and outpatient surgery. Furthermore, they contend that during the relevant period of time, St. Joseph controlled no more than 23 percent of the market for those hospital services requiring anesthesiology. Defendants claim, therefore, that since St. Joseph has never had more than 23 percent of the market for the tying product, its arrangement with ASA cannot, as a matter of law, be per se illegal.

To controvert these facts, Dr. Leyba baldly states that,

Based on the facts and for the reasons outlined in his Memorandum Brief in Opposition to Defendants' Joint Motion for Partial Summary Judgment Dismissing Plaintiff's Monopolization Claim . . . it is clear that defendants control a substantially greater share of the relevant market in this case. Even assuming defendants' market definition, which Dr. [**14] Leyba disputes, defendants' share of the market is greater than 23%.

Plaintiff's Corrected Memorandum on Tying Arrangement at 1. In seeking to defeat summary judgment on the issue of per se illegality, Plaintiff relies entirely upon his brief on monopolization.

Looking to Plaintiff's monopolization brief, Plaintiff apparently contends that the information relied upon by Defendants in determining market share for the tying product is flawed. Specifically, Plaintiff points to the numbers of cases in which anesthesiology services were actually administered at St. [*1235] Joseph in 1988 as indicating that the numbers relied upon by Defendants are too low, resulting in a lower market share. Plaintiff's Memorandum on Monopolization Claim, P 22.

For example, Plaintiff notes that the 1988 figures, relied upon by Defendants as most indicative of surgical procedures requiring anesthesiology at St. Joseph, would signify that 15,286 patients required anesthesiology. However, Plaintiff points out that St. Joseph has admitted that the actual number of cases in which anesthesiology was administered at St. Joseph in 1988 was 22,970.

What Plaintiff has not accounted for is the fact that Defendants' [**15] expert has specifically stated that figures for outpatient surgery were not available for 1988. Hence, those figures were not included in the discharge summary prepared by NMHA. When looking at the figures for 1990, the first year data was available for outpatient surgery, it is readily apparent that NMHA's utilization reports are consistent with St. Joseph's discharge figures. When the figures for both inpatient and outpatient discharges are included in the determination of 1990 market share for the tying product, St. Joseph still has less than 25 percent of the market.⁵ McCarthy Affidavit, P 2(f).

[**16] Plaintiff has not disputed Defendants' contention that the hospital services which are most related to surgical procedures requiring anesthesia are medical-surgical, obstetrics, pediatrics, and outpatient surgery. Plaintiff has not disputed that the discharge figures for such services are indicative of the anesthesiology services provided at St. Joseph. Plaintiff merely challenges Defendants' figures for 1988 because they apparently do not account for outpatient surgery.

Plaintiff has not adequately set forth specific facts to dispute Defendants' description of the relevant product market for the tying product and has failed to show that St. Joseph's market share for the tying product gives rise to a

⁵ For 1990, total discharges for St. Joseph medical-surgical, obstetrics, and pediatrics were 14,700. Among the four non-federal hospitals, this represents a 21.4 percent market share. Total outpatient surgeries for 1990 were 9,263, representing a 26.9 percent market share for the non-federal hospitals. Adding the raw numbers together results in a total of 23,963 patients in need of hospital services which require anesthesiology. St. Joseph's figures for actual cases where anesthesiology was administered is 22,480.

probability of forcing. Plaintiff simply concludes that Defendants' market share calculation is based upon data of questionable relevance and is also "probably too low."

The facts put forth by Defendants indicate that St. Joseph's market share of the relevant product market for the tying product is somewhere between 23 percent and 25 percent. Plaintiff has come forward with no evidence which would show that St. Joseph's market share exceeds 25 percent. Even 25 percent of the relevant [**17] market does not represent the kind of market dominance which would permit St. Joseph to exploit its control over the tying product and force patients to purchase the services of ASA. *Jefferson Parish, 466 U.S. at 26-27*. Therefore, the exclusive contract between St. Joseph and ASA is not per se illegal under the *Jefferson Parish* analysis.

In light of the above conclusions, Defendants are entitled to summary judgment on Plaintiff's federal and state tying arrangement claims.

II. MONOPOLIZATION CLAIMS.

Defendants next move for summary judgment on Plaintiff's monopolization claims which are contained in Counts I and III of the complaint. The complaint alleges that Defendants have monopolized and have attempted to monopolize with the intent to exclude or inhibit competition by Plaintiff. Complaint, P 38. HN4 [↑] Section 2 of the Sherman Act "addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize." *Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884, 889 (1993)*.

HN5 [↑] To prove monopolization, Plaintiff must show that Defendants had "possession of monopoly power in the relevant [**18] market" and "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior [*1236] product, business acumen, or historic accident." *City of Chanute, Kan. v. Williams Natural Gas Co., 955 F.2d 641, 653-54 (10th Cir. 1992)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1976)*). In this context, Plaintiff has the burden of proving the "relevant market."

In defining the scope of the relevant market, both the product market and the geographic market must be considered. *City of Chanute, 955 F.2d at 654; Rural Tel. Serv. v. Feist Publications, 957 F.2d 765, 768 (10th Cir. 1992)*.

In the complaint, under the paragraph heading entitled "Relevant Market," Plaintiff has alleged that: "The provision of anesthesiology services within the Albuquerque, New Mexico metropolitan area is the relevant market for antitrust purposes." Complaint, P 13.

As is evident from the above allegation, Plaintiff originally characterized the product market to be "the provision of anesthesiology services," and the geographic market to be "the Albuquerque, New Mexico metropolitan area." Later [**19] in the complaint, however, Plaintiff alleges that Defendants have caused anticompetitive effects "in the market for anesthesia services at St. Joseph Hospital." Complaint, P 63. This allegation similarly characterizes the product market as "anesthesia services" but appears to recharacterize and limit the geographic market to "St. Joseph Hospital."

Focusing specifically on the two different geographic markets alleged, Defendants moved for summary judgment. Defendants first contend that the more limited characterization of geographic market as a single hospital fails as a matter of law. Defendants also contend that even using Plaintiff's broader characterization of the geographic market as the Albuquerque metropolitan area, Defendants are still entitled to summary judgment because there is no genuine issue of material fact as to whether Defendants possessed monopoly power in that particular geographic market.

A. St. Joseph Hospital as Geographic Market.

A review of the several cases which have addressed this issue indicates that it would be inappropriate to limit the geographic market to a single hospital. [Collins v. Associated Pathologists, 676 F. Supp. 1388, 1404-05 I**201 \(C.D. Ill. 1987\); Dos Santos v. Columbus-Cuneo-Cabrini Medical Ctr., 684 F.2d 1346, 1353 \(7th Cir. 1982\); Drs. Steuer and Latham v. National Medical Enters., 672 F. Supp. 1489, 1514 \(D.S.C. 1987\).](#)

In his response to the motion for summary judgment, Plaintiff denies that he seeks to limit the geographic market to one hospital. Instead, Plaintiff claims to reaffirm his position that the relevant geographic market is the Albuquerque metropolitan area, excluding the VA Hospital, Kirtland Air Force Base Hospital, and the Indian Health Service hospitals. Plaintiff's Memorandum on Monopolization Claim, PP 13, 14. It being undisputed that the relevant geographic market is the Albuquerque metropolitan area, the Court need not address the issue of a single hospital geographic market.

B. Metropolitan Albuquerque as Geographic Market.

Defendants' second contention is that there is no genuine issue of material fact as to whether Defendants possess sufficient market power in the Albuquerque metropolitan area to support a monopolization claim. Defendants base this argument on Plaintiff's own characterization of product market, specifically alleged in the complaint, as the "provision [**21] of anesthesia services." Seeking to avoid summary judgment, Plaintiff responds by stating that "the relevant product market in this case is 'osteopathic' anesthesia services--that is, anesthesiology services provided by an osteopathically trained physician in a hospital which traditionally draws patients from osteopathic physicians." Plaintiff's Memorandum on Monopolization, P 11.

Plaintiff's recharacterization of product market appears to be a departure from the allegation contained in paragraph 13 of the complaint and is an apparent attempt to exclude allopathic anesthesiology services from the relevant product market. This contention [*1237] is raised by Plaintiff without moving to amend the complaint to narrow the relevant product market from anesthesiology services to osteopathic anesthesiology services.

In light of the above, the following two analyses must be made: first, can Plaintiff resist the motion for summary judgment using the relevant product market asserted in his complaint; and, second, if permitted to amend the complaint, can Plaintiff defeat summary judgment using the relevant product market asserted in his memorandum in opposition to the motion?

As to the first inquiry, [**22] the relevant market is the provision of anesthesia services in the Albuquerque metropolitan area. Defendants have asserted that in this relevant market, they have never possessed more than 23 percent of that market. As discussed in the section on tying arrangements, the Court concludes that Defendants have put forth sufficient evidence showing that they have not controlled more than 23 percent to 25 percent of the relevant market. Under the case law, this percentage is not, as a matter of law, sufficient to establish monopolization. [Pennsylvania Dental Ass'n. v. Medical Serv. Ass'n. of Pa., 745 F.2d 248, 261 \(3d Cir. 1984\)](#) (32 to 35 percent share of market is insufficient as a matter of law to establish monopolization); [United Air Lines, Inc. v. Austin Travel Corp., 867 F.2d 737, 742 \(2d Cir. 1989\)](#) (31 percent market share is insufficient); [United States v. Aluminum Co. of America, 148 F.2d 416, 424 \(2d Cir. 1945\)](#) (33 percent of relevant market is "certainly" not a monopoly). Defendants have met their initial [Rule 56](#) burden of showing that no genuine issue of material fact exists on this issue. It is now for Plaintiff to come forward with evidence to show that Defendants [**23] do possess a sufficient portion of the relevant market (in this instance the market defined in paragraph 13 of the complaint) to establish a question of fact as to whether Defendants had monopolized the market.

Again, Plaintiff has not disputed the contention that "market share for anesthesiology services can best be measured by hospital discharges in the areas of hospital services most related to surgical procedures." Using this measurement, the Court has concluded that Defendants' evidence shows no more than a 23 percent to 25 percent market share for anesthesiology services in the Albuquerque metropolitan area.

In an attempt to controvert such evidence, and to show that Defendants possess a greater market share, Plaintiff refers to evidence concerning numbers of "operational hospital beds" and to statistics concerning hospital-based osteopathic anesthesiology services. This evidence is not material to the issue at hand. With respect to the issue of

Defendants' market share as calculated by hospital discharges, Plaintiff merely repeats that "the jury could find that St. Joseph's market was well in excess of 23 percent." Plaintiff's Memorandum on Monopolization at 22.

Market share [**24] may indicate Defendants' market power and it may also indicate a lack of market power. Plaintiff has made no showing, has offered no evidence, as to what share of the relevant market Defendants possess. Of equal importance, is the fact that Plaintiff has made no showing of Defendants' power or ability to control prices or to exclude competition in the relevant market. [United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391-92, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#). Plaintiff has simply failed to show that there exists a genuine issue of material fact as to Defendants' monopoly power or market power in the market for anesthesiology services.

Based upon the definition of relevant market as put forth by Plaintiff in paragraph 13 of the complaint, Defendants are entitled to summary judgment on the claim of monopolization.

The Court's next inquiry addresses whether Plaintiff may withstand a motion for summary judgment based upon the narrow definition of the relevant product market as presented in Plaintiff's brief in opposition to the motion for summary judgment--that is, hospital-based osteopathic anesthesiology. In determining whether the relevant product market may be narrowed as contended by Plaintiff, [**25] it is necessary to examine the competing services and service providers. [HNG](#) A relevant [*1238] product 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. 377, 404, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#). A product market is defined to include interchangeable products or services. [Telex Corp. v. IBM Corp., 510 F.2d 894, 917-919 \(10th Cir. 1975\)](#). The interchangeability between substitutes is measured by a consumer's disposition to substitute a product in response to a price change.

An argument similar to that made by Plaintiff regarding product market was made in [Morgan, Strand, Wheeler & Biggs v. Radiology Ltd., 924 F.2d 1484 \(9th Cir. 1991\)](#), in which the court affirmed a summary judgment against the plaintiffs for failure to establish a relevant product market. In that case, the plaintiffs were asserting that the services of osteopathic radiologists were distinct from the market for radiology services generally. The same services are provided by osteopathic or allopathic practitioners. Despite their different training and standards for admission to [**26] practice, they satisfy the same consumer needs and therefore, operate in the same product market and are competitors. [Wilk v. American Medical Assn., 671 F. Supp. 1465 \(N.D. Ill. 1987\), aff'd, 895 F.2d 352 \(7th Cir. 1990\)](#), cert. denied, 496 U.S. 927 (1990); see also [Weiss v. York Hosp., 745 F.2d 786 \(3d Cir. 1984\)](#), cert. denied, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985); [Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1443 \(9th Cir. 1988\); Bhan v. NME Hosps., Inc., 929 F.2d 1404 \(9th Cir. 1991\)](#).

The Court concludes that osteopathic anesthesia services and allopathic anesthesia services are reasonably interchangeable and, hence, part of the same relevant market. Therefore, Plaintiff has failed to sustain his position that the relevant product market may be limited to hospital-based osteopathic anesthesiology.

Finally, and in any event, the court concludes that Plaintiff should not be permitted to amend his complaint to narrow his definition of the relevant product market. [HNT](#) A motion to amend may properly be denied when there has been undue delay in moving for leave to amend or when amendment would be futile. [Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 \(1962\); In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1162 \(5th Cir. 1979\)](#), cert. denied, 449 U.S. 905 (1980). Defendant's Motion for Partial Summary Judgment Dismissing Plaintiff's Monopolization Claim was filed on February 18, 1992. The suit was filed on March 13, 1990. The plaintiff has had ample time to seek to amend his complaint, but has failed to do so during the more than two years since he filed his brief in opposition. Moreover, in light of the Court's analysis above, it would be futile to seek to do so because such a narrow characterization of the product market is not supported by the evidence or the law. Defendants are entitled to summary judgment on Plaintiff's monopolization claims.⁶

⁶ Both the monopolization and attempt to monopolize claims are disposed of. As is made clear by the Supreme Court's decision in [Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884 \(1993\)](#), both claims require an adequate showing of

[28] III. GROUP BOYCOTT CLAIMS.**

Finally, Defendants have moved for summary judgment on Plaintiff's group boycott claims. These claims are contained in Counts II and III of the Complaint. It is Plaintiff's contention that Defendants engaged in a collective or group boycott in that they combined to exclude him from the practice of anesthesiology. In their motion for summary judgment, Defendants raise three arguments: (i) that Plaintiff's claim fails because there is no evidence of concerted activity between two or more of his competitors whose market positions are horizontal to each other; (ii) that there is no evidence of per se liability; and, (iii) that there is no [*1239] evidence which would support liability under the rule of reason. For the reasons stated below, Defendants are entitled to summary judgment on the group boycott claims.

Plaintiff's group boycott claim alleges that, "Defendants Dr. Renger, ASA and St. Joseph have contracted, combined and conspired with others in an unreasonable restraint of trade or commerce." Complaint, P 43. The essence of Plaintiff's theory is that Defendants conspired to exclude him from performing his services in the market because of their [**29] animosity toward osteopathic physicians and because they wanted to limit the competition for ASA.

Specifically, Plaintiff contends that St. Joseph's denial of staff privileges took place in the context of allopathic bias against osteopathic practitioners. Plaintiff's Memorandum on Group Boycott at 22. Plaintiff states that the allopathic physicians involved in the decision making were suspicious of and held prejudices and animosity toward the osteopaths at Heights. *Id. at 23*. Plaintiff states that in particular, Renger was biased against osteopaths and Leyba and that Renger was "intimately involved" in the denial of privileges. *Id. at 22*.

A. Horizontal Restraint.

HN8 "A concerted, horizontal refusal to deal - which is often referred to as a group boycott - is an agreement among competitors not to deal with a third party or parties." Von Kalinowski, *Antitrust Laws and Trade Regulation*, Vol. 2, § 6D.01. "To prove that a conspiracy exists which violates Section 1 of the Sherman Act, [Leyba] must show either that the conspiracy results in an unreasonable restraint on competition (referred to as the rule of reason), or that the conduct falls into one of the categories [**30] of 'per se' illegality." *Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1392 (10th Cir. 1992)* (citing *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*).

HN9 For the plaintiff to establish that a group boycott is per se illegal, he must prove the existence of an agreement among conspirators whose market positions are horizontal to each other. *Coffey, 955 F.2d at 1392* (citing *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1224, n.1 (10th Cir. 1986)*; *Key Fin. Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635, 641 (10th Cir. 1987)*). The offending competitors need not be at the same market level as the plaintiff, but Plaintiff must show concerted activity between two or more competitors which are positioned at the same market level with each other. *Key, 828 F.2d at 641*. Defendants contend that there is no genuine issue of material fact as to whether they as a group are horizontal competitors, and as to whether there is evidence of concerted activity.

To controvert these claims, Plaintiff argues that "there is substantial evidence in this record of a horizontal combination [**31] or conspiracy." Plaintiff's Memorandum on Group Boycott at 15. Again, Plaintiff must show both a horizontal relationship and a conspiracy. In support of Plaintiff's contentions, Plaintiff states that "the initial denial of staff privileges resulted from the actions of the physicians on the medical staff of the St. Joseph hospitals." *Id. at 21*. Plaintiff cites to the fact that "Dr. Renger, on behalf of ASA, was intimately involved in [Leyba's] denial of privileges through the medical staff credentialing process." *Id. at 22*. Moreover, he cites to "numerous contacts"

relevant market. As stated in *Spectrum Sports*, "demonstrating the dangerous probability of monopolization in an attempt case . . . requires inquiry into the relevant product and geographic market and the defendant's economic power in that market." *Id. at 892*. Because no such showing has been made by Plaintiff, summary judgment is appropriate on both claims.

between Renger and other allopathic physicians which would warrant a jury finding that Renger had combined and conspired with others to prevent Plaintiff from obtaining anesthesiology privileges at the St. Joseph hospitals. *Id.*⁷

[**32] [*1240] Of critical importance, however, is the fact that Plaintiff has put forth absolutely no direct evidence of an agreement between Renger, ASA, St. Joseph or staff physicians to exclude Plaintiff from the market, or to deny him staff privileges. Moreover, there is insubstantial circumstantial evidence put forth on the issue of conspiracy. The evidence Plaintiff does put forth is ambiguous and is consistent with legitimate activities.

As stated in *Key*,

In an antitrust action based on section one of the Sherman Act . . . ambiguous evidence, standing alone, is not enough to survive a defendant's motion for summary judgment. '**Antitrust law**' limits the range of permissible inferences from ambiguous evidence in a § 1 case' . . . To survive a motion for summary judgment . . . [a plaintiff] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently.'

If the evidence is as consistent with permissible independent business interests as with an illegal conspiracy, then the plaintiff fails to create a fact issue on the existence of a section one conspiracy unless the ambiguity is negated by evidence tending to exclude the [**33] possibility that the defendants were pursuing independent interests.

Key, 828 F.2d 635, 638-9 (citations omitted).

The Court concludes that there is just no evidence of a Section 1 conspiracy. As pointed out in the opinion on defamation, at minimum, there is evidence of independent action by one anesthesiologist, but no evidence of agreement or concerted action by the defendants herein.

Moreover, Plaintiff has failed to put forth sufficient evidence to show that the relationship between Dr. Renger, ASA, St. Joseph and the alleged "other physicians" is horizontal. Dr. Renger and ASA are not in competition with each other, and neither Renger nor ASA are in competition with St. Joseph for the provision of anesthesiology services. In light of the above, I conclude that Defendants are entitled to summary judgment on the claim of horizontal restraint of trade.

B. Vertical Restraint.

The evidence shows that St. Joseph is not at the same market level as either Dr. Renger or ASA, and is not in competition with either of these parties for the provision of anesthesiology services. Hence, their relationship is not horizontal. If anything, the evidence shows that the relationship [**34] between the defendants is vertical. See Coffey, 955 F.2d 1388 (10th Cir. 1992). HN10 A vertical restraint on trade is said to occur "when persons or firms at different market levels in the chain of distribution of a specific product conspire to restrain trade." Key, 828 F.2d at 640, n.3; Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988). It is not clear from the case law whether the vertical restraint concept would be directly applicable in this situation, in light of the fact that this is not a classic "product distribution" case. But even applying this concept, I find no antitrust violation under either the per se rule or the rule of reason analysis.

Applying first the "per se" rule, the Court notes that it is only appropriate when it relates to conduct that is manifestly anticompetitive. Key, 828 F.2d at 640 (quoting Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-50, 53

⁷ The specific facts cited to by Leyba in an effort to defeat summary judgment are as follows: "Members of the St. Joseph administration, including Kirk and Dr. Floyd, had numerous meetings and other communications with Dr. Renger and other ASA anesthesiologists about dealing with the D.O. anesthesiologists practicing at Heights General. There were numerous communications among Mr. Kirk, Dr. Duncan, and Dr. Renger concerning Dr. Leyba's participation in the ASA group. The St. Joseph administration had numerous meetings and communications with members of its medical staff concerning the Heights General acquisition and how to deal with the heavily osteopathic medical staff already credentialed there." Plaintiffs Counterstatement of Material Facts, P 12; Memorandum on Group Boycott.

L. Ed. 2d 568, 97 S. Ct. 2549 (1977)). The Tenth Circuit only applies a per se rule to vertical restraints of trade if they include price fixing motives. Id. at 640 (citing Westman, 796 F.2d 1216, 1222-24 (10th Cir. 1986)). **[**35]** Here, as in *Key*, there are no allegations, nor is there any hint of evidence, that price fixing has occurred. Hence, there is no per se illegality.

With regard to the second inquiry, "in order to satisfy the rule of reason, the plaintiff must prove that [his denial of staff privileges] had an adverse impact on competition." Key, at 642. That is, the plaintiff must show that the complained of activity unreasonably restrained competition among anesthesiologists within the relevant geographic market.

[*1241] The relevant geographic market is that set out in paragraph 13 of the complaint: the Albuquerque metropolitan area, and the relevant product market is the provision of anesthesiology services.⁸ Defendants contend that there is no issue of material fact with regard to whether there has been an adverse effect upon competition among anesthesiologists in the relevant geographic market. Specifically, Defendants assert an absence of evidence regarding the effect on the price, the quality, or the supply or demand for anesthesiology services.

[36]** In response, Plaintiff offers no evidence concerning effect upon the price or quality of anesthesiology services. Instead, Plaintiff offers evidence which he claims shows that the supply of anesthesiology services has been adversely affected. In support of this contention, Plaintiff cites to the fact that three individual osteopathic anesthesiologists were impacted by St. Joseph's takeover of the Heights hospital. First, Plaintiff cites to the fact that Dr. Langford reached an agreement with Defendants whereby he agreed that he would not practice in the Albuquerque area after ninety days. Dr. Langford eventually moved away from New Mexico. Second, Plaintiff cites to Dr. Margel, who was concerned that the takeover would make it impossible for him to continue his practice in Albuquerque. But Plaintiff himself acknowledges that Dr. Margel was granted staff privileges at St. Joseph and became associated with ASA. Hence, there was an osteopathic anesthesiologist offering his services at St. Joseph. Finally, Plaintiff cites to his own situation of being denied staff privileges in support of his contention that the supply of anesthesiologists in the Albuquerque market was adversely impacted.

[37]** Plaintiff's evidence, that two osteopathic anesthesiologists left the Albuquerque market, without more, is insufficient to defeat summary judgment. Plaintiff failed to set forth sufficient evidence regarding the impact upon consumers, if any, by the loss of the osteopathic anesthesiologists. A close look at the evidence offered by Plaintiff makes clear that the true nature of the "impact" upon the competition is the direct harm suffered by Dr. Leyba. As in *Coffey*, Plaintiff has simply shown that he suffered a detrimental effect, not that the competition in general was adversely impacted and not that there was a negative impact upon consumers.

Finally, Defendants assert a lack of evidence of market power on the part of Defendants and, hence, argue that there is no anticompetitive effect under the rule of reason. As noted in the Court's opinion on monopolization and on tying arrangements, I agree that Defendants did not, as a matter of law, possess sufficient market power to warrant liability under the rule of reason. Again, the relevant geographic and product market is the provision of anesthesiology services in the Albuquerque metropolitan area. (The product market is not **[**38]** limited to osteopathic anesthesiology services.) Looking at that market, there is no suggestion that there has been a negative impact upon price, quality, or the supply or demand for anesthesiology services generally. But even if you only looked at osteopathic anesthesiology services as the product market, there is insufficient evidence to defeat summary judgment that competition was negatively impacted. For all of the above reasons, Defendants are entitled to summary judgment on the group boycott claim.

An order in accordance with this memorandum opinion shall be entered.

C. LeROY HANSEN

UNITED STATES DISTRICT JUDGE

⁸ As noted earlier, Plaintiff does not assert a relevant geographic market of a single hospital.

End of Document



Hammes v. AAMCO Transmissions

United States Court of Appeals for the Seventh Circuit

May 11, 1994, Argued ; August 24, 1994, Decided

No. 93-3884

Reporter

33 F.3d 774 *; 1994 U.S. App. LEXIS 22955 **; 1994-2 Trade Cas. (CCH) P70,695

JOSEPH W. HAMMES, Trustee of the Estate in Bankruptcy of BONNIE J. COOKSEY and CLAUDE W. COOKSEY; and COOKSEY AAMCO, INCORPORATED, Plaintiffs-Appellants, v. AAMCO TRANSMISSIONS, INCORPORATED; INDIANAPOLIS, INDIANA, AAMCO DEALERS' ADVERTISING POOL; MARC BRITTLER; et al., Defendants-Appellees.

Subsequent History: [\[**1\]](#) Petition for Rehearing with Suggestion for Rehearing En Banc Denied October 20, 1994, Reported at: [1994 U.S. App. LEXIS 29368](#).

Prior History: Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 92 C 678. S. Hugh Dillin, Judge.

Core Terms

interstate commerce, dealers, cases, antitrust, commerce, conspiracy, Sherman Act, arbitration, advertising, cartel, pool, customers, allegations, defendants', anti trust law, transmissions, numbers, franchise agreement, violations, phantom, courts

LexisNexis® Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[HN1](#) **Pleadings, Rule Application & Interpretation**

The Federal Rules of Civil Procedure do not require the plaintiff to plead the particulars of his claim, [Fed. R. Civ. P. 8\(a\) \(1\)](#) with the exceptions, of which the best known is fraud, listed in rule 9(b). The rules regarding the statement of the claim in the complaint and the jurisdictional allegations use the same formula, "short and plain statement," for both. [Fed. R. Civ. P. 8\(a\) \(1\), \(2\)](#). Jurisdiction is a threshold issue, normally not litigated at all; and the court has an independent duty to satisfy itself that it has jurisdiction. The court relies on the complaint to say enough about jurisdiction to create some reasonable likelihood that the court is not about to hear a case that it is not supposed to have the power to hear.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

[HN2](#) [down] **Private Actions, Remedies**

When the jurisdictional prerequisite to a claim is the effect on interstate commerce, the pleading of a conclusion should be good enough, since the number of cases that fail at that threshold has become minuscule.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

International Trade Law > Authority to Regulate > General Overview

Transportation Law > Interstate Commerce > Federal Powers

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Limitations

[HN3](#) [down] **Interstate Commerce, Prohibition of Commerce**

The Sherman Act, [15 U.S.C.S. § 1](#), forbids conspiracies in restraint of trade or commerce among the states or with foreign nations. The U.S. Congress's power over interstate commerce is understood not to be limited to activities that substantially involve or affect such commerce. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.

Antitrust & Trade Law > Sherman Act > General Overview

[HN4](#) [down] **Antitrust & Trade Law, Sherman Act**

Where dealers are merely the last intermediary in an interstate transaction, conspiracies among local sellers affect interstate commerce within the meaning of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

[HN5](#) [down] **Antitrust & Trade Law, Sherman Act**

Even activity that is purely intrastate in character may be regulated by the U.S. Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the states or with foreign nations.

33 F.3d 774, *774LÁ994 U.S. App. LEXIS 22955, **1

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

HN6 [down] **Private Actions, Remedies**

It is quite enough, probably more than enough, if an antitrust complaint alleges that the plaintiff was engaged in interstate commerce and was injured by the alleged antitrust violation.

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

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > Sherman Act > General Overview

HN7 [down] **Sherman Act, Scope**

The most elementary prohibition of the Sherman Act, [15 U.S.C.S. § 1](#), is that of conspiracies between competitors to fix prices, and the prohibition extends to conspiracies between dealers in the same brand. A type of conspiracy that has effects almost identical to those of price-fixing and is treated the same by the law is a conspiracy between competitors to rotate or otherwise allocate customers among the conspirators, so that each customer faces a monopoly seller.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > Sherman Act > General Overview

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

HN8 [down] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

An out-and-out scheme of customer allocation is a per se violation of the Sherman Act, [15 U.S.C.S. § 1](#).

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

HN9 [down] **Private Actions, Standing**

Losses inflicted by a cartel in retaliation for an attempt by one member to compete with the others are certainly compensable under the antitrust laws.

Counsel: For JOSEPH W. HAMMES, Trustee of the Estate of Bonnie J. Cooksey and Claude W. Cooksey, COOKSEY AAMCO, INCORPORATED, Plaintiff - Appellant: Philip A. Whistler, Curtis W. McCauley, ICE, MILLER, DONADIO & RYAN, Indianapolis, IN.

For AAMCO TRANSMISSIONS, INCORPORATED, Defendant - Appellee: Abraham C. Reich, FOX, ROTHSCHILD, O'BRIEN & FRANKEL, Philadelphia, PA. Richard J. Darko, Susan P. Stuart, LOWE, GRAY, STEELE & HOFFMAN, Indianapolis, IN. Kevin A. Norris, AAMCO TRANSMISSIONS, INCORPORATED, Corporation Counsel, Bala Cynwyd, PA. For INDIANAPOLIS, INDIANA, AAMCO DEALERS' ADVERTISING POOL, MARC BRITTLER, TOM SCHROEDER, DARRYL DIEG, Defendant - Appellee: Bernard L. Pylitt, Jeffrey A. Hearn, KATZMAN, KATZMAN & PYLITT, Indianapolis, IN. For CHUCK KELLERMEYER, Defendant - Appellee: John A. Kitley, Jr. Beech Grove, IN.

Judges: Before POSNER, Chief Judge, and CUDAHY and ROVNER, Circuit Judges.

Opinion by: POSNER

Opinion

[*777] POSNER, *Chief Judge*. The plaintiffs appeal from a judgment that dismissed their antitrust suit on the surprising ground that the complaint had failed adequately [**2] to allege that the defendants' violations had affected interstate commerce. The defendants defend the judgment on other grounds as well, so we have a number of issues to resolve; but the most important is the issue of commerce, and it is entangled with a procedural issue: how detailed federal pleadings must be.

The complaint alleges the following facts. By reciting them we do not of course vouch for their truth, but they are all we have at this stage. Bonnie and Claude Cooksey were franchised by AAMCO Transmissions, Inc. (ATI) to operate an AAMCO transmission repair center in Indianapolis. To obtain the franchise they had been required by ATI to join the Indianapolis, Indiana, AAMCO Dealers' Advertising Pool, an unincorporated association that along with ATI and the dealers belonging to the pool is a defendant in this suit. The pool buys an advertisement in the yellow pages that lists the address and telephone number of each of the pool's members, who in the relevant period were five in number including the Cookseys' dealership, Cooksey AAMCO, Inc. It lists five other phone numbers with only a general indication of location (a neighborhood or other area in Indianapolis) rather than [**3] street addresses corresponding to these numbers. The reason for the omission of the street addresses is that these five "dealers" are phantoms--apparently nothing new in this industry. *McAlpine v. AAMCO Automatic Transmissions, Inc.*, 461 F. Supp. 1232, 1263 (E.D. Mich. 1978). A call to one of the five numbers is automatically forwarded, in accordance with a preexisting agreement, to one of the dealers in the pool-- presumably, we were told at argument, one near the location designated in the advertisement for the "dealer" with the phantom number. Because the other members wanted to stifle the Cookseys' competition, the pool refused to include the Cooksey dealership in the call-forwarding network, and as a result no calls to phantom numbers were forwarded to Cooksey. Its phone number and address were listed in the advertisement, so it got some business that way, but, without any calls being forwarded from the phantom numbers, not enough to stay afloat. And when it tried to advertise outside the pool, it was enjoined at the suit of the other dealers for violating the pool agreement. So eventually Cooksey went belly-up. The injunction was issued in the [**4] course of a suit in state court that the defendants had brought against the Cookseys for failing to pay their share of the advertisement in the yellow pages. That suit was stayed when the Cookseys went into bankruptcy, so its merits have never been determined.

Since the Cookseys' dealership was operated in the corporate form, we do not understand why their trustee in bankruptcy is a plaintiff along with the corporation. Shareholders do not have standing to sue for harms to the corporation, or even for the derivative harm to themselves that might arise from a tort or other wrong to the corporation. *Singletary v. Continental Illinois National Bank & Trust Co.*, 9 F.3d 1236, 1240 (7th Cir. 1993); *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1335 (7th Cir. 1989); *Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1378 (7th Cir. 1987); cf. *Associated General*

Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). [**5] There is no suggestion that the Cookseys incorporated during rather than before the alleged [*778] violations took place, in which event they would have sustained a direct injury to themselves as well as the derivative injury resulting from their ownership of the corporation. Although the complaint states that the corporation declared bankruptcy along with its owners, and has been liquidated, there is no mention of a trustee. Maybe the rights of the bankrupt estate were assigned to the Cookseys. But if so why would--how could--the corporation, liquidated without a trace as it were, be a plaintiff?

These are deep mysteries, but not ones we have to solve. The defendants do not question the Cookseys' standing, and, despite the suggestive terminology, "antitrust standing" is not a jurisdictional requirement and is therefore waivable. The issue is not whether the Cookseys were hurt by the injury to their corporation--no doubt they were, albeit obliquely, but that would be enough to confer standing in the Article III sense. It is whether they have a legal right to obtain damages for that hurt, *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991), and that [**6] is a question about the merits. It has been waived, so we shall pay no further attention to it, except that in the balance of our opinion we shall pretend that there is one plaintiff and call it "Cooksey."

The complaint alleges that ATI sells franchises in several states and that pursuant to the franchise agreements Cooksey and the other AAMCO dealers in Indianapolis mailed substantial fees to ATI at its Pennsylvania headquarters, contributed money to ATI's national advertising, "and purchased equipment and inventory sold by ATI (or otherwise meeting ATI's specifications)," "all of which activities occurred in and had a substantial effect on interstate commerce." There are no allegations concerning the amount of equipment or inventory purchased or where the stuff came from. There are no numbers. Nor is it expressly alleged that the defendants' violations of the Sherman Act, as distinguished from the specific activities of the plaintiffs and the defendants that the complaint describes in the passages we have just quoted, activities none of which is unlawful, affected interstate commerce.

So what? *HN1*[[↑]] The Federal Rules of Civil Procedure do not require the plaintiff to plead the particulars [**7] of his claim, *Fed. R. Civ. P. 8(a)(1)* with the exceptions (of which the best known is fraud) listed in Rule 9(b). *Early v. Bankers Life & Casualty Co.*, 959 F.2d 75, 79 (1992). A nascent movement in the lower courts to add judge-made exceptions to those listed in Rule 9(b), well described in *Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 862-64 (1st Cir. 1993), was scotched by the Supreme Court in *Leatherman v. Tarrant County Narcotics Unit*, 113 S. Ct. 1160, 1163 (1993); see also *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990). We continue to be puzzled why lawyers insist on writing prolix complaints that can only get them into trouble, as in *Conn v. GATX Terminals Corp.*, 18 F.3d 417, 419 (7th Cir. 1994), and *Fryman v. United States*, 901 F.2d 79, 82 (7th Cir. 1990).

But we have been speaking so far of the statement of the *claim* in the complaint and it may be necessary to distinguish between that and the jurisdictional [**8] allegations, even though the rules use the same formula, "short and plain statement," for both. *Fed. R. Civ. P. 8(a)(1)*, (2). Jurisdiction is a threshold issue, normally not litigated at all; and the court has an independent duty to satisfy itself that it has jurisdiction. Naturally, therefore, it relies on the complaint to say enough about jurisdiction to create some reasonable likelihood that the court is not about to hear a case that it is not supposed to have the power to hear. In a diversity case, for example, it is not enough for the plaintiff to allege that the claim is within the diversity jurisdiction; the complaint must allege the citizenship of the parties and the amount in controversy. Fed. R. Civ. P., Form 2(a); *Hemmings v. Barian*, 822 F.2d 688, 693 (7th Cir. 1987).

But *HN2*[[↑]] when the jurisdictional prerequisite is effect on interstate commerce, the pleading of a conclusion should be good enough, since the number of cases that fail at that threshold has become minuscule; "there are astonishingly few offenses to antitrust principles that do not 'affect commerce.' " [*779] Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust* [**9] *Principles and Their Application* § 232.1f, at p. 286 (1992 Supp.). At a time when the interstate character of certain restraints of trade in the health-care industry (namely those that involved the denial of staff privileges at one hospital for one doctor) was in doubt, more particularized allegations were necessary to assure the court that the plaintiff's claim satisfied the commerce

requirement, as in *Marrese v. Interqual, Inc.*, 748 F.2d 373, 379-83 (7th Cir. 1984). That time is past. See *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991).

Section 1 of the Sherman Act, [15 U.S.C. § 1](#), which the dealers' practice of allocating customers through the callforwarding system is alleged to violate, [HN3](#) forbids conspiracies in restraint of trade or commerce among the states or with foreign nations. It would therefore have been enough for the plaintiff to have alleged, without further particulars, that the defendants' conduct in excluding it from the call-forwarding feature of the advertising pool restrained (impeded, impaired, diminished--there [**10](#) is no magic word) interstate commerce. Though some cases state otherwise, the complaint would not have had to add that the restraint was substantial. No such limitation is stated in the Act. When the Act was passed back in 1890, a limitation to cases in which the defendant's conduct had a "direct" effect on interstate commerce (thus excluding all of manufacturing) was implicit because of the narrow construction that the Supreme Court had placed on the power of Congress to regulate such commerce. But the Act has been held to go to the limit of that power as expanded by interpretations of the Constitution in later decisions. *Summit Health, Ltd. v. Pinhas*, *supra*, 111 S. Ct. at 1846 and n. 10; *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 n. 2, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976); *Fuentes v. South Hills Cardiology*, 946 F.2d 196, 200 (3d Cir. 1991). Congress's power over interstate commerce is now understood not to be limited to activities that *substantially* involve or affect such commerce. "The power of [**11](#) Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small." *NLRB v. Fainblatt*, 306 U.S. 601, 606, 83 L. Ed. 1014, 59 S. Ct. 668 (1939).

If the Sherman Act goes to the constitutional limit, an antitrust conspiracy that by raising the price of some good or service made in one state and sold in another reduced the quantity sold would be within the reach of the Act even if both the traffic affected, and the conspiracy's effect on that traffic, were small. Cf. *Hospital Building Co. v. Trustees of Rex Hospital*, *supra*, 425 U.S. at 745. We shall see that despite what the cases say, or rather what some of them say, it is not certain that the word "commerce" in the Sherman Act means exactly the same thing as "commerce" in Article I of the Constitution. But it is certain that they are very close, so that cases like *Heille v. City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982), holding that local rubbish collection is beyond the reach of the Sherman Act, clearly are outmoded.

Although all the complaint [**12](#) had to allege, therefore, was that the defendants had restrained interstate commerce, this was not the character of the allegation actually made. It was instead that certain activities of the dealers (including Cooksey), such as purchasing equipment and mailing fees, either occurred in or affected interstate commerce. But this allegation was sufficient to confer jurisdiction when read together with the substantive allegations of the complaint. Provided that some of the transmissions and parts purchased by Indianapolis AAMCO dealers from ATI come from other states--as the complaint alleges, and the defendants have not denied--a conspiracy among the dealers to exclude the plaintiff would *have to restrain* interstate commerce, the [HN4](#) dealers being merely the last intermediary in an interstate transaction that ends with the purchase of a transmission or a part by the consumer. Cases almost too numerous to cite either find or, because the proposition is rarely questioned, assume on this basis that conspiracies among local sellers affect interstate commerce within the meaning of the Sherman [**780](#) Act. E.g., *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298, 89 L. Ed. 951, 65 S. Ct. 661 (1945); [**13](#) *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959); *Burke v. Ford*, 389 U.S. 320, 19 L. Ed. 2d 554, 88 S. Ct. 443 (1967) (per curiam); *Hospital Building Co. v. Trustees of Rex Hospital*, *supra*, 425 U.S. at 744; *McLain v. Real Estate Board*, 444 U.S. 232, 245, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980).

Even if Indiana were a vehicular autarky, so that all the parts that the AAMCO dealers install in the transmissions they repair and all the transmissions they sell as replacements of unrepairable transmissions were fabricated in Indiana, a conspiracy among the Indianapolis dealers to eliminate competition among themselves would restrain interstate commerce. For it would raise the price of automobile transportation, much of which is interstate, thereby reducing the amount of interstate transportation demanded and so supplied. The effect on interstate commerce would be small. No doubt it is small in this [**14](#) case. But it is not required to be large, or even measurable; there are sound practical reasons for this, as we shall see.

It is true that many cases, such as *McLain v. Real Estate Board, supra, 444 U.S. at 242*, and *Hospital Building Co. v. Trustees of Rex Hospital, supra, 425 U.S. at 743-44*, say that the Sherman Act requires proof of a *substantial*, or at least a *not insubstantial*, effect on interstate commerce, either by the antitrust violation itself, or by the activities affected by the antitrust violation. But the cases do not indicate where the line between substantial and insubstantial lies, and their reference to substantiality is in tension with the cases which hold that the Sherman Act goes to the constitutional limit--and some of them are the same cases, such as *Rex Hospital*. It seems that the approach actually taken (as distinct from articulated) by a majority of the Justices "comes so close to covering virtually every restraint that the judicial formulae covering proof of jurisdiction seem mainly to complicate, confuse, and lengthen antitrust [**15] litigation without affecting the outcome. Simplification seems called for." Areeda & Hovenkamp, *supra*, § 232.1a, at pp. 271-72. The authors opine that the "*not insubstantial*" formula of *McLain* "appears to state only a nominal requirement," *id.*, § 232.1a, at p. 271, but they consider the opinion as a whole ambiguous. *Id.*, § 232.1d, at p. 280; § 232.1f, at p. 285.

So there is a deep tension in the cases between the go-to-the-constitutional-limit position and the must-prove-substantial-effect position, as well as a variety of uninformative and possibly inconsistent verbal tests (are "*substantial*" and "*not insubstantial*" the same or different?). Simplification is indeed overdue. One possibility would be to adopt an irrebuttable proposition that all violations of *antitrust law* affect commerce. This approach would be consistent with economic reality, because the United States has an integrated economy, but it is an approach that the Supreme Court has shied away from taking. Another possibility would be to deem beyond the reach of the Sherman Act those conspiracies and other offenses that have only a trivial effect on interstate commerce, provided (the significance of the [**16] proviso will become apparent shortly) that the entire class of cases represented by the case in question would also have only a trivial effect. If two children operating competing lemonade stands decided to fix prices, the effect on interstate commerce would be trivial; and even if an epidemic of price-fixing occurred among child operators of lemonade stands, the effect on the national economy would be slight. Although the exclusion of such cases from the Sherman Act's reach would be consistent with the outcomes and most of the language of the Supreme Court's decisions, Areeda and Hovenkamp warn that "*a de minimis threshold . . . would be hard to administer.*" *Id.*, § 232.1f, at p. 286. The principle *de minimis non curat lex* is applied in many areas of law, without undue mischief or inconvenience, *Hessel v. O'Hearn, 977 F.2d 299, 302-04 (7th Cir. 1992)*, but applied here it would invite arcane disputes over economic incidence and it would sit uncomfortably with the Court's repeated assertions that the Sherman Act goes to the constitutional [*781] limit. For there is no *de minimis* exception to the power of Congress to regulate commerce--though there [**17] is also no reason why the statute and the Constitution should be exactly coterminous. It is one thing for Congress to assert a plenary power over commerce, and another for it to require the courts to entertain cases involving trivial local disputes.

We need not attempt to resolve the question whether a *de minimis* exception to the otherwise unlimited scope of the Sherman Act with respect to interstate commerce should be recognized. It would not help the defendants in this case. For they argue, contrary to the conclusion we reached earlier, that a Sherman Act plaintiff must allege and prove not merely a nontrivial, but a *large*, effect on interstate commerce. They rely on two cases of ours, both involving the suspension of hospital privileges, *Seglin v. Esau, 769 F.2d 1274 (7th Cir. 1985)*, and *Doe on behalf of Doe v. St. Joseph's Hospital, 788 F.2d 411, 417 (7th Cir. 1986)*. The authority of these cases, and of the Ninth Circuit's decision in *Mitchell v. Frank R. Howard Memorial Hospital, 853 F.2d 762, 764-66 (9th Cir. 1988)*, a similar case, has been greatly undermined by subsequent decisions [**18] in medical antitrust cases, notably *Summit Health, Ltd. v. Pinhas, supra*, and our own *Nelson v. Monroe Regional Medical Center, 925 F.2d 1555, 1566-67 (7th Cir. 1991)*. The plaintiffs in *Seglin*, *Doe*, and *Mitchell* had shown merely that a defendant hospital was engaged in interstate commerce; and this was deemed insufficient to support an inference that the antitrust violations themselves had had any effect on commerce. The plaintiff in each case was a physician not alleged to be engaged in interstate commerce, and it was not apparent to the courts that decided these cases how suspending him would affect commerce in the slightest. The courts' puzzlement was understandable. But *Summit Health, Ltd. v. Pinhas* was the same kind of case--one doctor, dropped by one hospital--and the Supreme Court held that the commerce requirement was satisfied. *111 S. Ct. at 1848-49*. Our case is stronger for finding the requirement satisfied because the plaintiff, as well as the defendants, is alleged to be engaged in interstate commerce, so that [**19] it is manifest that a conspiracy aimed at driving the plaintiff out of business--and succeeding in that aim, as it is alleged to have done--would affect that commerce.

A particularly questionable feature of *Seglin*, explicitly rejected by the Supreme Court in *Summit Health* (see [id. at 1848](#)), is the attempt to evaluate impact on interstate commerce on the basis of the facts of an individual case, as distinct from the class of cases to which it belongs. Obviously if the entire health-care industry, or all of retail trade, were cartelized, the effect on interstate commerce would be profound. The prices and probably the costs as well of the services produced by these vast sectors of the economy would be higher and the output smaller, and these effects would reverberate throughout the economy. In an industry or sector, however immense, in which most units of production are small--and both health care and retail trade are such sectors--an insistence by the courts that each cartel be shown to have a demonstrable effect on interstate commerce would allow the entire industry to be cartelized, piecemeal, with impunity. [*Klor's, Inc. v. Broadway-Hale Stores, Inc., supra, 359 U.S. at 213.*](#) [\[**20\]](#) The law does not require such a showing. [HN5](#) "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." [*Fry v. United States, 421 U.S. 542, 547, 44 L. Ed. 2d 363, 95 S. Ct. 1792 \(1975\).*](#)

The defendants could prevail on the issue of the adequacy of the complaint's allegations concerning interstate commerce only if such a complaint had to allege that running *this* plaintiff out of business would have a substantial impact on interstate commerce, or if the facts alleged in the complaint negated an inference that the defendants' conduct could affect interstate commerce, or if the plaintiff had to allege a connection between the mechanics of the conspiracy (here, the allocation of customers through phantom numbers) and interstate commerce, [\[*782\]](#) or if the complaint had explicitly to state that the defendants' conduct affected interstate commerce even though the effect could be inferred from other facts alleged (such as that the plaintiff was engaged in interstate commerce and [\[*21\]](#) the defendants drove it out of business). None of these things is required, and the defendants' argument therefore fails. [HN6](#) It is quite enough, probably more than enough, if the complaint alleges that the plaintiff was engaged in interstate commerce and was injured by the alleged antitrust violation.

So the defendants lose on commerce; but they have several fall-back positions. The first is that the complaint does not state a claim of violation of [section 1](#); at most it shows a deceptive practice. But the complaint's description of the defendants' practice is certainly consistent with an antitrust conspiracy, and no more is required at this stage, [*Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 \(1984\); Hrubec v. National R.R. Passenger Corp., 981 F.2d 962, 963 \(7th Cir. 1992\)*](#), for again we remind that a plaintiff is not required to plead the particulars of his claim. The inference of a heightened pleading requirement in antitrust cases that the court in [*Boston & Maine Corp. v. Town of Hampton, supra, 987 F.2d at 864*](#), drew from our opinion [\[**22\]](#) in [*Sutliff, Inc. v. Donovan Co., 727 F.2d 648, 654 \(7th Cir. 1984\)*](#), cannot be considered authoritative after *Leatherman*. Properly understood, *Sutliff* is simply another of those cases in which the plaintiff pleaded himself out of court.

[HN7](#) The most elementary prohibition of [section 1](#) of the Sherman Act is that of conspiracies between competitors to fix prices, and the prohibition extends to conspiracies between dealers in the same brand, here AAMCO. A type of conspiracy that has effects almost identical to those of price-fixing and is treated the same by the law is a conspiracy between competitors to rotate or otherwise allocate customers among the conspirators, so that each customer faces a monopoly seller. The AAMCO dealers in Indianapolis are located in different parts of the city and each presumably has an advantage in competing for the customers nearest to it. Under conditions of unrestricted competition, customers on the borderline of these zones of advantage would be courted by two or more dealers. The allocation of these customers among the dealers by means of automatic call forwarding from phantom dealers supposedly located in the borderline [\[**23\]](#) areas could eliminate competition for customers who, not being within the gravitational field of any dealer by reason of proximity, would, were it not for the allocation, have a real and not merely theoretical choice between dealers. Such [HN8](#) an out-and-out scheme of customer allocation would be a per se violation of [section 1](#). [*Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 112 L. Ed. 2d 349, 111 S. Ct. 401 \(1990\)*](#) (per curiam). Of course we do not yet know whether this is the character of the call-forwarding scheme; maybe the only purpose or effect is to deceive customers into thinking that there are more, and more conveniently located, AAMCO dealers than there are. But these are not issues that can be resolved on the pleadings.

The defendants' next fall-back argument is that Cooksey has not alleged antitrust injury--injury caused by the kind of conduct that the antitrust laws seek to prevent. [*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\); Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698, 708 \(7th*](#)

Cir. 1984). **[**24]** More precisely, since a complaint need not go into such detail, their argument is that the allegations that the complaint does make, however unnecessarily, show that the plaintiff is not claiming antitrust injury and therefore has failed to state a good claim. This would be yet another example of pleading oneself out of court, the occupational hazard of authors of prolix complaints.

If the complaint showed that Cooksey's only gripe was that it had been expelled from a cartel and thereby deprived of cartel profits, it could not recover those lost profits as antitrust damages. The antitrust laws seek to prevent rather than to protect cartel profits; it would be a strange perversion to make antitrust law the vehicle for the enforcement of illegal anticompetitive agreements. That Cooksey is seeking lost cartel **[*783]** profits is only one possible interpretation of the complaint, however, and any ambiguities must be left to further proceedings to resolve. Another interpretation is that Cooksey wanted to compete by underselling the other dealers, thus weakening or breaking the cartel, and that it was ejected from the advertising pool in order to prevent it from, or punish it for, doing this. **[**25]**

HN9  Losses inflicted by a cartel in retaliation for an attempt by one member to compete with the others are certainly compensable under the antitrust laws, *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 258 (2d Cir. 1989); *Volvo North America Corp. v. Men's International Pro Tennis Council*, 857 F.2d 55, 67-68 (2d Cir. 1988); cf. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139-40, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968), for otherwise an effective deterrent to successful cartelization would be eliminated; and it is premature to conclude that this is not the character of the loss that Cooksey seeks to recover.

The defendants also defend the dismissal on the ground that the franchise agreement required Cooksey to arbitrate any disputes arising out of it. If the agreement-- which required Cooksey to join the dealers' advertising pool--was itself an instrumentality of a cartel, then it might seem obvious that no part of it, including its arbitration clause, would be legally enforceable, even if we assume, following the Ninth Circuit's **[**26]** recent decision in *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437 (9th Cir. 1994), that agreements to arbitrate domestic as well as international antitrust disputes are now enforceable. But analogy to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-06, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967), which holds that an arbitration clause is enforceable even if the dispute is over whether the contract containing it was induced by fraud, suggests that an arbitration clause may be enforceable even if the dispute is over the validity under the antitrust laws of the contract containing the clause. Especially may it be enforceable where as in this case there is no suggestion that the party resisting invocation of the clause was coerced into accepting it or that the arbitrators are themselves a cat's paw of the cartel.

We need not resolve the issue of enforceability. Cooksey *did* demand arbitration. It was the defendants who refused, and, rather than referring to arbitration their dispute with Cooksey over the latter's refusal to contribute to the advertising pool, brought a suit in state **[**27]** court to resolve it. The situation is a little more complicated, because the arbitration clause appears in the franchise agreement that Cooksey signed with ATI rather than in the advertisingpool agreement that it signed with the dealers. And ATI never sued Cooksey. But rather than seek to bring Cooksey to heel by demanding arbitration to determine the lawfulness of the advertising pool (which the franchise agreement required Cooksey to join), ATI authorized the dealers to sue Cooksey, and they refused Cooksey's request to arbitrate the dispute. We do not know what direct role ATI played in that refusal; but having deliberately forgone a chance to arbitrate the dispute, and thus put Cooksey to the expense of bringing this suit, the defendants have waived their right to insist on arbitration now. *St. Mary's Medical Center, Inc. v. Disco Aluminum Products Co.*, 969 F.2d 585, 588-89 (7th Cir. 1992); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 712 F.2d 270, 273 (7th Cir. 1983).

The defendants' last argument is that Cooksey agreed that the venue of any suit arising out of the franchise arrangement would be Pennsylvania, not Indiana. **[**28]** The provision concerning venue appears in the franchise agreement too, and so may or may not fall with that agreement. It does not matter. While requiring the franchisee to consent to venue in Pennsylvania if ATI sues it there, the provision does not purport to confine the franchisee's suits to Pennsylvania and should not be interpreted to do so. *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992).

The complaint should not have been dismissed. The judgment is reversed and the case remanded for further proceedings consistent with this opinion. REVERSED AND REMANDED.

End of Document



County of Stanislaus v. Pacific Gas & Elec. Co.

United States District Court for the Eastern District of California

August 25, 1994, Decided ; August 25, 1994, FILED; September 22, 1994, Docketed

CV-F-93-5866-OWW

Reporter

1994 U.S. Dist. LEXIS 21032 *; 1994-2 Trade Cas. (CCH) P70,782

COUNTY OF STANISLAUS, a public entity, and MARY GROGAN, an individual, on behalf of themselves, and all entities and persons similarly situated, Plaintiffs, v. PACIFIC GAS & ELECTRIC COMPANY, a California corporation, and PACIFIC GAS TRANSMISSION COMPANY, a wholly owned subsidiary of Pacific Gas & Electric Company, Defendants.

Core Terms

rates, natural gas, regulation, import, prices, customers, filed rate doctrine, plaintiffs', antitrust, costs, transportation, authorization, producers, suppliers, state action, defendants', purchasers, pipeline, Carriers, procurement, tariff, negotiated, displace, immunity, complaint alleges, motion to dismiss, anticompetitive, guidelines, contracts, shipper

LexisNexis® Headnotes

[Energy & Utilities Law > Utility Companies > Buying & Selling of Power](#)

[Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview](#)

[Energy & Utilities Law > Natural Gas Industry > General Overview](#)

[Energy & Utilities Law > Natural Gas Industry > Distribution & Sale](#)

[Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview](#)

[Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview](#)

[Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > Certificates of Need](#)

[Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation](#)

[Energy & Utilities Law > Utility Companies > General Overview](#)

[Energy & Utilities Law > Utility Companies > Rates > General Overview](#)

[HN1](#) [] Utility Companies, Buying & Selling of Power

Under [15 U.S.C.S. § 717c\(c\), \(d\)](#), sellers of natural gas in interstate commerce are required to file their rates with the Federal Energy Regulatory Commission. Under [15 U.S.C.S. § 717c\(a\)](#), the rates that a regulated gas company files with the Commission for sale and transportation of natural gas are lawful only if they are "just and reasonable."

Energy & Utilities Law > Natural Gas Industry > Exports & Imports

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

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

[**HN2**](#) **Natural Gas Industry, Exports & Imports**

The Economic Regulatory Administration (ERA) must approve the importation of natural gas, and will do so unless the proposed import will not be consistent with the public interest. [15 U.S.C.S. § 717b](#). The ERA considers: the competitiveness of the imported gas, the need for the gas, and the security of the supply. The authorization of a given volume of gas at up to a particular price is a decision by ERA that the particular import is in the public interest, and that no market failure has been shown that has or would interfere with the pipeline's acting in its own interest to acquire gas on the most favorable terms. This ERA process raises a rebuttable presumption that the terms are prudent if freely negotiated and flexible.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Utility Companies > General Overview

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

[**HN3**](#) **Public Utility Commissions, Authorities & Powers**

The California Public Utility Commission (CPUC) has authority to regulate rates charged to the public by California utilities. A utility cannot change a rate unless the CPUC approves. [Cal. Pub. Util. Code § 454\(a\)](#). All rates and charges must be "just and reasonable." [Cal. Pub. Util. Code § 451](#).

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > General Overview

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

[**HN4**](#) **Adjudicative Facts, Facts Generally Known**

[Fed. R. Evid. Rule 201](#) provides in part that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A court shall take judicial notice if requested by a party and supplied with the necessary information.

Evidence > Judicial Notice > General Overview

HN5 Evidence, Judicial Notice

Federal courts may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > General Overview

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN6 Parties, Joinder of Parties

To maintain an action under [Fed. R. Civ., P. 23\(b\)\(3\)](#), a plaintiff 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 in the class; (4) the representative parties will fairly and adequately represent the interests of the class; and (5) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for a fair and efficient adjudication of the controversy.

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

HN7 Class Actions, Prerequisites for Class Action

Whether an administrative adjudication would provide a more advantageous procedure than a class action may depend on the type of remedy that could be awarded by the agency and the general attitude of the agency toward the issues and problems raised by the claimants.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Parties > Capacity of Parties > General Overview

Civil Procedure > ... > Capacity of Parties > Representative Capacity > Representatives

HN8 Federal & State Interrelationships, Erie Doctrine

Capacity to sue and be sued is to be determined by the law of the state in which the district court sits. [Fed. R. Civ. P. 17\(b\)](#).

Administrative Law > Separation of Powers > Primary Jurisdiction

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Primary Jurisdiction

Energy & Utilities Law > Antitrust Issues > Administrative Considerations

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

HN9 [↓] Separation of Powers, Primary Jurisdiction

Antitrust actions in pervasively-regulated areas, such as the natural gas industry, are circumscribed by the filed rate doctrine. The considerations underlying the doctrine are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant. The filed rate doctrine is not limited to "rates" per se, but applies to any activity under the controlling agency's regulatory power.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN10 [↓] Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine does not bar all antitrust claims against regulated entities.

Energy & Utilities Law > Natural Gas Industry > Exports & Imports

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

HN11 [↓] Natural Gas Industry, Exports & Imports

The Natural Gas Act, [15 U.S.C.S. § 715 et seq.](#), is intended to protect interstate gas consumers from pipeline monopoly power. [15 U.S.C.S. § 717b](#) requires the government to authorize an import of natural gas unless the proposed importation will not be consistent with the public interest. Congress did not define "public interest," thus giving broad discretion to the government agencies in establishing criteria that an importer must fail to meet for the government to deny an authorization to import.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

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

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > US Federal Energy Regulatory Commission

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Federal Oil & Gas Leases > Competitive Leases

Energy & Utilities Law > Natural Gas Industry > Exports & Imports

Energy & Utilities Law > Natural Gas Industry > Natural Gas Policy Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Policy Act > Wellhead Price Regulation

HN12 [] **Natural Gas Industry, Distribution & Sale**

The Natural Gas Policy Act of 1978, [15 U.S.C.S. § 3301 et seq.](#), was enacted to stimulate the interstate flow of gas by reducing wellhead price regulation by the Federal Energy Regulatory Commission.

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

Energy & Utilities Law > Pipelines & Transportation > Pipelines > Rates

Energy & Utilities Law > Utility Companies > General Overview

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

Energy & Utilities Law > Utility Companies > Contracts for Service

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

HN13 [] **Natural Gas Industry, Natural Gas Act**

The National Gas Act, [15 U.S.C.S. § 715 et seq.](#), requires the Federal Energy Regulatory Commission to ensure that all rates and charges made, demanded or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission shall be just and reasonable. [15 U.S.C.S. § 717c\(a\).](#)

Energy & Utilities Law > Natural Gas Industry > Common Carriage Obligations

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > Pipelines & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

Energy & Utilities Law > Pipelines & Transportation > Pipelines > Rates

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

HN14 [] **Natural Gas Industry, Common Carriage Obligations**

The Federal Energy Regulatory Commission has no authority over how foreign producers or pipeline suppliers bill their costs through to importers. The Commission's first access for regulating imported gas rates is at the pipeline-to-customer stage.

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

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

HN15 [] **Utility Companies, Buying & Selling of Power**

In California, utilities must seek permission from the California Public Utility Commission (CPUC) to charge additional rates or change rates, and are subject to the CPUC's finding that such rates are "just and reasonable."

Cal. Pub. Util. Code §§ 451, 454(a), 701.

Administrative Law > Judicial Review > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

HN16 [] **Administrative Law, Judicial Review**

The focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations. Judicial review of activities beyond the scope of the agencies' jurisdiction does not violate the filed rate doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

[**HN17**](#) [blue document icon] Exemptions & Immunities, Filed Rate Doctrine

Under the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls. To permit parties to vary by private agreement the rates filed with the Federal Energy Regulatory Commission would undercut the clear purpose of the congressional scheme: granting the Commission an opportunity in every case to judge the reasonableness of the rate.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

[**HN18**](#) [blue document icon] Exemptions & Immunities, Filed Rate Doctrine

The filed rate cannot be varied or enlarged by either contract or tort of the regulated entity.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

[**HN19**](#) [blue document icon] Filed Rate Doctrine, Public Utilities & Telecommunications Carriers

No meaningful distinction exists between conduct regulated by state, as distinguished from federal, entities; the filed rate doctrine applies whether the rate in question is approved by a federal or state agency.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

[**HN20**](#) [blue document icon] Filed Rate Doctrine, Public Utilities & Telecommunications Carriers

The filed rate doctrine bars claims filed with state, as distinguished from federal, agencies.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

[**HN21**](#) [+] Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine contains one important caveat: The filed rate is not enforceable if the regulating agency finds the rate to be unreasonable.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

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

[**HN22**](#) [+] Filed Rate Doctrine, Public Utilities & Telecommunications Carriers

The filed rate doctrine recognizes that where a legislature has established a scheme for utility rate-making, the rights of the rate-payer in regard to the rate paid are defined by that schedule.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Transportation Law > Interstate Commerce > Federal Preemption

[**HN23**](#) [+] Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine applies not only to federal court review, but as a matter of federal supremacy to state law causes of action that conflict with or interfere with federal authority over the same activity.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

[**HN24**](#) [+] Estoppel, Judicial Estoppel

Judicial estoppel is intended to protect the integrity of the judicial process and prevent unfairness to an opponent.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

[**HN25**](#) [blue icon] **Estoppel, Judicial Estoppel**

Under the majority view, judicial estoppel does not apply unless the assertion inconsistent with the claim made in the subsequent litigation was adopted in some manner by the court in the prior litigation. Under the minority view, judicial estoppel can apply even when a party was unsuccessful in asserting its position in the prior judicial proceeding, if the court determines that the allegedly offending party engaged in fast and loose behavior which undermined the integrity of the court.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

[**HN26**](#) [blue icon] **Estoppel, Judicial Estoppel**

The doctrine of judicial estoppel is invoked by a court at its discretion.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

[**HN27**](#) [blue icon] **Estoppel, Judicial Estoppel**

Judicial estoppel should not be invoked to freeze an opponent into a position on a pure issue of law.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

[**HN28**](#) [blue icon] **Sherman Act, Defenses**

Federal antitrust laws are subject to supersession by state regulatory programs.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

[**HN29**](#) [blue icon] **Exemptions & Immunities, Parker State Action Doctrine**

State action immunity is narrowly construed.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

[**HN30**](#) [blue icon] **Exemptions & Immunities, Parker State Action Doctrine**

Private entities may claim state action immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

HN31 [+] Exemptions & Immunities, Parker State Action Doctrine

State action immunity is an affirmative defense.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN32 [+] Exemptions & Immunities, Parker State Action Doctrine

The test for determining whether a state anticompetitive mechanism operates because of a deliberate and intended state policy, such that the federal antitrust laws are superseded, requires, first, that the challenged restraint must be clearly articulated and affirmatively expressed as state policy, and, second, that the policy must be actively supervised by the state itself.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN33 [+] Exemptions & Immunities, Parker State Action Doctrine

In order for the state action doctrine to bar claims, the courts must assure themselves that the subordinate acts in accord with the state's wishes when it contravenes federal antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN34 [+] Exemptions & Immunities, Parker State Action Doctrine

The misuse of clearly granted regulatory power does not cause state action immunity to lapse, so long as the conduct was objectively foreseeable in the state scheme. A defendant's alleged malice or bad faith is not relevant to the state action inquiry.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN35 [+] Exemptions & Immunities, Parker State Action Doctrine

Parker immunity is only available when the challenged activity is undertaken pursuant to the policy of the state itself as sovereign, through a state statute or opinion of a state supreme court.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Energy & Utilities Law > Utility Companies > General Overview

HN36 [] **Exemptions & Immunities, Parker State Action Doctrine**

A private party acting pursuant to an anticompetitive regulatory program need not point to specific, detailed legislative authorization for its challenged conduct. If the legislature delegates supervision to a regulatory agency, state action immunity is available if: (1) the state as sovereign has delegated authority to the agency to regulate the challenged conduct, and (2) the agency articulates a policy, consistent with its delegated authority, to displace price competition with a regulatory structure.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN37 [] **Exemptions & Immunities, Parker State Action Doctrine**

As long as an agency is under the mandate of a sovereign state to establish just and reasonable rates, and retains discretion as to how those rates will be determined, the method by which it establishes those rates is, and remains, regulation, even if one of the factors used in determining the just and reasonable rates is the effect of competition.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

HN38 [] **Natural Gas Industry, Distribution & Sale**

Introduction of competition into a regulatory structure does not preclude application of state action immunity.

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN39 [] **Utility Companies, Buying & Selling of Power**

See [Cal. Pub. Util. Code § 785.5.](#)

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

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

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN40 [] Energy & Utilities, State Regulation

The California Public Utilities Commission's authority has been liberally construed.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

Energy & Utilities Law > Utility Companies > General Overview

HN41 [] Separation of Powers, Legislative Controls

The California legislature delegated the details of regulatory oversight to the California Public Utilities Commission. [Cal. Pub. Util. Code § 785.5](#). Agency delegation does not preclude application of state action immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN42 [] Exemptions & Immunities, Parker State Action Doctrine

To satisfy the active supervision requirement, state officials must have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. The purpose of this requirement is to determine whether the state has exercised sufficient independent judgment and control so that the details of rates or prices have been established as a product of deliberate state intervention, not simply by the agreement of private parties. Much as in causation inquiries, the analysis asks whether the state has played a substantial role in determining the specifics of the economic policy.

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

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Energy & Utilities Law > Utility Companies > Rates > Overcharging

HN43 [] Regulated Industries, Energy & Utilities

Where suppliers violate antitrust laws by overcharging a public utility, and the utility passes on the overcharges to the customer, only the utility has a cause of action because it alone has suffered an antitrust injury. The rationale for

the indirect purchaser bar is that allowing suits by parties all along the distribution chain could impose duplicative liability on the antitrust violator, particularly since it is difficult to apportion damages between successive distribution levels.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN44 [blue icon] Motions to Dismiss, Failure to State Claim

A motion to dismiss for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#) is viewed with disfavor and is rarely granted.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN45 [blue icon] Motions to Dismiss, Failure to State Claim

A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

HN46 [blue icon] Motions to Dismiss, Failure to State Claim

In deciding a motion to dismiss, the court must accept as true all material allegations in the complaint and construe them in the light most favorable to the plaintiff. The court need not accept as true allegations that contradict facts which may be judicially noticed. The court may consider matters of public record including pleadings, orders, and other papers filed with the court or records of administrative bodies. The court need not accept conclusory allegations, nor unreasonable inferences or unwarranted deductions of fact. The court may disregard allegations in the complaint if contradicted by facts established by exhibits attached to the complaint.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

HN47 [blue icon] Motions to Dismiss, Failure to State Claim

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, in part because proof of these elements is in the hands of the opponent.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN48 [blue icon] Antitrust & Trade Law, Sherman Act

The Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal. [15 U.S.C.S. § 1](#). This language cannot be read strictly, or else a vast array of competitive activities could be considered restraints of trade and therefore illegal.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

[HN49](#) [💡] **Conspiracy to Monopolize, Sherman Act**

To establish a claim under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must show: (1) that there was a contract, combination or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule or illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce. The pleader must allege more than a bare legal conclusion; if the facts do not outline or adumbrate a violation of the Sherman Act, the plaintiff will get nowhere by merely dressing them up in the language of antitrust.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > General Overview

[HN50](#) [💡] **Duties & Liabilities, Authorized Acts of Agents**

An entity can incur antitrust liability for the acts of its employees or agents, when acting within the scope of their apparent authority, despite the agent's desire to benefit only him or herself.

Antitrust & Trade Law > Clayton Act > Scope

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

Antitrust & Trade Law > Clayton Act > General Overview

[HN51](#) [💡] **Antitrust & Trade Law, Clayton Act**

Section 3 of the Clayton Act, [15 U.S.C.S. § 14](#), prohibits any person from making a sale or contract for sale of goods or other commodities on the condition, agreement or understanding that the purchaser shall not deal with other commodities or competitors of the seller, where the effect would substantially lessen competition or tend to create a monopoly in any line of commerce. Even if a contract is found to be an exclusive-dealing arrangement, it does not violate the section unless the court believes it is probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected.

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > General Overview

HN52 [+] **Antitrust & Trade Law, Clayton Act**

Section 3 of the Clayton Act, [15 U.S.C.S. § 14](#), applies solely to sellers or lessors, not to purchasers. This conclusion follows from the fundamental antitrust concept that the alleged sins of the seller should not be visited on buyers because of the risk of chilling competition.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Foreign Corporations > General Overview

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

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

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Denial of Allegations

HN53 [+] **Antitrust & Trade Law, Sherman Act**

The Wilson Tariff Act, [15 U.S.C.S. § 8](#), prohibits every combination, conspiracy, trust, agreement or contract between two or more persons or corporations, either of whom is engaged in importing any article from any foreign country when the transaction is intended to operate in restraint of trade or competition, or to increase the market price of articles imported into the United States. Although analogous to [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), the Wilson Tariff Act does not include monopolization or intent to monopolize. Where allegations state a claim under [§ 1](#) of the Sherman Act, dismissal of a Wilson Tariff Act claim is generally inappropriate.

Counsel: [*1] RON DEMIRDJIAN, plaintiff: Lawrence W Schonbrun, Law Offices of Lawrence W Schonbrun, Berkeley, CA.

PACIFIC GAS AND ELECTRIC COMPANY, a California Corporation, defendant: Donald Henry Glasrud, Dietrich Glasrud and Jones, Fresno, CA. Stephen V. Bomse, Heller Ehrman White and McAuliffe, San Francisco, CA.

ALBERTA AND SOUTHERN GAS CO. LTD, defendant: Marie L Fiala, Heller Ehrman White and McAuliffe, San Francisco, CA.

Judges: Oliver W. Wanger, UNITED STATES DISTRICT JUDGE

Opinion by: OLIVER W. WANGER

Opinion

MEMORANDUM OPINION AND ORDERS RE:

1) PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

2) DEFENDANTS' MOTIONS TO DISMISS

I.

INTRODUCTION

In this antitrust action brought under both state and federal law, plaintiffs are a putative class seeking certification under [Federal Rule of Civil Procedure 23\(b\)\(3\)](#). Defendants Pacific Gas & Electric Co. ("PG&E") and Pacific Gas Transmission Company ("PGT"), have filed motions to dismiss plaintiffs' complaint under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

II.

BACKGROUND

Regulatory Scheme

Plaintiffs challenge defendants' acquisition and sale of natural gas from Canada to the California market, alleging antitrust violations. The [*2] issues raised must be understood in the context of the regulatory controls under which the defendants operate.

During the 1950's, PG&E constructed the Alberta-California Pipeline to transport natural gas from Canadian suppliers to California users. During that time, PG&E also incorporated two wholly-owned subsidiaries: 1) Alberta and Southern Gas (A&S), which contracted to purchase gas from 190 Canadian suppliers, P 38 and Exhibit A (listing participants), organized transport of the Canadian gas to the Alberta border, where Alberta Natural Gas Co., Ltd. ("ANG") transports it to the Canadian border; and 2) PGT, which purchases gas from A&S and ships it through its facilities to the California border, where it is sold to PG&E under a service agreement and rate schedule. PP 23-25.

In Canada, natural gas rights are owned by the provinces for the benefit of the provinces' citizens, subject to the interest of any other owner. Canada Constitution Act, § 109 (1930). Alberta regulates gas sales through a removal permit process. Gas Resources Preservation Act, Chapter G-3.1. Before gas may be removed from Alberta, a permit must be approved by the Alberta Energy Resources Control Board ("ERCB"), [*3] and either the Alberta Minister of Energy or the Alberta Lieutenant Governor in Council. *Id.* §§ 2, 4-6, 11, 19.

Under Alberta's Natural Gas Marketing Act, a shipper may not remove gas from Alberta for resale unless, among other requirements, there is a finding of producer support by the Alberta Petroleum Marketing Commission. § 9(1). Purchasers can choose between two pricing formulas: 1) "Netback pricing," under which the actual price paid by the shipper is calculated with reference to a resale price; or 2) a price derived through arbitration. A&S uses the first method. The Alberta Petroleum Marketing Commission can find that producer support exists if producers representing at least 60% of the aggregate of the attributed contract quantities have voted to support the transaction.

After the gas is transported into the United States, the federal regulatory controls come into effect. [HN1↑](#) Sections 4(c) and 4(d) of the Natural Gas Act ("NGA"), 52 Stat. 822-823, [15 U.S.C. §§ 717c\(c\)](#) and [\(d\)](#) require sellers of natural gas in interstate commerce to file their rates with the Federal Energy Regulatory Commission ("FERC"). Under § 4(a) of the Act, 52 Stat. 822, [15 U.S.C. § 717c\(a\)](#), the [*4] rates that a regulated gas company files with the FERC for sale and transportation of natural gas are lawful only if they are "just and reasonable."

Under section 3 of the NGA, [HN2↑](#) the Economic Regulatory Administration ("ERA") must approve the importation of natural gas, and will do so unless the proposed import "will not be consistent with the public interest." [15 U.S.C. § 717b](#). The ERA considers: the competitiveness of the imported gas, the need for the gas, and the security of the supply. See, [Transcanada Pipelines, Ltd. v. FERC, 278 U.S. App. D.C. 299, 878 F.2d 401, 407 \(D.C. Cir. 1989\)](#). As stated in *Transcanada Pipelines*:

The authorization of a given volume of gas at up to a particular price is a decision by ERA that the particular import is in the public interest, and that no market failure has been shown that has or would interfere with the pipeline's acting in its own interest to acquire gas on the most favorable terms.

This ERA process raises a rebuttable presumption that the terms are prudent if freely negotiated and flexible. *Id. at 407-08*. Gas imported by PGT from Alberta is subject to regulation by the ERA. See, *Pacific Gas Transmission Co.*, 1 E.R.A. P 70,591 [*5] (April 2, 1985).

At the state level, [HN3](#)¹ the CPUC has authority to regulate rates charged to the public by the California utilities. A utility cannot change a rate unless the CPUC approves. Cal. Pub. U. Code [§ 454\(a\)](#). All rates and charges must be "just and reasonable." Cal. Pub. U. Code [§ 451](#).

In April, 1989, PG&E requested reasonableness review under its Energy Cost Adjustment Clause, for the 1988-90 period. An ALJ conducted hearings, and issued a preliminary decision on November 15, 1993. On March 22, 1994, the CPUC issued a final 249-page decision, discussing its findings regarding the reasonableness of PG&E's gas procurements from Canada, from February 1, 1988 through December 31, 1990. See, Supplemental Appendices in Support of Motion to Dismiss, No. 1. Because the proceedings were bifurcated, the CPUC will separately issue a ruling which considers remaining electric and gas department reasonableness issues.

Allegations of the Complaint

As a general matter, PG&E has two types of customers: core and non-core. P 29; *see generally, Re Regulatory Framework for Gas Utilities*, [22 CPUC 2d 491](#) (Dec. 3, 1986). Core customers are residential and commercial customers, [*6] whose individual gas usage is small. P 29. Non-core customers are larger industrial users who could, in theory, bargain for alternative sources of supply or price. P 29. The complaint alleges that PG&E used its exclusive control over the PGT pipeline to protect long-term gas contracts with the pool of Canadian gas producers who did business with A&S, by keeping the pipeline filled with A&S gas, such that it was incapable of transporting cheaper gas for non-core customers. P 29. Specifically, PG&E made a core election for 100% of the needs of its largest non-core customer, Utility Electric Generation Department ("UEG"), allegedly owned by PG&E.¹ P 29. This election put more high-priced A&S gas in the pipeline, making it impossible for non-core customers to obtain cheaper gas. P 29.

[*7] During the February, 1988, through October, 1993, time period, PG&E is alleged to have overpaid for Canadian gas, and shut out competition from third-party suppliers, in contravention of the California Public Utilities Commission ("CPUC") direction to provide transportation services for Canadian competitors, and in the wake of deregulation under the Natural Gas Policy Act ("NGPA"). PP 30, 32. PG&E neither purchased from the "spot gas" market,² nor used the "spot gas" market for bargaining leverage in negotiating with Canadian suppliers. As a result, A&S's suppliers purchased spot gas, and in turn resold it to PG&E at an inflated contract price. P at 75.

PG&E dictated the Canadian seller's price, [*8] a price which mirrored higher prices charged by other U.S. suppliers that had pipeline access to California. P 40. This practice is evidenced by the fact that all PG&E's contracts reflect an identical price per million BTUs. P 41. The price set by PG&E is the highest possible, subject to the condition that the core price charged be low enough to keep core election attractive for UEG. P 44. Other than this limitation, PG&E is "financially indifferent" to the prices charged, because those costs were passed on, penny for penny, to PG&E's ratepayers. PP 45, 46. These contracts also had "take or pay" provisions, which required PG&E to purchase unneeded gas or pre-pay for gas not yet needed. P 76. This conduct resulted in PG&E advancing hundreds of millions of dollars to Canadian gas producers for gas not yet taken, and keeping the pipeline full of unneeded, expensive gas. *Id.* PG&E could have replaced at least 50% of expensive A&S gas with lower-cost spot gas. P 78.

¹ Non-core customers can choose to become "elected core" customers and have the utility procure a specified quantity of gas for them as part of the core market. This ensures a steady supply, but reduces a non-core customer's flexibility in negotiating alternative sources of supply.

² "Spot gas" is supplied under short-term contracts, usually of less than thirty days duration. In comparison, "long-term gas" is gas supplied over an extended period of time, such as the twenty-five year A&S contracts. P 34. Spot gas is generally less expensive than gas purchased under long-term contracts. *Id.*

The purpose of the arrangement was to keep the A&S producer price high and to prevent cheaper independent suppliers from getting to PG&E's market. P 43. The arrangement permitted PG&E to hand out millions of dollars annually [*9] in windfalls to Canadian gas producers, give PGT higher profits, and provide PG&E with larger revenues which result in large incentive packages and bonuses for PG&E executives. P 46. A&S officers and directors, and officers and directors of A&S affiliates have board memberships and ownership interests in Canadian gas producers and transporters. P 48.

The complaint alleges the following claims for relief:

First Claim for Relief. Violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), for conspiring to raise or stabilize prices for natural gas in California;

Second Claim for Relief. Violation of the Wilson Tariff Act, [15 U.S.C. § 8](#), for entering into a combination, conspiracy, trust, agreement or contract, in regard to the sale and transmission of natural gas from Canada to California, with intent to operate in restraint of trade;

Third Claim for Relief. Violation of section 3 of the Clayton Act, [15 U.S.C. § 14](#), for entering into a trust and contract to fix prices of natural gas in California, to lessen competition and create a monopoly;

Fourth Claim for Relief. Violation of California's Cartwright Act, for entering into a trust by the [*10] combination of capital, skill or acts to: 1) create restrictions in trade or commerce; 2) increase the price of natural gas in California; 3) prevent competition in the production, transportation, sale and purchase of natural gas in California; and/or 4) fix the price of gas at an artificially high rate, in violation of [California Business and Professions Code section 16720](#). Further, defendants and the A&S pool entered into a trust by entering into agreements: 1) to fix the price of Canadian natural gas; 2) to establish or settle the price at an artificially high rate, which precluded competition; and/or 3) pool, combine, or directly or indirectly unite their interests in connection with the sale and transportation of natural gas from Canada to California, in violation of [California Business and Professions Code section 16720\(e\)](#).

Fifth Claim for Relief. Violation of California's Unfair Business Practices Act, Business and Professions Code section 17000 et. seq., for preventing or destroying competition, and colluding with the A&S pool to violate Business and Professions Code section 17048.

The complaint seeks monetary, declaratory, and injunctive relief.

[*11] Plaintiffs bring this action on behalf of themselves and all persons and entities (except for defendants and their affiliates) who paid for the purchase of natural gas from defendants from February, 1988, through October, 1993. P 16. There are two sub-classes alleged: 1) Public entities, such as the County of Stanislaus, who purchased gas from PG&E for unreasonably high prices; and 2) All other customers of PG&E, such as residential customer Mary Grogan. P 16. Plaintiffs estimate that PG&E has 3.3 to 3.5 million customers. P 18.

In February, 1994, PG&E filed suit against the County of Stanislaus and members of its Board of Supervisors in Stanislaus County Superior Court, No. 303786. The State Court action alleged that the County was *ultra vires* in filing this federal action, in violation of state law based on violations of the Brown Act, had improperly maintained the suit in the name of other counties without consent, and in so doing made an improper and illegal use of public monies. PG&E sought preliminary and permanent injunctive relief against the continued maintenance of the instant federal action. On May 3, 1994, the state court sustained the County's demurrer without leave [*12] to amend.

III.

PARTIES' REQUESTS FOR JUDICIAL NOTICE

Both parties have submitted requests for judicial notice in the form of foreign law, federal and state agency decisions, pleadings and unpublished state court decisions, and pleadings and testimony submitted in CPUC proceedings. Neither party has filed objections to the other parties' requests.

HN4 [↑] [Federal Rule of Evidence Rule 201](#) provides in pertinent part "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A court shall take judicial notice if requested by a party and supplied with the necessary information."

HN5 [↑] Federal courts may "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue." [U.S. ex rel Robinson Rancheria Citizens Council v. Borneo, 971 F.2d 244, 248 \(9th Cir. 1992\)](#).

The parties' requests for judicial notice are granted, although the testimony and pleadings submitted [*13] will be considered for the fact that they exist as submitted, not for the truth of disputed assertions of fact or argument.

IV.

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Legal Standard

HN6 [↑] To maintain an action under Federal [Rule 23\(b\)\(3\)](#), plaintiff must show: 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 in the class; 4) The representative parties will fairly and adequately represent the interests of the class; and 5) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for a fair and efficient adjudication of the controversy.

Discussion

The numerosity requirement is met, as the complaint alleges class sizes ranging from 3.3 to 3.5 million persons. Joinder of that number of persons, representing all PG&E customers in Northern and Central California, is not practicable. The commonality requirement is met, as the complaint alleges all class members [*14] were injured by defendants' conduct in the acquisition, transportation, and sale of natural gas during the class period. All plaintiffs assert the same five claims for relief. There are questions of law or fact common to the class. Defendants do not contend that either the numerosity or commonality requirements have not been met.

Defendants argue plaintiffs have failed to demonstrate that class action treatment is "superior to other available methods for the fair and efficient adjudication of the controversy." [Fed. R. Civ. Pro. 23\(b\)\(3\)](#). Defendants point out the CPUC has already adjudicated the same issues raised by plaintiffs, and has ordered a \$ 100 million "refund" to class members. In assessing the "superiority" requirement, a court may consider whether administrative proceedings which embraced the issue before the court can adequately resolve the controversy. 7A Wright, Miller & Kane, *Federal Practice and Procedure*, § 1779 at 560-61; [Pattillo v. Schlesinger, 625 F.2d 262, 265 \(9th Cir. 1980\)](#).

HN7 [↑] "Whether an administrative adjudication would provide a more advantageous procedure than a class action may depend on the type of remedy that could be awarded by the agency and [*15] the general attitude of the agency toward the issues and problems raised by the claimants." 7A *Federal Practice and Procedure*, at 561.

Defendants point out that the CPUC has already expended considerable effort, in holding 54 days of hearings and examining thousands of pages of briefing and written submissions, and rendering its 250 pages of findings. Defendants argue that any decision by this court would, at minimum, duplicate and possibly negate the CPUC's efforts. Because court adjudication may undermine the CPUC's jurisdiction, court adjudication may disrupt that agency's ability to evaluate utilities according to its own policy goals. Defendants note that the relief sought by plaintiffs is calculated in a similar manner to that used by the CPUC, and that ratepayers will receive duplicative relief if this action proceeds. Defendants point out that they will incur double litigation expenses by proceeding here. Defendants acknowledge that the CPUC cannot award treble damages, but do not discuss whether injunctive relief is available from the CPUC. Defendants question that, if this action were to proceed to a jury trial, every juror would have a direct financial stake in the [*16] outcome, rendering this proceeding inferior to administrative adjudication. Plaintiffs assert that the CPUC considers, but does not adjudicate, antitrust principles. As stated by the California Supreme Court:

By considering antitrust issues, the [Public Utilities] Commission merely carries out its legislative mandate to determine whether the public convenience and necessity require a proposed development. That task does not impinge upon the jurisdiction of the federal courts in federal antitrust cases. . . . The Commission may approve projects even though they would otherwise violate the antitrust laws; it may also disapprove projects which do not violate such laws. Its consideration of antitrust problems is for purposes quite different from those of the courts; it does not usurp their function.

[Northern California Power Agency v. Public Utilities Com., 5 Cal. 3d 370, 378, 96 Cal. Rptr. 18, 486 P.2d 1218 \(1971\).](#)

Although judicial proceedings will require a considerable amount of time and judicial resources, those resources must be expended whether the case proceeds as a class action, or by the named plaintiffs. Much of the legal and factual complexity lies in the issues raised against defendants [*17] by any plaintiff, not because of the size of the class or variation of interests among class member plaintiffs. The CPUC has only a limited ability to issue injunctive relief--a remedy sought by plaintiffs--and no direct jurisdiction over defendant PGT. A finding cannot be made that adjudication before the CPUC is superior to a judicial proceeding.

Defendants challenge the County as an inadequate or atypical class representative, due to alleged lack of statutory authority under California law to represent public entities outside the county. [HN8](#) Capacity to sue and be sued is to be determined by the law of the state in which the district court sits. [Fed. R. Civ. P. 17\(b\)](#). The issue raised by defendants turns on interpretation of a California statute. The Stanislaus Superior Court, in sustaining the County's demurrer without leave to amend, has rejected defendants' contention. Because the state court has ruled adversely to the defendants on the issue, defendants' contention need not be reconsidered here. The state court's decision on the matter of state substantive law concerning standing would be followed in any event. [Erie Railroad v. Tompkins, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 \(1938\).](#)

All prerequisites [*18] of [Rule 23\(b\)\(3\)](#) have been met, plaintiffs' motion for class certification is GRANTED.

V.

DEFENDANTS' MOTION TO DISMISS

Filed Rate Doctrine: Federal Claims

[HN9](#) Antitrust actions in pervasively-regulated areas, such as the natural gas industry, are circumscribed by the "filed rate doctrine."³ See, [Arkansas Louisiana Gas. Co. v. Hall, 453 U.S. 571, 577, 101 S. Ct. 2925, 2930, 69 L. Ed. 2d 856 \(1981\)](#). "The considerations underlying the doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." [Arkansas Louisiana Gas, 453 U.S. at 578-79, 101 S. Ct. at 2930](#). Holding the filed rate doctrine barred a breach of contract claim, because it would require alteration of the filed rate. The Court noted that, in enacting the NGA,

Congress . . . has granted exclusive authority over rate regulation to the FERC. In so doing, Congress withheld authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It would surely be inconsistent with this congressional purpose to permit a state court [*19] to do through breach of contract action what the Commission itself may not do.

³The filed rate doctrine is distinguishable from antitrust immunity, a doctrine invoked by several cases cited by plaintiffs. Compare, [Arkansas Louisiana Gas. Co. v. Hall, 453 U.S. 571, 577, 101 S. Ct. 2925, 2930, 69 L. Ed. 2d 856 \(1981\)](#) (barring claims under filed rate doctrine to dispute involving seller of natural gas), with, [Otter Tail Power Co. v. U.S., 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 \(1973\)](#) (no general antitrust immunity exists under National Gas Act).

Id. at 580, 101 S. Ct. at 2932. The filed rate doctrine is not limited to "rates" *per se*, but applies to any activity under the controlling agency's regulatory power. Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953, 106 S. Ct. 2349, 2357, 90 L. Ed. 2d 943 (1986) (utility company could not obtain more FERC-regulated power than FERC permitted).

Although applied in earlier cases, the genesis of the filed rate doctrine is most often attributed to Keogh v. Chicago & Northwestern Railway Co., [*20] 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922). In *Keogh*, a shipper brought suit under section 7 of the Antitrust Act, against eight railroad companies and twelve individual defendants, who were officers and agents of transporters of freight. The shipper alleged that the defendants had entered into an agreement which set higher rates than if no agreement existed, and that the higher rates eliminated competition. The shipper's claims were, that, absent the conspiracy: 1) the rates charged would have been lower; and 2) the shipper's business would be increased. The Supreme Court held that the plaintiff could not challenge the rates, which had been approved by the Interstate Commerce Commission:

Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. 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.* And they are [*21] *not affected by the tort of a third party.* This stringent rule prevails, because otherwise, the paramount purpose of Congress--prevention of unjust discrimination--might be defeated. (Emphasis added)

Keogh, 260 U.S. at 163 (citations omitted). The Court found two additional obstacles to the relief sought by the shipper. First, plaintiff could not show that the hypothetical lower rate sought would have conformed to ICC requirements, because "by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination." Id. at 164. Second, the damages alleged were purely speculative, in that lowered rates might have been passed on to the shipper's customers or ultimate consumer. Id. at 165.

Under *Keogh*, allegations that a defendant charged rates other than those filed with the regulatory agency cannot give rise to an injury to business or property prerequisite to recovery under the antitrust laws. See also, Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986) (reaffirming *Keogh*). A complainant "cannot [*22] litigate in a judicial forum its general right to a reasonable rate, ignoring that qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion." Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251-52, 71 S. Ct. 692, 695, 95 L. Ed. 912 (1951).

Although neither the Supreme Court nor the Ninth Circuit have addressed the issue, some courts have extended the filed rate doctrine to bar claims filed with state--as distinguished from federal--agencies. Taffet v. Southern Co., 967 F.2d 1483, 1494 (11th Cir.), cert. denied, 506 U.S. 1021, 113 S. Ct. 657, 121 L. Ed. 2d 583 (1992); E.J. Inc. v. Northwestern Bell Telephone Co., 954 F.2d 485 (8th Cir.), cert. denied, 504 U.S. 957, 112 S. Ct. 2306, 119 L. Ed. 2d 228 (1992) ("We see no reason to distinguish between rates promulgated between state and federal agencies,"); Sun City Taxpayers' Assoc. v. Citizens Utilities Co., 847 F. Supp. 281 (D.Conn. 1994).

HN10 [↑] The filed rate doctrine does not bar all antitrust claims against regulated entities. As stated by the Supreme Court:

. . . *Keogh* simply held that an award of treble damages is not an available remedy for a private shipper [*23] claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation.

Square D, 476 U.S. at 421, 106 S. Ct. at 1929. For example, in Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 679 (9th Cir. 1985), the Ninth Circuit held that a producer of sterilized milk could bring an action against an interstate shipper. The complaint alleged that competitor dairies conspired with the shipper to manipulate shipping tariffs to charge almost double for sterilized milk, compared with other milk products, and thereby kept the producer from entering the Alaskan market. The court held that plaintiff--a customer of defendant shipping company--was not barred by *Keogh*, although interstate shipping is subject to ICC regulation and rate-setting:

[Plaintiff] did not allege merely that illegal rates were set, but in addition that [the shipper] undertook further alleged anticompetitive acts by attempting to prevent a prospective distributor from entering into an agreement with [plaintiff]. Because such activities *would be beyond the scope of ICC's jurisdiction*, the antitrust action was not subject to dismissal. . . .

Barnes, [*24] 759 F.2d at 679 (emphasis added).

Pike County Light & Power Co. v. Pennsylvania Public Utility Commission, 77 Pa. Commw. 268, 465 A.2d 735 (Pa. Commw. Ct. 1983) permits state agency review of conduct outside of the federal regulating agency's jurisdiction. There, a state PUC was not barred by the filed rate doctrine from reviewing retail power rates, where only wholesale rates were subject to federal regulation:

In carrying out its regulatory function, the FERC examines the cost of service data of Orange & Rockland to determine that its wholesale rates provide a fair return to the utility's stockholders without being unfair to Orange & Rockland's purchasers. The FERC does not analyze Pike's cost of service data or purchased power alternatives in making its determination. The FERC focuses on Orange & Rockland to determine whether it is just and reasonable for that company to charge a particular rate, but makes no determination of whether it is just and reasonable for Pike to incur such a rate as an expense. The PUC, on the other hand, . . . focuses on Pike and its cost of service data to determine whether it is reasonable for Pike to incur such costs in light of available alternatives. [*25] . . . The regulatory functions of the FERC and the PUC thus do not overlap, and there is nothing in federal legislation which preempts the PUC's authority to determine the reasonableness of a utility company's claimed expenses.

Pike County, 465 A.2d at 738.⁴ In Kentucky West Virginia Gas v. Pennsylvania Public Utility Comm., 837 F.2d 600, 609 (3d Cir.), cert. denied, 488 U.S. 941, 102 L. Ed. 2d 355, 109 S. Ct. 365 (1988), the Third Circuit relied on *Pike County* to permit state agency review of natural gas rates. There, a utility was alleged to have purchased gas from an affiliate, despite availability of lower cost gas from other sources, and passed this added cost onto consumers. In finding that the PUC did not violate the supremacy clause in reviewing the reasonableness of the utility's actions, the court stated:

While it is true that NGA does not expressly preclude FERC from regulating the entire spectrum of a wholesale transaction, exclusive regulation is not the declared intent of the statute. Indeed, retail sales are expressly excluded from federal regulation by 15 U.S.C. § 717(b), and accordingly, companies engaging only in retail sales are also necessarily excluded from [*26] regional regulation. . . . Since the question here of whether the retailer acted with economic prudence in purchasing from one wholesaler rather than another is never before FERC, the PUC is not regulating the same activity.

⁴When PG&E presented the filed rate argument in the CPUC proceedings, the CPUC relied on the *Pike County* exception in rejecting PG&E's argument, stating: "PG&E applies the filed-rate doctrine too broadly. The doctrine does not preclude a state agency from reviewing whether a utility made reasonable purchasing decisions, even though it may not review the FERC-approved wholesale rate." Re Pacific Gas and Electric Co., 135 PUR 4th 424, 432 (CPUC July 22, 1992).

Id., 837 F.2d at 608-09. *Nantahala*, 476 U.S. at 972, 106 S. Ct. at 2360, acknowledges the Pike County exception in dicta, observing that a state agency could challenge whether "a particular quantity of power procured by a utility from a particular source could be deemed unreasonably excessive, if lower cost power is available elsewhere, even though the higher cost of power actually purchased is obtained at a FERC-approved, and therefore reasonable, price." (emphasis in original); accord, *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 373, 108 S. Ct. 2428, 2440, 101 L. Ed. 2d 322 (1988) (dicta). Pike County has not been extended, beyond permitting state regulatory agency review, to authorize private enforcement actions by ratepayers in court.

[*27] *Keogh* does not bar claims of potential competitors. For example, in *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3rd Cir.), cert. dismissed, 114 S. Ct. 625 (1993), the Third Circuit examined antitrust allegations surrounding shipping and transport of iron ore in the Lake Erie region. Plaintiffs alleged that a defendant railroad company had conspired with others to halt technical innovations which would have compromised the railroad's monopoly on iron ore transportation. The court found that plaintiff steel companies--who were customers of defendant railroad--were not barred by *Keogh* in asserting antitrust claims:

We recognize that the success of anticompetitive non-rate activity would coincidentally implicate rates promulgated under the jurisdiction of the ICC. It is fully consistent with *Keogh*, however, to accept these rates as lawful and nonetheless to conclude that through non-rate activities, particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors, the railroads effectively retarded entry of lower cost competitors to the market. The instrument of damage to the steel companies [*28] was the absence of the lower-cost combination. In contrast, the Supreme Court in *Keogh* made it clear that "the instrument by which *Keogh* is alleged to have been damaged is rates approved by the Commission." *260 U.S. at 161, 43 S. Ct. at 49*.

The Third Circuit found that potentially lower rates were only a "by-product" of the defendants' conduct:

Even strained to simplification, the railroads' anticompetitive behavior involved far more than the assessment of rates. The mere measure of damages, which begins with an ICC-approved rate, does not define the nature of the conspiracy.

Id., 998 F.2d at 1160; cf, *Florida Municipal Power Agency v. Florida Power and Light Co.*, 839 F. Supp. 1563, 1570-71 (M.D.Fla. 1993) (antitrust damages not available where a reasonable rate was an "integral part" of remedy sought, because FERC has sole authority to determine reasonableness of rates).

Defendants contend that plaintiffs' action is barred under the filed rate doctrine, for the failure to allege any antitrust injury beyond the claimed harm resulting from gas purchases at the filed rate. Defendants argue the allegedly inflated prices were filed and approved [*29] at three separate domestic regulatory levels: 1) The ERA, which specifically reviews and approves the International Contract under which PGT imports natural gas from Canada, and which found its terms were "competitive in the market served;" 2) The FERC, which approved as "just and reasonable" the Service Agreement and tariff schedule submitted by PGT, establishing the price at which PG&E buys Canadian gas from PGT; and 3) The CPUC, which approves the retail rates at which plaintiffs, as customers, purchase gas from PG&E. At P 25, the complaint alleges:

PGT owns and ships the gas through its own facilities to the California border, where it is sold to PG&E under a service agreement and rate schedule. PG&E then sells the Canadian gas to its millions of customers, passing on to them the excessive amounts paid by A&S for the purchase of gas, as well as unreasonable gas expenses associated with the transmission of the gas which totals hundreds of millions of dollars over the class period.

Plaintiffs' complaint alleges, at P 45:

PG&E and PGT were guaranteed recovery in their resale rates of 100 percent of their respective gas purchase costs, and thus lacked any [*30] incentive to minimize those costs. *These costs were passed on penny for penny* to PG&E's ratepayers.

(emphasis added). Plaintiffs' complaint alleges, at P 78:

The damages for the class period arise from the difference between what PG&E paid the Alberta producers based on an anti-competitive system which was designed to keep the price artificially high, and a substitute price that could have been obtained by PG&E if it had not fixed prices. This price differential would be applied to the amount of spot gas that could be purchased from independent producers outside the cartel which could replace A&S gas during the class period including any such gas available from reserves. The reasonable price that PG&E could have negotiated for that independent gas was as low as the spot price for Alberta gas calculated in a manner that takes into account what the price would have been if PG&E made the PGT pipeline accessible, and if PG&E used its leverage to free up access to NOVA and ANG as well. . . . The damage to the class is at least as much as that price differential multiplied by the replacement volume of gas, and, depending on how the overcharges are allocated [*31] between particular users.

(emphasis added). At P 80, the complaint alleges:

By paying its Canadian suppliers in order to get out of the high-priced, long-term contracts, PG&E again victimized the class members who had the substantial costs associated with the buy out passed on to them.

Plaintiffs argue the challenged activity is outside the regulatory agencies' jurisdiction, and that there is consequently no filed rate because no federal agency reviews the purchase price under the A&S contracts.

To determine whether the disputed sales are subject to federal regulation, some insight into the review process is necessary. HN11[] The Natural Gas Act ("NGA"), 15 U.S.C. §§ 715 et. seq., was intended to protect interstate gas consumers from pipeline monopoly power. See, Sen. Doc. No. 92, part 84A, 70th Cong., 1st Sess. 588-91 (1935). Section 3 of the NGA requires the government to authorize an import of natural gas unless "the proposed importation will not be consistent with the public interest." 15 U.S.C. § 717b. Congress did not define "public interest," "thus giving broad discretion to the government [agencies] in establishing criteria that an importer [*32] must fail to meet for the government to deny an authorization to import." New Policy Guidelines and Delegation Orders from Secretary of Energy to Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas and Delegation Orders No. 0204-111 and No. 0204-122, 49 Federal Register, 6684, 6687 (1984) ("1984 DOE Guidelines") (Defendants Appendix Tab 14).

In 1973, the Canadian National Energy Board, after finding that gas exports were under-priced in relation to alternative fuels in the U.S., persuaded exporters to increase prices. In 1976, a uniform border price was established for all Canadian exports. These export prices were evaluated on a case-by-case basis, using the price of alternative fuels in the relevant geographic region as a basis for comparison.

HN12[] The Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 et. seq., was enacted to stimulate the interstate flow of gas by reducing wellhead price regulation by the Federal Energy Regulatory Commission ("FERC"). Maryland People's Counsel v. F.E.R.C., 245 U.S. App. D.C. 377, 761 F.2d 780, 782 (D.C.Cir. 1985). Also about this time, federal agencies were questioning whether the [*33] method of evaluating natural gas import prices was competitive. A new system was developed, which measured natural gas imports against a composite of nationwide fuel oil prices. By 1983, various federal agencies concluded that more flexibility was needed, using direct buyer-seller negotiations, under a simplified regulatory review process.

ERA Rate Review

In 1984, the DOE promulgated policy guidelines, establishing new criteria for the public interest standard of evaluating import prices:

This policy approach presumes that buyers and sellers, if allowed to negotiate free of constraining governmental limits, will construct competitive import agreements that will be responsive to market forces over time. The specific commercial terms and conditions of a particular arrangement should be negotiated by the parties pursuant to the discrete requirements of the buyer's market and not directed by government regulators. The government's role in authorizing such agreements should be to evaluate whether the arrangement assures the competitiveness of the import throughout the contract period and to provide a review process whereby affected parties have sufficient opportunity [*34] to demonstrate that the import [price] is not consistent with the public interest.

1984 DOE Guidelines, at 6687. The 1984 Guidelines, "set forth certain rebuttable presumptions and contemplate flexible application of consideration to individual cases." *Id.*

The terms and conditions of the gas purchase contract, taken together, must provide a supply of gas that the importer can market competitively over the term of the contract. The contract arrangement must be sufficiently flexible to permit pricing and volume adjustments, as required by market conditions. Contract flexibility is a function of certain provisions which may include, but are not limited to: the volume of gas under the contract, base price, price review or adjustment mechanisms, take-or-pay obligations, make-up provisions, length of the contract, and other terms which may affect the marketability for gas. . . .

Import agreements that are negotiated between buyer and seller should result in contracts that provide a competitive energy source for the duration of the import.

Id. at 6688. Under these guidelines, "so long as flexibility as to price or volume allowed the buyer to [*35] respond to changing market forces, the gas would be presumed competitive in price. An opponent of the proposed import could, however, rebut the presumption." *Panhandle Producers v. Economic Regulatory Administration, 262 U.S. App. D.C. 43, 822 F.2d 1105, 1107 (D.C.Cir. 1987)*. The need for natural gas in the proposed market, national energy requirements, and the security of supply are also relevant to the public interest inquiry. Altogether, the 1984 DOE Guidelines were "highly flexible, creating only rebuttable presumptions and leaving parties free to assert 'other factors.'" *Panhandle Producers, 822 F.2d at 1113*.

On November 1, 1984, the ERA conditionally authorized PGT to import from A&S a quantity of natural gas, through October 31, 1993, subject to a showing that the import arrangement would remain competitive in PG&E's market. DOE/ERA Opinion and Order No. 63. On April 2, 1985, the ERA completed the approval process of PGT's contract with A&S:

The substantial reduction in PGT's take-or-pay obligations, the elimination of its minimum physical take obligations, the reduction in the price of the Canadian gas imported by PGT, and the flexibility provided by the semi-annual review and [*36] redetermination provisions amply demonstrate that PGT's import arrangement is competitive and market-responsive, and can be expected to remain so over the term of the underlying contract. . . . The revised gas sales contract allows PGT to negotiate price changes, as was recently done to reduce the commodity rate, in order for the Canadian gas to remain competitive. It is not our intention to intervene in the negotiation of such contract adjustments so long as PGT is operating within the terms of its existing import arrangement.

Pacific Gas Transmission Company, DOE/ERA Opinion and Order No. 63A, at P 72,386 (Defendants Appendix Tab 15). Under this approval, PGT was required to file its import prices under the A&S international contract, specifically:

File with the ERA in the month following each calendar quarter, quarterly reports showing, by month, the quantities of gas imported, the average price paid through MMBtu for both the demand and commodity components, and the average delivered price at the Canadian border per MMBtu.

On September 12, 1989, PGT filed an unopposed application to extend the import authorization through October 31, 2005, under [*37] the existing gas sales contract with A&S, for delivery to PG&E for use in California. The Office of Fossil Energy⁵ ("FE") granted the extension, stating:

The guidelines direct DOE to look for, as indicia of competitiveness, flexible contract arrangements which permit the parties to respond to changing market conditions over the life of the import. The PGT/Alberta and Southern gas purchase contract provides such flexibility in the form of semi-annual price review and redetermination provisions. Previously, in issuing Order 63-A, DOE concluded that PGT's import arrangement based on this same gas purchase contract was competitive and would remain so over the term of the contract

⁵ In 1989, the Department of Energy transferred authority over the natural gas import and authorization program from the ERA to the Office of Fossil Energy ("FE"). Delegation Order 0204-127, **54 Fed. Reg. 11436 (1989)** (Defendants Appendix, Tab 13).

arrangement. There is no information in the record of this proceeding on which to base a different conclusion for the proposed extended term of the import arrangement.

Pacific Gas Transmission Company, DOE/FE Opinion and Order No. 387, 1 FEP 70,371, 71,422 (March 6, 1990).

[*38] FERC Rate Review

Once Canadian gas enters the PGT pipeline at the United States border, jurisdiction over its transportation and sale passes to the FERC. Section 4 of [HN13](#) [↑] the NGA requires the FERC to ensure that "all rates and charges made, demanded or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission . . . shall be just and reasonable." [15 U.S.C. § 717c\(a\)](#). PGT must:

File with the Commission . . . schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

[15 U.S.C. § 717c\(c\)](#). The 1984 DOE Guidelines restrict the scope of FERC review of imported gas arrangements:

In regulatory decisions on a gas supply authorized for importation, the Commission will adopt the terms and conditions attached by the ERA Administrator to the import authorization, thus acting consistently with the determinations [*39] made by the Administrator and the policy considerations reflected in the authorization.

The FERC can reclassify costs to the extent reclassification is consistent with ERA import authorizations. [Transcanada Pipelines Ltd. v. F.E.R.C., 278 U.S. App. D.C. 299, 878 F.2d 401, 409 \(D.C.Cir. 1989\)](#). For example, the FERC can exclude production and gathering costs for both domestic and Canadian natural gas, because the FERC has jurisdiction to ensure that Canadian suppliers are treated no differently than domestic suppliers. [Natural Gas Pipeline Company of America, 39 FERC P 61,218](#) (Opinion No. 256-A May 27, 1987) (Defendants Supplemental Appendix, Tab 14); [Transcanada Pipelines, 878 F.2d at 411](#) (upholding FERC actions taken "to avoid a regulatory distortion that would have resulted in Canadian gas enjoying a competitive disadvantage over domestic gas, in accordance with ERA's policy that domestic and imported gas should be treated the same"). The FERC has also determined whether costs of reforming, restructuring or terminating existing supply contracts between A&S and its suppliers, the costs of settling related claims by Canadian gas suppliers, and the costs of reforming or terminating the [*40] existing International Contract between A&S and PGT were recoverable costs. [Pacific Gas Transmission Company, Order on Compliance with Restructuring Rule and Related Offer of Settlement, 64 FERC P 61,051](#) (July 12, 1993) (ruling such costs were recoverable in settlement). But the FERC was not delegated jurisdiction to "second guess" the ERA's reasonableness determination:

The authorization of a given volume of gas at up to a particular price is a decision by the ERA that the particular import is in the public interest, and that no market failure has been shown that has or would interfere with the pipeline's acting in its own interest to acquire gas on the most favorable terms. For FERC to take a second look at the arrangement between pipeline and exporter and decide whether the pipeline did in fact arrange reasonably prudent terms would be to say that the Commission may reevaluate either ERA's factual determinations or its policy. This, however, is what FERC is specifically prohibited from doing. See 1984 Guidelines, 49 Fed. Reg. at 6689.

[Transcanada Pipelines, 878 F.2d at 407. HN14](#) [↑] "FERC has no authority over how foreign producers or pipeline suppliers bill [*41] their costs through to importers. FERC's first access for regulating imported gas rates is at the pipeline-to-customer stage." [Transcanada Pipelines, 878 F.2d at 411](#). As the FERC noted in [Pacific Gas Transmission Company, 64 FERC P 61,052, at 61,484](#):

The Commission has no jurisdiction to bar the passthrough of any portion of PGT's gas costs or to modify its gas import and purchase agreements. The Commission's authority in this regard is with respect to such matters as the classification of costs in the pipeline's rates and even then only if such classification is consistent with DOE/FE's import authorizations. The Commission's mandate under its authority delegated to it

from DOE/FE is "to ensure that the costs of Canadian and domestic gas are treated the same so that there be no preference for either source of supply." Permitting PGT to resell Canadian gas at the Canadian border at market-based rates is consistent with that mandate in that pipeline wellhead or field resales of domestically-produced gas, is similarly regulated on a light-handed market based pricing basis.

(footnote omitted).

CPUC Rate Review

HN15 In California, utilities must seek [*42] permission from the CPUC to charge additional rates or change rates, and are subject to the CPUC's finding that such rates are "just and reasonable." [Cal. Pub. Util. Code §§ 451, 454\(a\), 701](#). The CPUC conducts annual reasonableness reviews of PG&E's gas purchases to serve core procurement needs. [Cal. Pub. Util. Code § 728](#) ("the commission shall determine and fix, by order, the just, reasonable, or sufficient rates."); see also *Re New Regulatory Framework for Gas Utilities*, [22 C.P.U.C. 2d 491, 530](#) (December 3, 1986) (Defendants Appendices, Tab 21). The CPUC's Division of Ratepayer Advocates ("DRA"), created pursuant to authority granted in the [California Public Utilities Code section 309.5](#), participates in the reviews, representing ratepayer interests.

The CPUC has completed a reasonableness review for 1988-90. *Pacific Gas and Electric Company*, Decision 94-03-050 (March 16, 1994). According to defendants, corresponding reasonableness reviews for 1991, 1992 and 1993 are in progress. Defendants' Memorandum of Points and Authorities, at p.17:12-14. In the 1988-90 reasonableness review, the CPUC noted its jurisdiction to consider PG&E's conduct in negotiating contracts with Canadian [*43] suppliers:

To the extent PG&E's actions as a price negotiator may have increased the ultimate costs ultimately charged to PG&E's retail customers, we may properly scrutinize such actions and compare them against other strategies which PG&E might have pursued. The focus of our review is upon PG&E's actions.

The CPUC examined PG&E rates based on the alternatives available outside the A&S pool:

A key part of our price analysis is to define the market in which PG&E could have procured Canadian gas based on supply alternatives to the A&S pool. Given the range of prices within which gas was sold during the recent periods, we assess a bargaining range within which a fair price could be negotiated between PG&E and the Alberta producers. Accordingly, we compute an overall savings assuming PG&E had replaced a portion of its gas from the A&S pool with other Alberta gas.

The CPUC reviewed PG&E's negotiating conduct in thorough detail, ultimately issuing an over-200 page opinion, discussing its assessment of PG&E's use of the voter pool and failure to use one-on-one negotiation.

HN16 "The focus for determining whether the filed rate doctrine applies is the impact [*44] the court's decision will have on agency procedures and rate determinations." [K.J. Inc., 954 F.2d at 489](#). Judicial review of activities beyond the scope of the agencies' jurisdiction do not violate the filed rate doctrine. [Barnes, 759 F.2d at 679](#). The focus of plaintiffs' complaint is on the method of contract formation between A&S and the Canadian suppliers, and defendants' alleged failure to permit market entry by more competitive sources of natural gas supply. ERA/FE review does not examine A&S's contractual relationship with Canadian suppliers. ERA/FE opinions scrutinize PGT's contractual relationship with A&S, not A&S's relationship with the producers. According to the facts alleged in the complaint, however, the prices paid in Canada are passed through "penny for penny" to PG&E customers. Complaint, at P 45. According to that allegation, although the ERA/FE did review the conduct at issue in the complaint, the ERA/FE reviewed the price of gas paid by A&S as a component of the A&S-PGT international contract when the gas enters the U.S. Plaintiffs do not dispute that ERA review of import prices for natural gas is to ensure such prices are competitive with domestic market [*45] conditions over time. Plaintiffs' complaint alleges injury in the form of higher utility rates, passed on "penny for penny" to plaintiff ratepayers:

PG&E then sells the Canadian gas to its millions of customers, passing on to them the excessive amounts paid by A&S for the purchase of gas, as well as unreasonable gas expenses associated with the transmission of the gas which totals hundreds of millions of dollars over the class period.

Complaint, at P 25. To succeed in showing injury for an antitrust violation, plaintiffs cannot presume federal agencies would have approved lower rates:

The burden resting on plaintiff would not be satisfied by provision that some carrier would, but for the illegal conspiracy, have maintained a lower rate than that published. It would be necessary for the plaintiff to prove, also, that the hypothetical rate would have conformed to the requirements of the Act. . . . But by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination. And that hypothetical question is one with which plaintiff would [*46] necessarily be confronted at trial.

Keogh, 260 U.S. at 163-64.

In Arkansas Louisiana Gas, 453 U.S. at 582-83, 101 S. Ct. at 2932, vacating the judgment of the Louisiana Supreme Court which awarded damages for breach of contract to a natural gas supplier, the Supreme Court emphasized:

In the case before us, the Louisiana Supreme Court's award of damages to respondents was necessarily supported by an assumption that the higher rate respondents might have filed with the [Federal Energy Regulatory] Commission was reasonable. Otherwise, there would have been no basis for that court's conclusion that the Commission would have approved the rate. But under the filed rate doctrine, the Commission alone is empowered to make that judgment, and until it has done so, no rate other than the one on file may be charged.

The Court rejected the argument that breach of contract damages could be premised on a rate differential:

HN17[] Under the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the [*47] policy which has been adopted by Congress. Moreover, to permit parties to vary by private agreement the rates filed with the Commission would undercut the clear purpose of the congressional scheme: granting the Commission an opportunity in every case to judge the reasonableness of the rate.

Id. at 582, 101 S. Ct. at 2933. HN18[] The filed rate "cannot be varied or enlarged by either contract or tort" of the regulated entity. Square D, 476 U.S. at 416-17, 106 S. Ct. at 1922 (quoting Keogh, 260 U.S. at 163, 43 S. Ct. at 49); Milne Truck Lines, Inc. v. Makita U.S.A., Inc., 970 F.2d 564, 572 (9th Cir. 1992).

According to the complaint, the challenged purchases were made by A&S, PG&E's wholly-owned subsidiary, and the alleged unavailability of the PGT pipeline to carry lower cost gas was purportedly caused by PGT's excessive purchases of higher priced gas. A&S is not regulated by federal or state authorities. PGT is not regulated by the CPUC. Re Pacific Gas and Electric Co., 137 PUR 4th 346, 348-49 (Oct. 21, 1992); *but see, Application of Pacific Gas and Electric Co.*, CPUC Decision 86-03-012 (March 5, 1986) (Defendants Supplemental Appendix, Tab 26) ("This commission [*48] regards the operation of PGT, a major interstate pipeline shortly to be 100% owned by PG&E, as coming within the purview of our reasonableness reviews; and PGT's transportation policy or lack thereof would naturally be a subject of any such review"). Nonetheless, the Supreme Court has acknowledged the weight of authority applies the filed rate doctrine to conduct engaged in by closely related entities. Nantahala Power and Light, 476 U.S. at 965, 106 S. Ct. at 2356 (citing cases) noting "these decisions are properly driven by the need to enforce the exclusive jurisdiction vested by Congress in FERC over the regulation of interstate wholesale utility rates"). As the courts noted in Taffet, 967 F.2d at 1494 and E.J. Inc., 954 F.2d at 494, HN19[] no meaningful distinction exists between conduct regulated by state--as distinguished from federal--entities; "the filed rate doctrine applies whether the rate in question is approved by a federal or state agency."

The FERC has expressly disclaimed any jurisdiction "to modify PGT's gas import and purchase agreements," but does ensure that costs are classified similarly for all sources of supply. As stated in [Pacific Gas Transmission Company, I](#)^{*49} [64 FERC P 61,052, at 61,484](#): "The Commission's mandate under its authority delegated to it from DOE/FE is 'to ensure that the costs of Canadian and domestic gas are treated the same so that there be no preference for either source of supply.'" The FERC ruled that PGT's costs of reforming, restructuring or terminating existing A&S supply contracts with Canadian producers, PGT's costs of settling related claims by Canadian gas suppliers, and the costs of reforming or terminating the existing International Contract between A&S and PGT are recoverable costs. [Pacific Gas Transmission Company, Order on Compliance with Restructuring Rule and Related Offer of Settlement, 64 FERC P 61,051](#) (July 12, 1993). According to facts alleged in the complaint such costs paid for Canadian gas are necessary components of rates filed with the FERC.

Defendants point out the CPUC exercised its jurisdiction to examine PG&E's role in setting the terms of A&S contracts with Canadian suppliers. In conducting its reasonableness reviews, the CPUC examines the rates negotiated in Canada. See [Pacific Gas and Electric](#), Decision 94-03-050 (March 22, 1994). Courts considering the issue have concluded that [*50] [HN20](#)[↑] the filed rate doctrine bars claims filed with state--as distinguished from federal-agencies. [Taffet, 967 F.2d at 1494](#); [E.J. Inc., 954 F.2d at 494](#). Arguably, the CPUC regulation displaces the court's jurisdiction under the filed rate doctrine. [HN21](#)[↑] The filed rate doctrine "contains one important caveat: The filed rate is not enforceable if the [regulating agency] finds the rate to be unreasonable." [Maislin Industries v. Primary Steel, Inc., 497 U.S. 116, 110 S. Ct. 2759, 2767, 111 L. Ed. 2d 94 \(1990\)](#); [City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 930-31 \(2d Cir. 1981\)](#). Here, the CPUC disapproved of some of PG&E's purchasing strategy. But this does not permit court adjudication of plaintiffs' claims, as the Supreme Court has noted that:

None of our cases involving a determination by the [regulating agency] that the carrier engaged in an unreasonable practice have required departure from the filed tariff schedule altogether; instead, they have required merely the application of a different filed tariff.

[Maislin Industries, 497 U.S. at 130 n.11, 110 S. Ct. at 2767 n.11](#). The CPUC has completed its reasonableness review for 1988-90, and filed rates have [*51] been fixed to bar plaintiffs' claims for that time period. The class period extends from February, 1988, through October, 1993. The pendency of administrative proceedings bars court adjudication until that process is complete. [Reiter v. Cooper, 507 U.S. 258, 113 S. Ct. 1213, 1220, 122 L. Ed. 2d 604 \(1993\)](#).

The complaint, at P 78, seeks damages "arising from the difference between what PG&E paid the Alberta producers based on the anticompetitive system which was designed to keep the price artificially high and a substitute price that could have been obtained by PG&E if it had not fixed prices." Unlike the theory presented in [Lower Lake Erie, 998 F.2d at 1160](#), plaintiffs do not allege that, absent anti-competitive conduct, ratepayers would have access to alternative sources of fuel and "no longer be captive customers of" PG&E. See also, [Barnes, 759 F.2d at 679](#). Nor do plaintiffs allege injury based on an inability to compete as a non-core customer. [Lower Lake Erie, 998 F.2d at 1161](#) ("competitors are not the intended beneficiaries of public utility regulation"); [Pinney Dock and Transport Co. v. Penn Central Corp., 838 F.2d 1445](#) (6th Cir.), cert. denied, 488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 (1988); see generally [*52] Martin V. Kirkwood, *Distributor Bypass in the Deregulated Gas Industry*, [39 Cath. U.L. Rev. 1157 \(1990\)](#) (noting non-core industrial customer's ability to compete with traditional natural gas distributing companies). At oral argument, plaintiffs referred to an injury suffered by non-core customers, forced by PG&E's conduct to take the core election. But the present complaint does not specify relief is sought for non-core customers. See Complaint P 16 (defining class members as "purchasers"). The complaint seeks recovery only for "excess prices paid to the cartel members [which] were passed on to the class members and consumers." As in *Keogh*, no antitrust injury beyond the filed rate has been alleged.

Plaintiffs argue the filed rate doctrine does not bar their claims, because the relevant federal and state entities do not adjudicate antitrust concerns, nor do they have the ability to award treble damages. Such concerns are not relevant to whether the filed rate doctrine applies. [Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 71 S. Ct. 692, 95 L. Ed. 912 \(1951\)](#); [Arkansas Louisiana Gas, 453 U.S. at 582, 101 S. Ct. at 2933](#). [HN22](#)[↑] "The filed rate doctrine [*53] recognizes that where a legislature has established a scheme for utility rate-

making, the rights of the rate-payer in regard to the rate [paid] are defined by that schedule." [Taffet, 967 F.2d at 1490](#). Plaintiffs have identified no legal right to pay any other rate than that established by the ERA/FE, the FERC, and CPUC. Plaintiffs have not alleged legally cognizable injury.

Defendants' motion to dismiss plaintiffs' antitrust treble damage claim is GRANTED. Plaintiffs have sought leave to amend if the motion is granted. They shall have ten (10) days to amend. This determination does not address plaintiffs' claim for injunctive relief, which was not a subject of defendants' motion. See also [Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 \(1945\)](#).

Filed Rate Doctrine: State Law Claims

In *Nantahala*, the Supreme Court held that [HN23](#)[[↑]] the filed rate doctrine applies not only to federal court review, but as a matter of federal supremacy to state law causes of action that conflict with or interfere with federal authority over the same activity. [Id., 476 U.S. at 964, 106 S. Ct. at 2355-56](#); see also [Chicago and Northwestern Transportation Co. v. Kalo](#) [*54] *Brick & Tile Co.*, 450 U.S. 311, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981) (state law cause of action barred by *Supremacy Clause*, due to conflict with federal regulation by Interstate Commerce Commission); [Arkansas Louisiana Gas](#), 453 U.S. at 582, 101 S. Ct. at 2933 (same, for FERC-filed rates for the sale of natural gas).

Plaintiffs cite [Cellular Plus v. Superior Court](#), 14 Cal. App. 4th 1224, 1243, 18 Cal. Rptr. 2d 308, 319 (1993), which held:

We decline to follow the *Keogh* and *Square D* decisions insofar as they would preclude Cellular Plus from bringing a cause of action for price-fixing under the Cartwright Act. We conclude the strong public policy of the Cartwright Act encouraging free and open competition and competitively established prices applies even to companies regulated by the PUC. If we were to deny Cellular Plus a cause of action merely because the PUC had approved the prices as "reasonable" while ignorant of the alleged price fixing agreement, we would be implicitly encouraging regulated companies to engage in anticompetitive price fixing activities by reason of denying plaintiffs the major private enforcement threat of treble damages under the Cartwright Act.

[*55]

Cellular Plus distinguished *Keogh* and *Square D* on the grounds that the action was not a challenge to the filed rates:

Cellular Plus includes not only individual customers, but also corporate sales agents who do not claim they paid higher prices but only that they lost sales as a result of the alleged price fixing conspiracy.

[Cellular Plus](#), 14 Cal. App. 4th at 1242, 18 Cal. Rptr. 2d at 318. This aspect of *Cellular Plus* is consistent with federal authority. See [Lower Lake Erie](#), 998 F.2d at 1161; [Pinney Dock and Transport Co. v. Penn Central Corp.](#), 838 F.2d 1445 (6th Cir. 1988) (filed rate doctrine does not bar competitor's claims). The *Cellular Plus* decision by an intermediate state appellate court declined to apply the filed rate doctrine to a Cartwright Act price fixing conspiracy in the cellular phone industry, primarily for the reasons that the reach of the Cartwright Act "is broader in range and deeper than the Sherman Act . . . (" [Cianci v. Superior Court](#) (1985) 40 Cal. 3d 903, 920, 221 Cal. Rptr. 575, 710 P.2d 375). It distinguished *Keogh*'s policy of uniform rates under the ICC, which did not apply in the cellular phone industry, [*56] because the PUC had expressed a policy of relying "on competitive forces to set prices for cellular phone service."

The present case is distinguishable on its facts. Plaintiffs are not competitors as was the claimant in *Cellular Plus*. Although the natural gas industry is in a period of deregulation, federal authorities have not relied on competitive

forces alone to set reasonable rates. Moreover, *Cellular Plus* did not reach the issue presented here: whether the filed rate doctrine can bar plaintiffs' state law claims where the rates have been filed with federal regulatory authorities.

Plaintiffs argue that *Cellular Plus* is consistent with a long line of California authority which rejects the filed rate doctrine as to all state law claims, citing [California Adjustment Co. v. Atchison, Topeka and Santa Fe Railway Co., 179 Cal. 140, 149, 175 P. 682 \(1918\)](#). But *California Adjustment* rejected the filed rate doctrine on the grounds that the commission's rates contravened its constitutional authority to fix rates, a holding consistent with federal law. Cf. [Security Services, Inc. v. Kmart Corp., 511 U.S. 431, 114 S. Ct. 1702, 128 L. Ed. 2d 433 \(1994\)](#) (filed rate doctrine does not apply to filed, but void, [*57] rates).

Plaintiff also cites [Empire West v. Southern California Gas Co., 12 Cal. 3d 805, 810, 117 Cal. Rptr. 423, 528 P.2d 31 \(1974\)](#), for the position that "a carrier will be held accountable for misrepresentations regarding a fact not contained in the published tariff, and thus not subject to verification by the shipper." But *Empire West* is not a filed rate case. There, Southern California Gas Company was alleged to have volunteered to prepare an analysis of the cost of a central heating and cooling system, to be used by plaintiff in constructing an apartment complex. When the actual operating cost greatly exceed SoCal's estimate, plaintiff sued for violation of [California Public Utilities Code § 532](#), which prevented public utilities from charging rates other than those specified in schedules on file. The Supreme Court of California distinguished filed rate cases:

The instant case does not involve a dispute over the rate which plaintiff must pay defendant for gas service. Plaintiff has not asserted that defendant misrepresented the legal rate set forth in the published tariff, nor does plaintiff seek a reduced rate, rebate or refund. Instead, *plaintiff contends that defendant misrepresented the* [*58] *quantity of gas which the proposed building project would consume*, resulting in a substantial understatement of plaintiff's total cost for gas service. Plaintiff seeks to recover the actual damages incurred by reason of defendant's fraud.

[Empire West, 12 Cal. 3d at 810](#) (emphasis added). Unlike *Empire West*, here, plaintiffs challenge over-charges which were produced by rates filed with federal and state authorities, not a fraudulent over-charge for the quantity of gas consumed. The industry and regulatory framework governing the importation of Canadian natural gas to Canada to California presents a different case for analysis under state antitrust law.

Defendants' motion to dismiss plaintiffs' state law antitrust claims is GRANTED, with ten (10) days to amend.

State Action

Judicial Estoppel

Plaintiffs argue that defendants are judicially estopped to claim that the CPUC actually has the authority to review defendants' gas procurement practices, because defendants argued forcefully in the CPUC proceedings that the CPUC had no jurisdiction to do so. The CPUC, although "not a judicial tribunal in the strict sense," conducts quasi-judicial proceedings [*59] which resemble court proceedings. [Consumers Lobby Against Monopolies v. Public Utilities Commission, 25 Cal. 3d 891, 906-08, 160 Cal. Rptr. 124, 133-34, 603 P.2d 41 \(1979\)](#). Because of this resemblance, plaintiffs contend any argument to the contrary presented by defendants should be barred by estoppel.

HN24[] Judicial estoppel is intended to protect the integrity of the judicial process and prevent unfairness to an opponent. [Yanez v. United States, 989 F.2d 323, 326 \(9th Cir. 1993\)](#). In [Britton v. Co-Op Banking Group, 4 F.3d 742, 744 \(9th Cir. 1993\)](#), the Ninth Circuit explained:

HN25[] Under the majority view, judicial estoppel does not apply unless the assertion inconsistent with the claim made in the subsequent litigation was adopted in some manner by the court in the prior litigation. Under

the minority view, judicial estoppel can apply even when a party was unsuccessful in asserting its position in the prior judicial proceeding, if the court determines that the allegedly offending party engaged in "fast and loose" behavior which undermined the integrity of the court.

Although the Ninth Circuit has adopted the doctrine of judicial estoppel generally, it has declined to choose [*60] between the majority and minority views. *Id.* [HN26](#)[↑] The doctrine is invoked by a court at its discretion. [Yanez, 989 F.2d at 326](#), quoting [Morris v. California, 966 F.2d 448, 453 \(9th Cir. 1991\)](#), cert. denied, 506 U.S. 831, 113 S. Ct. 96, 121 L. Ed. 2d 57 (1992).

Under the majority view, plaintiffs' argument fails because the CPUC rejected defendants' position. Under the minority view, a litigant plays "fast and loose" by asserting one position and then contradicting it in another proceeding. [Britton, 4 F.3d at 744](#). "This characterization is reserved for more egregious conduct than just 'threshold' inconsistency," and requires a showing of prejudice. *Id.*, [Arizona v. Shamrock Foods, 729 F.2d 1208, 1215](#) (9th Cir.), cert. denied, 469 U.S. 1197, 83 L. Ed. 2d 982, 105 S. Ct. 980 (1984). Plaintiffs have shown no prejudice.

[HN27](#)[↑] Judicial estoppel should not be invoked to freeze an opponent into a position on a pure issue of law. See [Shamrock Foods, 729 F.2d at 1215](#) (party may assert different position after change in law). Defendants have taken facially inconsistent positions on an issue of law but have consistently maintained a position that, as entities subject to pervasive regulation, they are insulated from further scrutiny for [*61] the challenged conduct under the filed rate and state action immunity doctrines. This legal position is a "threshold" inconsistency, for which invocation of judicial estoppel is unjustified. [Britton, 4 F.3d at 744](#). It is neither unfair nor prejudicial to plaintiffs that defendants, once found subject to the CPUC jurisdiction, claim the benefit of that finding.

State Action Immunity

Defendants argue the state action defense bars plaintiffs' antitrust claims, citing the CPUC's broad oversight of PG&E's activities. [HN28](#)[↑] Federal antitrust laws are subject to supersession by state regulatory programs. [Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 \(1943\)](#) ("Nothing in the language of the Sherman Act or its history . . . suggests its purpose was to restrain a state or its officer and agents from activities directed by its legislature"). The rule is grounded in principles of federalism and state sovereignty. [Federal Trade Commission v. Ticor Title Insurance, 504 U.S. 621, 112 S. Ct. 2169, 2176, 119 L. Ed. 2d 410 \(1992\)](#). Nevertheless, federalism does not justify a broad interpretation of state sovereignty. *Id.*, 112 S. Ct. at 2178. [HN29](#)[↑] State action immunity is narrowly construed. *Id.*

[HN30](#)[↑] Private [*62] entities may claim state action immunity. [Patrick v. Burget, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 \(1988\)](#). When applying the state action doctrine, courts and commentators have not distinguished between antitrust actions based on the Sherman Act and those based on other antitrust statutes. [Yeager's Fuel v. Pennsylvania Power & Light, 22 F.3d 1260, 1265 n.7 \(3rd Cir. 1994\)](#). [HN31](#)[↑] State action immunity is an affirmative defense. *Id.* at 1266, citing [Ticor Title, 112 S. Ct. at 2172](#).

In [California Retail Liquor Dealers Ass'n v. Midcal Alum., Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 943, 63 L. Ed. 2d 233 \(1980\)](#), the Supreme Court set forth [HN32](#)[↑] the test for determining whether a state anticompetitive mechanism operates because of a deliberate and intended state policy, such that the federal antitrust laws are superseded. First, "the challenged restraint must be clearly articulated and affirmatively expressed as state policy." [Midcal, 445 U.S. at 105](#). Second, "the policy must be actively supervised by the State itself." *Id.*

Clearly Articulated State Policy

In the Ninth Circuit, the "clearly articulated" requirement is met where: 1) the State legislature authorizes the challenged action; and, if so, 2) the legislature [*63] articulates an intent to displace competition with regulation. [Traweek v. City and County of San Francisco, 920 F.2d 589, 591-92 \(9th Cir. 1990\)](#). A delegating statute need not

explicitly permit the displacement of competition, so long as "suppression of competition is the 'foreseeable result' of what the statute authorizes." [*City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 \(1991\)*](#). The state authorization under which the defendant has acted must clearly contemplate that the defendant may engage in the anticompetitive conduct alleged. [*Traweek, 920 F.2d at 592. HN33*](#) In order for the state action doctrine to bar claims, "the courts must assure themselves that the subordinate acts in accord with the state's wishes when it contravenes federal antitrust laws." [*Lancaster Community Hospital v. Antelope Valley Hospital District, 940 F.2d 397, 400 \(9th Cir. 1991\)*](#), cert. denied, 502 U.S. 1094, 112 S. Ct. 1168, 117 L. Ed. 2d 414 (1992). At the same time, [HN34](#) misuse of clearly granted regulatory power does not cause state action immunity to lapse, so long as the conduct was objectively foreseeable in the state scheme. [*Id. at 402*](#) & n.10. A defendants' alleged malice or bad faith is not relevant [*64] to the state action inquiry. [*Traweek, 920 F.2d at 592.*](#)

The availability of [state action] immunity does not depend on the subjective motivations of the individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* and the authorities which interpreted it.

[*Llewellyn v. Crothers, 765 F.2d 769, 774 \(9th Cir. 1985\).*](#)

[HN35](#) [*Parker*](#) immunity is only available when the challenged activity is undertaken pursuant to the policy of the State itself as sovereign, through a state statute or opinion of a state supreme court. [*Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 63, 105 S. Ct. 1721, 1730, 85 L. Ed. 2d 36 \(1985\). HN36*](#) "[A] private party acting pursuant to an anticompetitive regulatory program need not point to specific, detailed legislative authorization for its challenged conduct." ⁶ [*Id. at 64, 105 S. Ct. 1730-31.*](#) If the legislature delegates supervision to a regulatory agency, state action immunity is available if: 1) The state as sovereign has delegated authority to the agency to regulate the challenged conduct, and 2) the agency articulates a policy, consistent with its delegated authority, to displace price [*65] competition with a regulatory structure. [*Id. at 65, 105 S. Ct. at 1731.*](#) For example, in *Southern Motor Carriers*, the Court found that a state commission, which had authority to proscribe "just and reasonable" rates, satisfied the clear articulation prong where the PUC actively encouraged the challenged conduct, there, collective ratemaking. [*Id. at 64, 105 S. Ct. at 1730.*](#)

Where a state's intention is solely to foster competition, rather [*66] that displace it, the "clear articulation" requirement is not met. [*McCaw Personal Communications, Inc. v. Pacific Telesis Group, 645 F. Supp. 1166, 1172 \(N.D.Cal. 1986\).*](#) But state support of some level of competition does not render state action immunity unavailable under all circumstances:

So long as the state as sovereign has exercised the power to regulate, has established the method by which it will execute its policy to regulate, and retains the power to alter that method, it does not forfeit that power by introducing competition into the regulation.

[*Metro Mobile CTS, Inc. v. Newvector Communications, Inc., 661 F. Supp. 1504, 1516 \(D.Ariz. 1987\), aff'd on other grounds, 892 F.2d 62 \(9th Cir. 1989\).*](#) The Ninth Circuit has recognized the continued viability of state action immunity where competition is introduced into state policy:

⁶ [*Southern Motor Carriers*](#) stated:

If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.

[*Id. at 64, 105 S. Ct. at 1730-31.*](#)

When there are abundant indications that a state's policy is to support competition, a subordinate entity must do more than merely produce an authorization to "do business" to show that the state's policy is to displace competition.

Lancaster Community Hospital, 940 F.2d at 403. However, "it should [*67] not ordinarily take a great many such specific authorizations to show that the state's policy is to displace competition with regulation." *Id. at 404 n.13*.

Courts have interpreted *Southern Motor Carriers* as permitting "clear articulation" to exist in after-the-fact agency reasonableness reviews. In *Metro Mobile, 661 F. Supp. 1504*, the court stated:

The factual circumstances of this case are different from those in most state action immunity cases. The [regulatory agency] did not mandate the anticompetitive conduct. Nor did it permit it in the sense that the regulations at issue in *Southern Motor Carriers* expressly permitted collective ratemaking. Neither the Arizona legislature nor the [regulatory agency] made an express determination that an anticompetitive price squeeze would further the economic policy of the state. At issue in this case is not the overarching regulation of wholesale service, but a detail in the implementation of the regulatory scheme. As the Supreme Court held in *Southern Motor Carriers*, the state as sovereign may leave the details of regulation to an administrative agency. *The distinction between an agency establishing an encompassing [*68] policy of price fixing, as in Southern Motor Carriers, and an agency expressly determining that a specific tariff is just and reasonable even in light of complaints that the tariff will lead to an anticompetitive price squeeze, is a distinction without substance for purposes of state action immunity.*

Metro Mobile accepted, without discussion, that conduct could be both "reasonably foreseeable" to the state, and yet not considered until an after-the-fact reasonableness review. *Metro Mobile, 661 F. Supp. at 1515-16*, further held, *HN37*[] "As long as an agency is under the mandate of a sovereign state to establish just and reasonable rates, and retains discretion as to how those rates will be determined, the method by which it establishes those rates is, and remains, regulation, even if one of the factors used in determining the just and reasonable rates is the effect of competition." *Metro Mobile* noted the regulating agency had "considered and rejected the very price squeeze issue alleged in this antitrust action," and the agency approved defendant's conduct despite plaintiff's antitrust concerns. *Id. at 1512*.

Defendants also cite *Lease Lights, Inc. v. Public *69 Service Co. of Oklahoma, 849 F.2d 1330, 1333-34 (10th Cir. 1988)*, cert. denied, 488 U.S. 1019, 102 L. Ed. 2d 807, 109 S. Ct. 817 (1989), in which the Tenth Circuit found the "clear articulation" requirement satisfied by a state statute, which delegated authority to a regulatory agency to determine just and reasonable rates, coupled with periodic agency rate investigations. Plaintiffs argued that defendant charged a low rate for outdoor lighting, monopolizing the market. The *Lease Lights* court noted that plaintiffs' injury had been caused by the agency's determination in 1975 that defendant charged less for certain services, "an independent decision of the Commission that [defendant] could not disobey." *Id. at 1334*. Unlike *Metro Mobile*, the Commission's determination pre-dated the defendant's conduct.⁷

⁷ Defendants also cite *DFW Metro Line v. Southwestern Bell, 988 F.2d 601 (5th Cir. 1993)*, cert. denied, 510 U.S. 864, 114 S. Ct. 183, 126 L. Ed. 2d 142 (1993), for the proposition that a legislative delegation to fix just and reasonable rates is sufficient to meet the clear articulation prong. But the state delegating statute at issue in *DFW Metro* expressly stated:

[*70] Plaintiffs argue that the CPUC's current policy of encouraging competition indicates no intent to displace competition with regulation:

All economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and *also comply with antitrust standards to the extent that it engages in competitive areas of the economy.*

Cantor v. Detroit Edison Co., 428 U.S. 579, 596, 96 S. Ct. 3110, 3120, 49 L. Ed. 2d 1141 (1976). However, *Cantor* speaks to "competitive areas of the economy," which are outside the ambit of PUC regulation. In *Re Pacific Gas and Electric Co.*, 32 CPUC 100 (May 26, 1989), the CPUC noted it had developed a procedure for annual cost allocations during its effort "to reconsider our regulation of the gas utilities in order to make them competitive and to promote efficient market transactions." See also *Re Refinements to the Regulatory* [*71] *Framework for Gas Utilities*, 37 CPUC 2d 87, 102 (July 18, 1990) ("We believe the best interests of consumers are served by competitive gas markets rather than markets in which a single utility and its affiliates dominate buying and selling."). Plaintiffs argue the challenged conduct occurred at the wellhead, an area in which the CPUC intends to foster, not displace competition. As stated in *Re Transportation of Customer-owned Gas*, 20 CPUC 2d 628, 631 (March 19, 1986) (Plaintiffs' Appendix, Tab 29):

The deregulation of gas at the wellhead has changed fundamentally the nature of buying and selling natural gas. What was once a highly regulated procedure is emerging as a viably competitive network. With gas becoming a competitive enterprise, the portion of the gas industry which remains a natural monopoly is transportation, where the word "transportation" refers generally to the movement of gas through transmission and distribution pipelines. In this changed world, it now makes sense to restructure our regulation with a new emphasis on transportation as a foundation, as perhaps the essential business, of the gas companies we regulate.

See also *Re Pacific Gas* [*72] and *Electric Co., 137 PUR 4th 346* (Oct. 21, 1992) ("We are not attempting to regulate the importation of natural gas. . . . The sole area of our inquiry is the retail sales of PG&E").

HN38 [↑] Introduction of competition into a regulatory structure does not preclude application of state action immunity. *Metro Mobile, 661 F. Supp. at 1515-16*. Because the CPUC has supported competition in the buying and selling of natural gas at the wellhead and placed its regulatory emphasis on transportation of natural gas, PG&E "must do more than merely produce an authorization to 'do business' to show that the state's policy is to displace competition." *Lancaster Community Hospital, 940 F.2d at 403*.

Defendants contend the clear articulation requirement is met through the legislature's comprehensive grant of power to the CPUC to independently fix rates under the "just and reasonable" standard, and the CPUC's assertion of jurisdiction over PG&E's gas acquisition practices and costs. *California Public Utilities Code § 728* states:

Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for [*73] or in connection with any service, product, or commodity, or the rules, practices or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory or preferential, *the commission shall determine and fix, by order, the just,*

The legislature finds that public utilities are by definition monopolies in the area they serve; that therefore normal forces of competition which operate to regulate prices in the free enterprise society do not operate; and therefore utility rates, operations, and services are regulated by public agencies with the objective that *such regulation shall operate as a substitute for competition.*

reasonable or sufficient rates, classifications, rules, practices or contracts to be thereafter observed and in force.

See also Cal. Pub. U. Code §§ 311, 451, 701, 729. All rate changes and new rates must be approved by the CPUC, which must find the rate justified before PG&E is authorized to recover the amount from ratepayers. Cal. Pub. U. Code [§ 454\(a\)](#). Under Public Utilities Code [§ 785.5](#):

HN39[] (a) *The commission shall require every gas corporation to adopt and pursue purchasing and procurement practices which assure its customers the lowest rates consistent with security of supply and with Section 785 [encouraging production of gas in California].*

(b) Pursuant to subdivision (a), the commission may establish and periodically revise for each gas corporation guidelines for priorities among suppliers and sources of supply of gas to gas corporations, taking into considerations [*74] the requirements of Section 785. The establishment of these guidelines does not relieve a gas corporation of any requirement to make reasonable and prudent purchases of gas or diminish the authority of the commission to review the reasonableness of any purchase or procurement decision of the corporation.

Section 785.5 (emphasis added). **HN40**[] The CPUC's authority has been liberally construed. *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891, 905, 160 Cal. Rptr. 124, 132, 603 P.2d 41 (1979). In 1986, the CPUC revised its gas procurement requirements to permit greater competition at the wellhead, but, because market response to this order was speculative, the CPUC retained authority to regulate the terms of procurement through annual reasonableness reviews. *Re New Regulatory Framework for Gas Utilities*, [22 CPUC 2d 491, 530-31](#) (Dec. 3, 1986). Additionally, the CPUC requires PG&E to

procure for their core procurement customers a supply portfolio which reasonably results in certainty of supply availability to serve core peak requirements, price security greater than can be achieved by relying totally on spot or other market sensitive supply sources, [*75] and which attains these objectives at the lowest possible cost.

Re New Regulatory Framework for Gas Utilities, [79 PUR 4th 1, 22 CPUC 2d 491, 530-31](#) (Dec. 3, 1986). In the March 22, 1994 decision on the 1988-90 reasonableness review, the CPUC acknowledged that its grant of authority to PG&E was not defined, but subject to after-the-fact oversight:

While various CPUC decisions and rulemaking provided broad guidelines and goals regarding PG&E's operations under new restructuring rules, no official CPUC pronouncement dictated the specific manner in which PG&E was to manage its procurement of natural gas.

Decision, at 247.

HN41[] The California legislature delegated the details of regulatory oversight to the CPUC. See [Cal. Pub. Util. Code § 785.5](#) (CPUC has authority to require gas utilities "to adopt and pursue purchasing and procurement practices"). Under *Southern Motor Carriers*, agency delegation does not preclude application of state action immunity. The CPUC, in turn, authorized PG&E to undertake procurement for its core customers, subject to CPUC oversight. *Re New Regulatory Framework*, [22 CPUC 2d at 527](#) ("Until such time in the evolution of [*76] the gas industry that core customers, or some other agent acting on their behalf, can reasonably provide for their own procurement needs . . . , the local distribution utility subject to our oversight must assume this role."). This authorization contemplates that PG&E will develop a procurement policy, consistent with the CPUC's goals and in anticipation of reasonableness review. Cf. *Nugget Hydroelectric v. Pacific Gas and Electric*, [981 F.2d 429](#) (9th Cir.), cert. denied, 508 U.S. 908, 113 S. Ct. 2336, 124 L. Ed. 2d 247 (1992).

The CPUC guidelines cited by defendants do not require, or even discuss, voter pools, uniform rate-setting, or a method of computing wellhead prices. See *Re New Regulatory Framework*, [22 CPUC 2d at 527](#). However, as part of CPUC oversight of purchasing and procurement practices, these matters are considered in after-the-fact review. Such oversight has been considered regulation. [Metro Mobile](#), [661 F. Supp. at 1516](#).

Southern Motor Carriers provides, "As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." [*Id.*, 471 U.S. at 64, 105 S. Ct. at 1730](#). Defendant [*77] PG&E has shown more than "an authorization to 'do business' to show that the state's policy is to displace competition." [*Lancaster Community Hospital*, 940 F.2d at 403](#). The CPUC has promulgated guidelines that require consideration of more than free-market principles, and subject PG&E's natural gas purchase and sale decisions to detailed oversight through rate reasonableness reviews. In the final analysis, PG&E's 1988-90 natural gas rates were not set by market forces, but rather by the CPUC under a statutory regulatory scheme intended in large part to displace competition. By setting reasonable rates for collection, the CPUC has displaced competition with regulation. The first *MidCal* prong is met.

Active Supervision

[**HN42**](#) To satisfy the "active supervision" requirement, "state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." [*Patrick v. Burget*, 486 U.S. 94, 101, 108 S. Ct. 1658, 1663, 100 L. Ed. 2d 83 \(1988\)](#). The purpose of this requirement

is to determine whether the State has exercised sufficient independent judgment and control so that the details of rates or prices [*78] have been established as a product of deliberate state intervention, not simply by the agreement of private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy.

[*Ticor Title*, 112 S. Ct. at 2177.](#)

The CPUC requires PG&E to participate in annual reasonableness reviews of its gas purchases to serve core procurement needs. [*Re New Regulatory Framework for Gas Utilities*, 22 CPUC 2d 491, 520](#) (Dec. 3, 1986) (Defendants' Appendix, Tab. 21); see generally *Application of Pacific Gas and Electric Co.*, Application No. 91-04-003 (Mar. 22, 1994). Defendants argue the CPUC's reasonableness reviews meet the second *MidCal* prong.

Plaintiffs argue that the CPUC does not review the specific conduct at issue here, but only evaluates the rates charged to consumers. See [*Ticor Title*, 112 S. Ct. at 2176](#) (State may displace competition if "displacement is both intended by the State and implemented in its specific details.") (emphasis added). But as to PG&E, the review undertaken by the CPUC is searching and thorough. See generally *Application of Pacific Gas and Electric* [*79] Co., Application No. 91-04-003 (Mar. 22, 1994). This includes CPUC application of criteria to consider competitive concerns in PG&E's upstream conduct. Although the CPUC does not affirmatively dictate the method by which PG&E operates, the Supreme Court has made clear that state action need not be compulsory to invoke the state action doctrine, so long as active state review is present. [*Southern Motor Carriers*, 471 U.S. at 66, 105 S. Ct. at 1731](#), [*Ticor Title*, 112 S. Ct. at 2179-80](#).

As plaintiffs point out, however, the same cannot be said of defendant, PGT, which is not directly regulated by the CPUC. See [*Re Pacific Gas and Electric Co.*, 137 PUR 4th 346, 348-49](#) (Oct. 21, 1992). As stated in Decision 94-03-050, at 18 (March 22, 1994):

The focus of our review is upon PG&E's actions. To the extent we make reference to the actions of its affiliates, PGT or A&S, it is only to provide a context in which to review PG&E's actions and how it could have influenced outcomes differently.

The CPUC cannot "actively supervise" an entity outside its jurisdiction.

The statutory authority provided by defendants, in addition to the CPUC's own oversight and analysis [*80] of the issue are sufficient to support the conclusion, in the absence of a contrary ruling from the California Supreme Court, that the CPUC has jurisdiction to review PG&E's conduct. See Cal. Pub. U. Code §§ 311, 451, 454(a), 701, 785.5,

728, 729; [Re Pacific Gas and Electric Co., 137 PUR 4th 346](#) (Oct. 21, 1992). The active supervision prong has been met with respect to defendant PG&E, only.

The state action bar against plaintiffs' claims is limited. It is inapplicable to claims against PGT. Moreover, the CPUC's subject matter jurisdiction to regulate the disputed conduct has been challenged by PG&E and is currently under review by the California Supreme Court. See generally [Columbia, 111 S. Ct. at 1349-51](#) (although errors in agency decision need not be examined in Parker analysis, complete lack of subject matter jurisdiction is relevant). Defendants motion to dismiss the federal antitrust claims, based on state action immunity, is GRANTED as to defendant PG&E, with ten (10) days leave to amend, and DENIED as to defendant PGT.

Illinois Brick

Defendants argue that plaintiffs are indirect purchasers from antitrust violators, and therefore barred from suit [*81] by [Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 \(1977\)](#). For example, in [Kansas v. Utilicorp United Inc., 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 \(1990\)](#), the Supreme Court held that, [HN43](#)[] where suppliers violate antitrust laws by overcharging a public utility, and the utility passes on the overcharges to the customer, only the utility has a cause of action under § 4 of the Clayton Act, because it alone has suffered an antitrust injury.

Like the State of Illinois in *Illinois Brick*, the consumers in this case have the status of indirect purchasers. In the distribution chain, they are not the immediate buyers from the alleged antitrust violators. They bought their gas from the utilities, not from the suppliers said to have conspired to fix the price of gas.

[Utilicorp, 497 U.S. at 206](#). The rationale for the indirect purchaser bar is that allowing suits by parties all along the distribution chain could impose duplicative liability on the antitrust violator, particularly since it is difficult to apportion damages between successive distribution levels. [Illinois v. Panhandle Eastern Pipe Company, 935 F.2d 1469 \(7th Cir. 1991\)](#).

Unlike *Utilicorp*, [*82] plaintiffs allege that PG&E was a primary antitrust violator. The complaint states, at P 40:

The price of natural gas from Alberta to California was set by PG&E and the cartel at the highest marketing clearing price at which the natural gas could be resold at the California border and within California. Indeed, PG&E would tell the cartel what price it should set, so that the Alberta natural gas would be sold to PG&E out of the pipeline at a price which mirrored the higher price to PG&E of natural gas within the United States and which had pipeline access to California.

Plaintiffs, in their own and representative capacities, are direct purchasers from PG&E. Complaint, at P 17. *Illinois Brick* does not apply. Defendants motion to dismiss plaintiffs' claims under *Illinois Brick* is DENIED.

Failure to State a Claim

Legal Standard

[HN44](#)[] A motion to dismiss for failure to state a claim under [F.R.C.P. 12\(b\)\(6\)](#) "is viewed with disfavor and is rarely granted." [Hall v. City of Santa Barbara, 833 F.2d 1270, 1274 \(9th Cir. 1986\)](#), cert. denied, 485 U.S. 940, 99 L. Ed. 2d 281, 108 S. Ct. 1120 (1988) (quoting 5 C. Wright & A. Miller, *Federal Practice & Procedure*, Civil § 1357, [*83] at 598 (1969)). [HN45](#)[] "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond a 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).

[HN46](#)[] In deciding a motion to dismiss, the court "must accept as true all material allegations in the complaint and construe them in the light most favorable to" the plaintiff. [NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 \(9th Cir. 1986\)](#). Yet, the court need not accept as true allegations that contradict facts which may be judicially noticed. [Mullis v. United States Bankruptcy Ct., 828 F.2d 1385, 1388 \(9th Cir. 1987\)](#), cert. denied, 486 U.S. 1040, 100 L. Ed.

2d 616, 108 S. Ct. 2031 (1988). For example, the court may consider matters of public record including pleadings, orders, and other papers filed with the court or records of administrative bodies. [Mack v. South Bay Beer Distributors, Inc.](#), 798 F.2d 1279, 1282 (9th Cir. 1986). The court need not accept conclusory allegations, nor unreasonable inferences or unwarranted deductions of fact. [Western Mining Council v. Watt](#), 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031, 70 L. Ed. 2d 474, 102 S. Ct. 567 (1981). The court may disregard allegations in the complaint if contradicted by facts established by exhibits attached to the complaint. [Durning v. First Boston Corp.](#), 815 F.2d 1265, 1267 (9th Cir. 1987). The Supreme Court has stated that [HN47](#) "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles," in part because proof of these elements is in the hands of the opponent. [Poller v. Columbia Broadcasting Sys.](#), 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962).

Section 1 of the Sherman Act/Cartwright Act

Section 1 of [HN48](#) the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal." [15 U.S.C. § 1](#). This language cannot be read strictly, or else a vast array of competitive activities could be considered "restraints of trade" and therefore illegal. [U.S. v. Topco Associates](#), 405 U.S. 596, 606, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972).

[HN49](#) To establish a claim under section 1 of the Sherman Act, a plaintiff must show: 1) that there was a contract, combination or conspiracy; 2) that [*85](#) the agreement unreasonably restrained trade under either a per se rule or illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce. [Bhan v. NME Hospitals, Inc.](#), 929 F.2d 1404 (9th Cir. 1991). [Matsushita Electric Industrial Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 597, 106 S. Ct. 1348, 1361 n.21, 89 L. Ed. 2d 538 (1986). The pleader must allege more than a bare legal conclusion; "if the facts do not outline or adumbrate a violation of the Sherman Act, the plaintiff will get nowhere by merely dressing them up in the language of antitrust." [Rutman Wine Co. v. E. & J. Gallo Winery](#), 829 F.2d 729 (9th Cir. 1987). Although the Cartwright Act varies in some respects from § 1 of the Sherman Act, the parties do not address either claim differently for purposes of the 12(b)(6) motion.

Defendants argue that plaintiffs have failed to allege any economically coherent theory from which a conspiracy can be inferred. Specifically, defendants argue plaintiffs pleaded no facts from which it can be inferred that PG&E, as a buyer of gas, conspired with a group of sellers it controls, to itself pay higher prices. Because PG&E was subject only to a potential downward adjustment [*86](#) by regulatory authorities, defendants argue no incentive existed to over-pay for gas. Defendants further contend that paying higher than market prices, through PG&E's subsidiaries to Canadian producers, makes no economic sense; because PG&E cannot benefit from higher costs, which it passes on to customers in a business context where PG&E's rate of return is limited by regulation. Plaintiffs respond that PG&E executives so acted in their own economic self interest in obtaining bonuses or other remuneration from increased revenues to PG&E and from alleged financial interests in members of the "cartel." Plaintiffs maintain that PG&E sought to "corner the market" in high priced gas to force core elections by non core customers and to keep these same customers from obtaining purportedly lower priced gas in Canada.

Defendants cite [Car Carriers, Inc. v. Ford Motor Co.](#), 745 F.2d 1101 (7th Cir. 1984), cert. denied, 470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985), which held that an inherently improbable theory failed to state a claim, for violation of the antitrust laws under the rule of reasonableness test. *Car Carriers* considered whether a complaint stated a claim against Ford Motor Co., based on allegations [*87](#) that Ford requested increased transport services from a carrier, on the promise that increased tariffs would pay for expansion. Ford later withdrew rate increases necessary for profitable operations and subsequently obtained the carrier's business at a distress-sale price. Plaintiff also alleged Ford awarded its next contract to Nu-Car, on the basis of the latter's "sham and knowingly predatory bid." The court found this last allegation insufficient to state a claim for conspiracy, stating:

If we assume that there actually was concerted activity between Ford and Nu-Car, the "predatory" bid becomes utterly implausible. In considering a motion to dismiss, the court is not required to don blinders and ignore commercial reality. If Ford absolutely controls the rates charged by its suppliers, it is preposterous to assume

that Ford would conspire with Nu-Car to eliminate Car Carriers by accepting Nu-Car's "predatory" bid so that the latter could later charge noncompetitive, monopoly prices. The complaint characterizes Ford as a buyer that was highly concerned about the prices it paid, it would be unusual indeed for Ford now to conspire with Nu-Car to accept a "predatory" bid with [*88] Ford to become the victim.

Id., 745 F.2d at 1110. Car Carriers found implausible that Ford could act as both the dictator and victim of a pricing scheme. See generally *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 n.21, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) ("Conduct that is more consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy."); but see *In re Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990) (limiting broad language in *Matsushita*).

Plaintiffs' complaint alleges PG&E controlled a pricing scheme for itself and its wholly-owned subsidiaries, through correspondence and a "town meeting" style of negotiating, to set prices among Canadian producers either directly or through its wholly-owned subsidiary, A&S. Complaint, at P 61. The complaint alleges, at P 46:

At best, [the regulatory scheme] left PG&E financially indifferent to the terms on which A&S purchased Canadian natural gas. Executives of PG&E and its affiliates were not indifferent, however, because the arrangement put them in a position to hand out hundreds of millions of dollars annually in [*89] windfalls to Canadian gas producers, gave PGT higher profits, and provided PG&E larger revenues, which resulted in larger annual bonuses and incentive packages for certain PG&E executives, who participated in the scheme alleged herein.

The complaint alleges, at P 48:

Despite purported policies to the contrary, and in furtherance of PG&E's efforts to keep their monopolistic grasp on the Canadian gas market, PG&E condoned known conflicts of interest. It is alleged that between 1988 to the present, several directors, officers, and/or employees of A&S and their affiliates had board memberships, and in certain cases, ownership interests in the very Canadian gas producers and transporters with whom PG&E was supposedly negotiating purchase prices.

The complaint alleges, at P 63:

PG&E executives recognized that keeping higher priced gas in the PGT pipeline protected profitability which supported performance incentives and bonuses, and was a motivation in resisting open access.

The complaint alleges, at P 64:

PG&E, through its then wholly owned subsidiary A&S, created and manipulated the cartel of Canadian gas producers with which [*90] it set a single price for all gas purchasers in Alberta. One material unlawful purpose of this cartel was that PG&E raised the price of Canadian gas above competitive levels so as to extract from the California consumer the highest possible profit for the cartel and benefits accruing to senior PG&E employees. A further unlawful purpose of the cartel was to fix the price at which Canadian gas was sold in downstream markets at a level which enabled PG&E to monopolize those markets.

The complaint alleges, at P 68:

PG&E's gas department actively sought to continue this pricing because of the closeness of senior officials in that division with gas producer members of the cartel; which said producers lavished favors and perks on those very officials who were responsible for the pricing formulas which supported the long-term contracts.

No individuals are named as defendants. Nor is any derivative liability sought against defendants. However, [HN50](#)[
↑] an entity can incur antitrust liability for the acts of its employees or agents, when acting within the scope of their apparent authority, despite the agent's desire to benefit only him or herself. *American Society of Mechanical* [*91] *Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982); *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1369-70 (9th Cir. 1992) (citing cases). The facts cited above support the inference that defendants' agents, acting within the scope of their apparent authority, engaged in anticompetitive conduct with the Canadian suppliers to their own and the alleged economic benefit of PG&E. It is inherently improbable that PG&E sought to pay too much for natural gas. However, the evidentiary merit of whether unlawful economic benefit resulted from collusion with "cartel" members by compelling core elections and restricting access to lower cost Canadian gas, cannot be decided on this 12(b)(6) motion. Plaintiffs' assert there was alternative lower cost gas available outside the "cartel," assuming without identifying a means of its transportation to central

California. Complaint, at P 35. Such allegations do not render the allegations of the conspiracy inherently improbable within the meaning of *Car Carriers*.

Defendants' 12(b)(6) motion to dismiss plaintiffs first and fourth claims for relief for failure to state a claim as inherently economically improbable is DENIED, [*92] subject to the preclusive effect of the filed rate and state action doctrines.

Section 3 of the Clayton Act

HN51[] Section 3 of the Clayton Act, [15 U.S.C. § 14](#), prohibits any person from making a sale or contract for sale of goods or other commodities on the condition, agreement or understanding that the purchaser shall not deal with other commodities or competitors of the seller, where the effect would substantially lessen competition or tend to create a monopoly in any line of commerce. Even if a contract is found to be an exclusive-dealing arrangement, it does not violate the section unless the court believes it is probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected. [Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 628, 5 L. Ed. 2d 580 \(1961\)](#).

Two courts have held that **HN52**[] section 3 of the Clayton Act applies solely to *sellers* or *lessors*, not to purchasers. [McGuire v. Columbia Broadcasting System, Inc., 399 F.2d 902, 906 \(9th Cir. 1968\)](#); [Genetic Systems Inc. v. Abbott Laboratories, 691 F. Supp. 407, 414-415 \(D.D.C. 1988\)](#). This conclusion follows from the "fundamental antitrust concept" [*93] that the alleged sins of the seller should not be visited on buyers because of the risk of chilling competition." [Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 211 \(9th Cir. 1987\)](#). Because plaintiffs allege that PG&E was a purchaser, rather than seller, in the transactions at issue, this precedent bars this claim for relief. The motion to dismiss the third claim for relief is GRANTED as to PG&E. The motion to dismiss the third claim for relief is DENIED as to PGT, subject to the effect of the filed rate doctrine.

Wilson Tariff Act

Defendants argue that plaintiffs' Wilson Tariff Act claim must be dismissed, because it adds nothing of substance to the Sherman Act claims and fails for the same reasons.

HN53[] The Wilson Tariff Act, [15 U.S.C. § 8](#), prohibits "Every combination, conspiracy, trust, agreement or contract" between two or more persons or corporations, either of whom is engaged in importing any article from any foreign country when the transaction is intended to operate in restraint of trade or competition, or to increase the market price of articles imported into the United States. Although analogous to [§ 1](#) of the Sherman Act, the Wilson Tariff Act [*94] does not include monopolization or intent to monopolize. [Western Concrete Structures Co. v. Mitsui & Co., 760 F.2d 1013, 1019 \(9th Cir.\), cert. denied, 474 U.S. 903, 88 L. Ed. 2d 229, 106 S. Ct. 230 \(1985\)](#). Where allegations state a claim under [§ 1](#) of the Sherman Act, dismissal of a Wilson Tariff Act claim is generally inappropriate. *Id.*

Because plaintiffs have stated a claim under [§ 1](#) of the Sherman Act, defendants motion to dismiss plaintiffs' second claim for relief under the Wilson Tariff Act for failure to state a claim is DENIED, subject to the preclusive effect of the filed rate and state action doctrines.

California Unfair Practices Act

Defendants argue that plaintiffs' fifth claim for relief fails to plead a violation of any specific provision of California's Unfair Practices Act, [California Business and Professions Code § 17000 et. seq.](#) Defendants also contend that the claim is barred by [California Business and Professions Code section 17024\(1\)](#).

Plaintiffs concede that it was their intent to plead a claim under the California Unfair Business Practices Act. [Cal. Bus. & Prof. Code § 17200 et. seq.](#). Plaintiffs offer to amend their complaint accordingly.

Because plaintiffs [*95] concede the Unfair Practices Act claim should be dismissed, defendants motion is GRANTED. Plaintiff shall have ten (10) days leave to amend.

CONCLUSION

For the reasons stated herein, IT IS ORDERED:

- 1) Plaintiffs' motion for class certification is GRANTED;
- 2) Defendants motion to dismiss the federal and state antitrust claims based on the filed rate doctrine is GRANTED with ten (10) days leave to amend;
- 3) Defendants' motion to dismiss the federal antitrust claims based on state action immunity is GRANTED with ten (10) days leave to amend as to defendant PG&E, and DENIED as to defendant PGT;
- 4) Defendants' motion to dismiss based on *Illinois Brick* is DENIED;
- 5) Defendants' motions to dismiss the first and fourth claims for failure to state a claim on account of economic improbability are DENIED, subject to the preclusive effect of the filed rate and state action doctrines.
- 6) Defendants' motion to dismiss the third claim for relief under the Clayton Act claim is GRANTED as to PG&E, and DENIED as to PGT, subject to the effect of the filed rate doctrine.
- 7) Defendants' motion to dismiss the claim under California's Unfair Practices Act, [California Business and Professions \[*96\] Code § 17000 et. seq.](#), is GRANTED with ten (10) days leave to amend;
- 8) Defendants shall prepare and lodge with the Court, an order consistent with the views expressed in this opinion, within five (5) days from the date of service of this order.

DATED: August 25, 1994.

Oliver W. Wanger

UNITED STATES DISTRICT JUDGE

End of Document

Picker Int'l v. Leavitt

United States District Court for the District of Massachusetts

August 26, 1994, Decided

C.A. No. 87-2828 & C.A. No. 87-2597 CONSOLIDATED

Reporter

865 F. Supp. 951 *; 1994 U.S. Dist. LEXIS 13776 **; 1995-1 Trade Cas. (CCH) P70,946

PICKER INTERNATIONAL, INC., Plaintiff, v. BRUCE LEAVITT and IMAGING EQUIPMENT SERVICES, INC. and THOMAS J. QUINN, Defendants.

Core Terms

Picker, Imaging, Scanners, manufacturers, tube, exclusionary, customers, specifications, monopolization, summary judgment motion, summary judgment, no evidence, Sherman Act, purchasers, pricing, relevant market, monopoly power, counterclaims, service contract, contracts, end-users, alleges, costs, competitor, consumers, documents, sabotage, exclusive agreement, discovery, contends

LexisNexis® Headnotes

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

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

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

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

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

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1[] Summary Judgment, Entitlement as Matter of Law

In considering a motion for summary judgment, a court is governed by [Fed. R. Civ. P. 56](#), which provides in pertinent part that summary judgment may be granted only if the pleadings, depositions, answers to interrogatories,

865 F. Supp. 951, *951A 1994 U.S. Dist. LEXIS 13776, **13776

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law under [Fed. R. Civ. P. 56\(c\)](#). In making this inquiry, the court must look at the record in the light most favorable to the party opposing the motion and must indulge all inferences favorable to that party.

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

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

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

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

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

[HN2](#) Summary Judgment, Motions for Summary Judgment

In weighing the merits of a motion for summary judgment, the court must address two questions: (1) whether the factual disputes are genuine, and (2) whether a fact genuinely in dispute is material. As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law properly preclude the entry of summary judgment. In order to determine if a dispute about a material fact is "genuine," the court must decide whether the evidence is such that a reasonable fact-finder could return a verdict for the nonmoving party.

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

[HN3](#) Monopolies & Monopolization, Actual Monopolization

The Sherman Act, [15 U.S.C.S. § 2](#), makes it illegal to monopolize, or attempt to monopolize any part of the trade or commerce among the several States.

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

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

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

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

865 F. Supp. 951, *951A 1994 U.S. Dist. LEXIS 13776, **13776

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

Antitrust & Trade Law > Sherman Act > General Overview

[HN4](#) [down] Monopolies & Monopolization, Attempts to Monopolize

In analyzing a [§ 2](#) claim, the Sherman Act, [15 U.S.C.S. § 2](#), it is essential to: (1) define the relevant market; (2) determine whether the party charged has attempted to obtain, or obtained, monopoly power in that market; and, if so, (3) determine whether such power was sought or acquired by "exclusionary conduct." More specifically, to prove actual monopolization, a party must establish that the other party has monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > 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

[HN5](#) [down] Sherman Act, Claims

As for attempted monopolization, to succeed in an attempted monopolization claim under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), a plaintiff must prove that a defendant had the specific intent to monopolize the relevant market, and a dangerous probability of success. A specific intent to monopolize or restrain competition can often be inferred from a finding of bad faith. A showing of exclusionary conduct is required for an attempted monopolization claim.

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

[HN6](#) [down] Regulated Practices, Market Definition

To define a market, one must decide the geographic dimension, the product dimension, and the production dimension.

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

[HN7](#) [down] Regulated Practices, Market Definition

Market definition must focus on the product dimension; that is, the commodities reasonably interchangeable by consumers for the same purposes. This focus is appropriate because the ultimate question concerning market definition is whether a hypothetical cartel could raise prices significantly above the competitive level.

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN8**](#) [blue download icon] Regulated Practices, Market Definition

The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the cross elasticity of demand. This is a question of fact.

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN9**](#) [blue download icon] Regulated Practices, Market Definition

If the service market price is to have an impact on equipment demand, consumers must inform themselves of the total cost of the "package" -- equipment, service, and parts -- at the time of purchase; that is, consumers must engage in accurate life cycle pricing. This is an information intensive analysis. It is, for example, a question of fact whether a party or its competition makes available the information necessary for life cycle pricing. Moreover, defining the relevant market also requires consideration of whether there are costs of switching to another product which lock-in a purchaser and make it vulnerable to supracompetitive price increases for service because it cannot, cost-effectively in view of its investment, switch to a competing brand if service becomes more expensive.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN10**](#) [blue download icon] Price Discrimination, Competitive Injuries

The willful acquisition or maintenance of monopoly power is characterized as "exclusionary conduct." It has given content to the term by defining it as conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power. A practice is "anticompetitive" if it harms the competitive process, not if it merely harms competitors. This process is harmed when the conduct at issue obstructs the achievement of competition's basic goals -- lower prices, better products, and more efficient production methods.

Evidence > ... > Exceptions > Public Records > General Overview

[**HN11**](#) [blue download icon] Exceptions, Public Records

Fed. R. Evid. 803(8)(C) provides for the introduction of reports of a public agency containing factual findings resulting from an investigation made pursuant to law.

Evidence > ... > Exceptions > Public Records > General Overview

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

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

[**HN12**](#) [L] Exceptions, Public Records

Out-of-court statements contained in public records require a separate hearsay exception before they can be admitted.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN13**](#) [L] Exemptions & Immunities, Parker State Action Doctrine

Efforts to influence government officials acting under statutes requiring competitive bidding are within the scope of the antitrust laws. It is, however, not improper for a producer to engage in an honest effort to persuade a government agency that specifications favoring it are appropriate. However, efforts of any industry leader to impose his product specifications by guile, falsity, or threats are contrary to the anti-trust laws. Although the fact of influence or inducement cannot itself be wrongful, its manner can be improper.

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

Torts > Intentional Torts > Defamation > Libel

[**HN14**](#) [L] Private Actions, Standing

Many buyers recognize disparagement of a rival as non-objective and highly biased. Although hardly a justification for falsehood, buyer distrust of a seller's disparaging comments about a rival seller should caution one against attaching much weight to isolated examples of disparagement. Essential, therefore, is a serious de minimis test. Such claims should be presumptively ignored.

Torts > Intentional Torts > Defamation > Libel

Torts > Intentional Torts > Defamation > General Overview

[**HN15**](#) [L] Defamation, Libel

A communication is defamatory if it discredits the plaintiff in the minds of any considerable and respectable segment in the community. Generally, where the discussion involves a rival's services or product, it is not considered libelous unless it imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct.

Torts > Business Torts > Trade Libel > Defenses

Torts > Business Torts > General Overview

865 F. Supp. 951, *951A 1994 U.S. Dist. LEXIS 13776, **13776

Torts > Business Torts > Trade Libel > General Overview

Torts > Business Torts > Trade Libel > Elements

Torts > Intentional Torts > Defamation > General Overview

Torts > Intentional Torts > Defamation > Libel

Torts > Intentional Torts > Defamation > Slander

HN16 [] **Trade Libel, Defenses**

Commercial disparagement is defined as a false statement intended to bring into question the quality of a rival's goods or services in order to inflict pecuniary harm. Statements constituting commercial disparagement are generally regarded as conditionally privileged. This is because many buyers recognize disparagement of a rival as non-objective and highly biased.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN17 [] **Price Discrimination, Competitive Injuries**

A monopolist may not refuse to make an "essential facility" available to a competitor. Nor may a monopolist reverse a well-established practice of dealing with a competitor if the change in policy injures competition, and there is no legitimate business reason for the change.

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

Torts > ... > Commercial Interference > Contracts > General Overview

HN18 [] **Regulated Practices, Trade Practices & Unfair Competition**

In the antitrust context, litigation may constitute, or contribute to a finding of, illegal conduct if: (1) the lawsuit is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits; and (2) the motive for the baseless lawsuit was an attempt to interfere directly with the business relationships of a competitor.

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

HN19 [] **Actual Monopolization, Anticompetitive & Predatory Practices**

Predatory pricing is the pricing of a product below its average total cost.

Antitrust & Trade Law > Sherman Act > 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

[HN20](#) [blue icon] Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. §. 1](#) has been interpreted to apply only to "unreasonable" restraints of trade.

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

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

[HN21](#) [blue icon] Price Fixing & Restraints of Trade, Vertical Restraints

The "rule of reason" test, states that the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

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

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

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

[HN22](#) [blue icon] Price Fixing & Restraints of Trade, Vertical Restraints

In applying the rule of reason test, 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. Thus, a vertical combination without a legitimate business justification which operates to the detriment of competition violates this standard.

Antitrust & Trade Law > Sherman Act > General Overview

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

[HN23](#) [blue icon] Antitrust & Trade Law, Sherman Act

It has generally been recognized that vertical agreements designed to prevent free-riding do not violate the Sherman Act, [15 U.S.C.S. §. 1](#), because free-riding discourages capital investment and product innovation.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN24 [+] **Intentional Interference, Elements**

In order to sustain a claim of interference with contractual relations, the plaintiff must prove that: (1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; and (3) the plaintiff was harmed by the defendant's actions.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > Business Torts > General Overview

HN25 [+] **Commercial Interference, Prospective Advantage**

The elements of the business tort of interference with advantageous relationships are that: (1) plaintiff had a business relationship or contemplated contract of economic benefit; (2) defendant knew of this relationship; (3) defendant intentionally and improperly interfered with it; and (4) plaintiff's injurious loss of advantage was a direct result of the defendant's conduct.

Torts > Business Torts > Unfair Business Practices > General Overview

HN26 [+] **Business Torts, Unfair Business Practices**

Unfair competition which, in Massachusetts, is addressed by Mass. Gen. Laws ch. 93A. To maintain a claim that Mass. Gen. Laws ch. 93A has been violated, the events allegedly constituting unfair competition must have occurred "primarily and substantially" in Massachusetts.

Judges: [**1] Wolf

Opinion by: MARK L. WOLF

Opinion

[*954] MEMORANDUM AND ORDER

WOLF, D.J.

August 26, 1994

Plaintiff Picker International, Inc.'s ("Picker") motion for partial summary judgment addresses federal antitrust and pendent state business tort counterclaims alleged by Defendant Imaging Equipment Services, Inc. ("Imaging"). For the reasons explained below, Picker's motion for summary judgment must be allowed on all counts of Imaging's counterclaims.

I. Facts

Unless otherwise noted, all of the following facts are uncontested and presented in the light most favorable to Imaging.

Picker International, Inc. is a New York corporation with a principal place of business in Highland Heights, Ohio. Picker designs, manufactures, sells, and services medical diagnostic equipment such as computed tomography scanners ("CT Scanners"), magnetic resonance imaging, nuclear imaging, and x-ray equipment. Affidavit of William J. Webb ("Webb Aff."), Picker's Appendix of Evidentiary Materials in Support of its Motion for Partial Summary Judgment ("Picker Evid. App."), Ex. 13, PP 10-12.

Imaging Equipment Services, Inc. is a Pennsylvania corporation with a principal place of business in Pittsburgh, Pennsylvania. Imaging is an independent **[**2]** service organization ("ISO"), which provides maintenance and repair services to end-users of a variety of medical diagnostic equipment. Affidavit of Robert S. Pindyck ("Pindyck Aff."), Picker Evid. App., Ex. 6, P 11; Webb. Aff., Ex. 13, P 11. Imaging competes with Picker to service Picker brand CT Scanners.

On April 9, 1991, Imaging filed a voluntary petition, under Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the Western District of Pennsylvania. On March 2, 1992, Imaging's amended plan of reorganization was approved. Answer of Imaging P 4; Picker Evid. App., Ex. 27; Ex. 30.

On July 6, 1994, after a hearing on Picker's motion for summary judgment, and after this case was scheduled for trial, Imaging again filed a voluntary petition for bankruptcy in Pennsylvania. Picker subsequently obtained limited relief from the automatic stay of civil litigation against Imaging in order to permit this case to proceed.

Thomas J. Quinn ("Quinn"), a resident of Mars, Pennsylvania, is President of Imaging. Deposition of Thomas J. Quinn ("Quinn Dep."), Picker Evid. App., Ex. 19 at I-4 to I-5.

Bruce Leavitt ("Leavitt") is a former Picker service engineer, who until recently **[**3]** was employed by Imaging. *Id.* at I-38 to I-39.

Picker sells its CT Scanners to hospitals and other medical facilities in competition with other manufacturers, including General Electric, Siemens, Philips, Toshiba, Elscint, and Shimadzu. Picker Evid. App., Pindyck Aff., Ex. 6, PP 10, 31; Webb. Aff., Ex. 13, P 5. **[*955]** Picker's largest competitor is General Electric, whose sales since 1986 have constituted about 40% of the United States market. *Id.* Picker's share of the United States market has ranged from between 15% to 19%, making it at various times the nation's third or second largest manufacturer of CT Scanners. *Id.*

Since 1985, the purchase price of a CT Scanner has ranged from \$ 400,000 to over \$ 1,000,000. Picker Evid. App., Pindyck Aff., Ex. 6, P 9; Webb. Aff., Ex. 13, P 6. CT Scanners are used by hospitals and other medical facilities to conduct various diagnostic procedures. These end-users are sophisticated consumers. Picker Evid. App., Pindyck Aff., Ex. 6, PP 12-14; Webb. Aff., Ex. 13, PP 7-8, 16-18. They seek to maximize the use of, and economic return on, their CT Scanners by minimizing the time during which the CT Scanner is not working ("down time"). *Id.*

CT **[**4]** Scanners typically have a useful life of eight to ten years. Picker Evid. App., Pindyck Aff., Ex. 6, P 9. As delicate, precision machines, they require substantial servicing. *Id.*, Pindyck Aff., Ex. 6, P 17; Webb. Aff., Ex. 13, P 20. Picker claims that the cost of servicing often equals or exceeds the original purchase price of the unit. *Id.* Generally, CT Scanners require preventative maintenance on a bi-weekly basis, consisting of several hours of diagnostic routines and trouble-shooting. *Id.*, Ex. 13, P 18. In addition, component parts of a CT Scanner require frequent replacement as part of the servicing schedule. *Id.*, Ex. 6, P 15; Ex. 13, P 18.

Imaging disputes Picker's claim that the cost of servicing a CT Scanner often exceeds its purchase price, particularly if the CT Scanner tubes, which are consumable items designed to be replaced, are not included in service costs. Imaging's Memorandum of Law in Opposition to Picker's Motion for Partial Summary Judgment ("Mem. Opp'n") at 5-6. In addition, Imaging states that Picker's life cycle costs are calculated on the basis of sales and service by a manufacturer of CT Scanners, suggesting that the cost is lower where service **[**5]** is provided by an ISO. *Id.* at 6 n.1.

Manufacturers like Picker service only the CT Scanners they manufacture, offer a warranty on their service and parts, and often also offer extended warranties at the time of sale. Picker Evid. App., Pindyck Aff., Ex. 6, PP 11; Webb. Aff., Ex. 13, PP 13-14. Upon the expiration of the warranty, manufacturers typically offer service under flat-fee contracts for a fixed period of time, or on a time and materials basis. *Id.*

Although most CT Scanners are serviced by the manufacturer, maintenance alternatives exist. *Id.* Specifically, there are ISOs like Imaging which provide service under flat fee contracts or on a time and materials basis. *Id.*, Webb. Aff., Ex. 13, P 15. In addition, some CT Scanner owners establish in-house service departments. *Id.*

Because of the substantial cost of servicing a CT Scanner, Picker contends that customers weigh this factor when choosing among the products of competing manufacturers, both in terms of the reliability of the unit and the quality and cost of service. Picker Evid. App., Pindyck Aff., Ex. 6, PP 18-24; Webb. Aff., Ex. 13, P 20. Institutions that purchase CT Scanners often have professional [**6] purchasing officers to assist in purchase decisions, hire outside consultants, or confer with colleagues at other medical institutions prior to choosing a Scanner. *Id.* Ex. 6, P 13; Ex. 13, P 8. Picker claims that manufacturers, in turn, value the expected return from servicing when establishing the sales cost of their equipment, seeking to maximize their profits on both sales and service within a competitive market. *Id.* Picker Evid. App., Ex. 6, PP 21-23; Ex. 13, PP 23-25. As explained *infra*, Imaging denies that purchasers can or do analyze life cycle costs before buying a CT Scanner. See, e.g., Mem. Opp'n at 26; Affidavit of Dr. William Witt ("Witt Aff."), Imaging's Appendix of Exhibits ("Imaging App."), Ex. 2; Affidavit of Dr. Joseph Morasco ("Morasco Aff."), Imaging App. Ex. 3.

On April 11, 1983, Leavitt began his employment as a service engineer with Picker. In this capacity, he serviced Picker CT Scanners and ultrasound equipment in Massachusetts and throughout New England. As a result of his training and work experience, Leavitt acquired confidential technical information [*956] relating to the installation, maintenance, and repair of Picker's equipment. Picker's Amended [**7] Complaint ("Am. Compl.") PP 9-10, 16-18. In connection with his employment, Leavitt entered into an Employee Invention and Confidential Information Agreement with Picker, agreeing not to disclose, during or after his employment, any secret or confidential Picker business information. *Id.* PP 10-11. In addition, Leavitt agreed that he would not, for a period of one year following the termination of his employment, service Picker equipment at any location which he had serviced while working for Picker. *Id.* PP 11-13.

In November 1986 Leavitt, while still a Picker employee, was solicited by Quinn to join Imaging. *Id.* P 19. Imaging was aware of Leavitt's contracts with Picker. *Id.* P 20. On April 3, 1987, Leavitt resigned his employment with Picker and began working for Imaging as a CT Scanner service engineer. *Id.* P 21.

Picker contends that prior to his departure from Picker, and at the request of Imaging, Leavitt took confidential business information, including service training manuals, customer information, pricing information, and diagnostic software from Picker. *Id.* P 22. Picker also charges that Leavitt and Imaging have since used this information to bid on [**8] service contracts for CT Scanners in direct competition with Picker. *Id.* In addition, Picker alleges that Leavitt, on behalf of Imaging, violated his agreement not to service, for a year after his departure, Picker equipment on which he had previously worked. *Id.* PP 25-26. Picker also asserts that Imaging has engaged in a scheme of wrongful conduct, including improperly obtaining confidential and copyrighted Picker service and repair documentation, from Picker employees and from Picker's client hospitals. *Id.* PP 29-33.

On November 19, 1987, Picker filed suit against Imaging and Leavitt based on Leavitt's alleged breach of his covenant not to compete and on his purported misappropriation of Picker's confidential business information. Pursuant to a stipulation of the parties, the court issued a Partial Final Injunction prohibiting Imaging from using certain documents Leavitt retained after he left Picker, without prejudice to the defendants' right to continue to contend that those documents did not contain Picker trade secrets. February 13, 1989 Partial Final Injunction.

In the course of discovery, Picker uncovered information suggesting to it that Imaging had unlawfully [**9] acquired, and was unlawfully using, Picker's proprietary service documents and diagnostic software. Consequently, in September 1988, Picker moved to amend its complaint to add claims based on the alleged misappropriation of intellectual property. That motion was allowed on August 1, 1989.

In September, 1989, almost two years after the commencement of this suit, Imaging filed the counterclaims which are the subject of this decision. Imaging alleges that Picker adopted a plan to destroy competition without any business justification, and that Picker obtained monopoly power in the relevant market. Imaging's Answer to Amended Complaint and Counterclaim ("Countercl.") PP 9-11. More specifically, Imaging counterclaimed against Picker, alleging that: (1) Picker is a monopolist under the Sherman Act, [15 U.S.C. § 2](#), in a purported market consisting of the servicing of Picker CT Scanners; (2) Picker has attempted to monopolize that market in violation of [15 U.S.C. § 2](#); (3) Picker violated [15 U.S.C. § 1](#) by making agreements in restraint of trade with manufacturers of component parts; (4) Picker [\[**10\]](#) interfered with Imaging's contractual relations; (5) Picker interfered with Imaging's advantageous relations with customers in the market; (6) Picker disparaged and defamed Imaging to customers and potential customers in the market; and (7) Picker engaged in unfair or deceptive acts or practices in violation of Mass. Gen. L. ch. 93A.¹ Countercl. PP 21-34, 43-58. Picker seeks summary judgment on each of these claims.

Imaging also requests a declaratory judgment that it has not violated Picker's copyrights [\[*957\]](#) or misappropriated its trade secrets. *Id.* at PP 35-42. Because these declaratory judgment counterclaims merely mirror the claims Picker asserts against Imaging in its Amended Complaint, Picker agrees that their resolution must await the impending [\[**11\]](#) trial of its claims.

In responding to Picker's motion for summary judgment, Imaging attempted for the first time to assert a claim of illegal tying in violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#). At the October 14, 1993 hearing on this motion, the court informed the parties that it agreed with Picker's contention that it would be inappropriate to permit Imaging to, in effect, amend its counterclaims to assert this claim at this late date.

More specifically, Imaging raised its claim of illegal tying six years after it knew of the events at issue; four years after its original counterclaim, itself filed two years after the inception of this case; three years after the close of discovery; and in a transparent effort to evade the consequences of Picker's formidable motion for summary judgment. In these circumstances, it was clear that Picker would be unfairly prejudiced by the belated introduction of yet another claim, which would require additional discovery, and which could and should have been asserted earlier. Thus, the court informed the parties that to the extent Imaging was implicitly seeking to amend its Counterclaim to assert an [\[**12\]](#) illegal tying claim, the request was denied. See October 14, 1993, Tr. at 7-8; *Kennedy v. Josephthal, Inc.*, [814 F.2d 798, 806 \(1st Cir. 1987\)](#) (upholding district court's denial of leave to amend where summary judgment was under advisement and allowing amendment would have required, among other things, reopening discovery); *Quaker State Oil Refining Corp. v. Garrity*, [884 F.2d 1510, 1517 \(1st Cir. 1989\)](#) (affirming denial of motion to amend filed two months prior to end of discovery and three weeks prior to deadline for summary judgment motion); *Serrano Medina v. United States*, [709 F.2d 104, 106 \(1st Cir. 1983\)](#) (trial court did not abuse discretion in denying leave to amend where there was no justification for delay in asserting new claims, and their acceptance would require additional research and discovery); *Tiernan v. Blyth Eastman Dillon & Co.*, [719 F.2d 1, 4 \(1st Cir. 1983\)](#) (two year delay in filing motion to amend shifts burden to movant to show "valid reason for neglect and delay").

Accordingly, the court will not consider any claim of Imaging alleging [\[**13\]](#) tying in violation of [Section 1](#) of the Sherman Act.

Additional relevant facts are discussed in the following analysis of Picker's meritorious motion for summary judgment.

II. Analysis

A. The Summary Judgment Standard.

¹ At the October 14, 1993 hearing on this motion for summary judgment, Imaging withdrew its Robinson-Patman Act claim of discriminatory pricing, *Picker v. Leavitt*, No. 87-2828, Summary Judgment Hearing, Transcript at 10 (Oct. 14, 1993) ("October 14, 1993 Tr.").

HN1[] In considering a motion for summary judgment, the court is governed by [Rule 56 of the Federal Rules of Civil Procedure](#), which provides in pertinent part that summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56\(c\)](#). In making this inquiry, "the court must look at the record in the light most favorable to the party opposing the motion and must indulge all inferences favorable to that party." [Stepanischen v. Merchants Despatch Trans. Corp.](#), 722 F.2d 922, 928 (1st Cir. 1983); [United States v. One Parcel of Real Property](#), 960 F.2d 200, 204 (1st Cir. 1992); [Attallah v. United States](#), 955 F.2d 776, 779 (1st Cir. 1992); [Medina-Munoz v. R.J. Reynolds Tobacco Co.](#), 896 F.2d 5, 8 (1st Cir. 1990). [**14]

HN2[] In weighing the merits of a motion for summary judgment, the court must address two questions: (1) whether the factual disputes are genuine, and (2) whether a fact genuinely in dispute is material. [Anderson v. Liberty Lobby](#), 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law properly preclude the entry of summary judgment." *Id.* In order to determine if a dispute about a material fact is "genuine," the court must decide whether "the evidence [*958] is such that a reasonable [factfinder] could return a verdict for the nonmoving party." *Id.*; [Medina-Munoz](#), 896 F.2d at 8; [Oliver v. Digital Equipment Corp.](#), 846 F.2d 103, 105 (1st Cir. 1988).

B. The Sherman Act Claims

As set forth below, on the basis of the record, a reasonable factfinder could conclude that a single product market existed for the service of Picker CT Scanners. However, a reasonable factfinder could not determine from [**15] the evidence presented that Picker engaged in any exclusionary conduct. Accordingly, summary judgment must be allowed on Imaging's Sherman Act [§ 2](#) monopolization and attempted monopolization claims.

With respect to the Sherman Act [§ 1](#) counterclaims, Picker is entitled to summary judgment because a factfinder could not properly conclude that the alleged restraints of trade were unreasonable.

1. Monopolization and Attempted Monopolization under the Sherman Act [§ 2](#)

a. The legal standard

Imaging alleges that through various acts of exclusionary conduct, Picker attempted to monopolize, and did monopolize, the service market for Picker CT Scanners, in violation of [§ 2](#) of the Sherman Act, [15 U.S.C. § 2](#).²

HN4[] In analyzing a [Section 2](#) claim, it is essential to: (1) define the relevant market; (2) determine whether the party [**16] charged has attempted to obtain, or obtained, monopoly power in that market; and, if so, (3) determine whether such power was sought or acquired by "exclusionary conduct." [Eastman Kodak Co. v. Image Technical Service, Inc.](#), 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2089 (1992); [United States v. Grinnell Corp.](#), 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); [Town of Concord v. Boston Edison Co.](#), 915 F.2d 17, 21 (1st Cir. 1990), cert. denied, 499 U.S. 931, 113 L. Ed. 2d 268, 111 S. Ct. 1337 and reh'g denied, 500 U.S. 930, 114 L. Ed. 2d 131, 111 S. Ct. 2047 (1991).

More specifically, to prove actual monopolization, Imaging must establish that Picker has monopoly power in the relevant market and "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [Grinnell](#), 384 U.S. at 570-71. [**17]

² **HN3**[] [Section 2](#) of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States. . . ."

HN5 As for attempted monopolization, the Court of Appeals for the First Circuit has stated that:

To succeed in an attempted monopolization claim under [Section 2](#) of the Sherman Act, the plaintiff must prove that the defendant had the specific intent to monopolize the relevant market, and a dangerous probability of success. As other courts have noted, a specific intent to monopolize or restrain competition can often be inferred from a finding of bad faith.

[CVD, Inc. v. Raytheon Co., 769 F.2d 842 \(1st Cir. 1985\)](#), cert. denied, 475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1198 (1986); see also [H.L. Hayden Co. of N.Y. v. Siemens Medical Systems, 879 F.2d 1005 \(2d Cir. 1989\)](#) (setting forth identical elements). A showing of exclusionary conduct is required for an attempted monopolization claim. [Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884, 890-91 \(1993\)](#) (it is "generally required that to demonstrate attempted monopolization" plaintiff must prove that defendant "engaged in predatory or anticompetitive [**18] conduct"); [Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478, 491 \(1st Cir. 1988\)](#), cert. denied, 488 U.S. 1007, 102 L. Ed. 2d 780, 109 S. Ct. 789 (1989).

b. *There is a genuine dispute concerning the relevant market*

Imaging contends that the relevant market is service for Picker CT Scanners, and that Picker has sought and achieved monopoly power in that market. In contrast, Picker asserts that the relevant market should be defined as the sale and service of all brands of CT Scanners, and that it has not attempted [*959] to achieve or acquired monopoly power in that highly competitive market. The evidence places the question of the proper definition of the relevant market in genuine dispute. This is, therefore, an issue which would have to be tried if it were material to the determination of Imaging's Section [§ 2](#) counterclaims.

HN6 "To define a market, one must decide the geographic dimension, the product dimension . . . and the production dimension . . ." 2 Philip Areeda and Donald Turner, [Antitrust Law](#) § 517 (1978). In this case, it is undisputed that the relevant geographic market [**19] is the United States, Countercl. P 7, and the production dimension is not implicated. Thus, **HN7** market definition must focus on the product dimension; that is, the "commodities reasonably interchangeable by consumers for the same purposes." [United States v. E. I. du Pont de Nemours, & Co., 351 U.S. 377, 395, 400, 100 L. Ed. 1264, 76 S. Ct. 994 \(1955\)](#). This focus is appropriate because the ultimate question concerning market definition is whether a hypothetical cartel could raise prices significantly above the competitive level. Areeda & Turner, *supra*, § 518.1b (1993 Supp.).

Picker contends that the ability of consumers to purchase its competitors' CT Scanners if Picker charges too much to service its own product makes it improper to limit the relevant market solely to the servicing of its CT Scanners. With regard to an argument of this nature, the Supreme Court has explained that: **HN8** "The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the cross elasticity of demand." [Kodak, 112 S. Ct. at 2038](#). This [**20] is a question of fact [Lee v. Life Insurance of North America, 23 F.3d 14, 16 \(1st Cir. 1994\)](#).

Picker relies on the affidavit of its expert, Professor Robert S. Pindyck, for its claim that, as sophisticated consumers who want to minimize the "downtime" of their equipment, purchasers of CT Scanners consider the cost and quality of service in deciding which brand to buy. See Pindyck Aff., Picker Evid. App. Ex. 6, PP 13-14, 18-19. Pindyck bases his opinion primarily on discussions with Picker, interviews with hospital administrators, and a telephone survey of end-users. [Id. P 20-24](#). He believes interbrand competition acts as a restraint on the price of servicing as well as on the purchase price of CT Scanners. [Id. at P 30](#). In Professor Pindyk's view, the relevant market includes all producers who sell and service CT Scanners. [Id. at 31](#). As Picker has never had more than 19% of this market, he asserts it lacks the monopoly power necessary to be found to have violated [Section 2](#) of the Sherman Act.

HN9 If, as Professor Pindyck opines, the service market price is to have [**21] an impact on equipment demand, "consumers must inform themselves of the total cost of the 'package' -- equipment, service, and parts -- at the time of purchase; that is, consumers must engage in accurate life cycle pricing." [Kodak, 112 S. Ct. at 2085](#)

(footnote omitted). This is an information intensive analysis. It is, for example, a question of fact whether Picker or its competition makes available the information necessary for life cycle pricing. *Id. at 2086*. Moreover, defining the relevant market also requires consideration of whether there are costs of switching to another product which lock-in a purchaser and make it vulnerable to suprareactive price increases for service because it cannot, cost-effectively in view of its investment, switch to a competing brand if service becomes more expensive. *Id. at 2087*.

Imaging offers the affidavits of Dr. William Witt to put the foregoing issues in dispute. Dr. Witt states that he participated in purchasing more than fifty Picker CT Scanners for the Veterans Administration Medical Center in Nashville, Tennessee. Witt Aff., Imaging App., Ex. 3, P 2. Neither he nor anyone at the Veterans [**22] Administration engaged in life-cycle pricing in connection with those acquisitions. *Id.* No representation was made to him by Picker or any other vendor concerning life-cycle costs or comparative CT Scanner costs. *Id. PP 2, 8.* In Dr. Witt's opinion, it would be difficult for anyone to engage in an accurate life-cycle cost [**960] analysis of CT Scanners because there are too many imponderables. *Id. P 3.*

Similarly, Dr. Morasco asserts that as Chairman of Diagnostic Radiology at St. Francis General Hospital in Pittsburgh, Pennsylvania he has received market presentations from many producers of CT scanners over fifteen years, and has purchased Picker CT Scanners. Morasco Aff., Imaging App., Ex. 3, P 5. He claims he has never heard the term "life-cycle costs" used by a CT Scanner manufacturer. *Id. at P 6.* More significantly, he agrees with Dr. Witt that, because service requirements are uncertain, there is no way to project life-cycle service costs reliably at the time a CT Scanner is purchased. *Id. P 7.* In addition, Imaging argues that Picker's survey is flawed in focusing exclusively on hospitals, which represent only a segment of consumers. See Mem. Opp'n at 35-36; October [**23] 14, 1993 Tr. at 24-25; Pindyck Aff., Picker Evid. App. Ex. 6, P 12 ("The buyers of CT Scanners are largely hospitals and medical clinics.") (emphasis added).

Picker challenges the evidence of Drs. Witt and Morasco. It claims that they are biased. Witt has sued Picker previously, Picker's Supplemental Appendix of Evidentiary Materials ("Supp. App."), *Ex. 4 P 2*, and Morasco is a shareholder of Imaging. Supp. App. Ex. 3 at 16-17. Picker also attacks the credibility of their contentions in other ways. Supp. App., Ex. 4, P 2; Ex. 3 at 35-36.

At this point, however, the court must look at the record in the light most favorable to Imaging. Accepting Imaging's experts evidence as credible for present purposes, it is sufficient to create a disputed fact concerning whether purchasers of CT Scanners can and do engage in life-cycle pricing. This is particularly true in view of the fact that Picker's main evidence on this point, Professor Pindyck's report, focuses exclusively on the class of purchasers best able to gather and process information, and ignores smaller or individual purchasers. A jury could reasonably infer on this record that smaller purchasers are [**24] less able or likely than large, institutional purchasers such as hospitals to engage in life-cycle pricing analysis. There is, therefore, a genuine dispute concerning whether the market should be defined as the sale and service of all CT Scanners, or the service of Picker's product alone.

It is undisputed that if the relevant market is the service of Picker's products, Picker's share is 70 to 80%. This is within a range which would permit a reasonable factfinder to conclude that Picker had monopoly power in that market. See *Kodak, 112 S. Ct. at 2090* (80-95% of service market with no readily available substitute is sufficient showing); *Grinnell, 384 U.S. at 571* (87% of market constitutes monopoly).

Accordingly, the issue of market definition would have to be tried if it were material to the outcome of this case. However, as there is inadequate evidence that Picker engaged in exclusionary conduct, the question of market definition is not material to the disposition of Picker's motion for summary judgment.³

³ The court notes that claims similar to those alleged by Imaging were made against Picker by another ISO in *Electronics in Medicine, Inc. v. Picker Int'l, Inc.*, C.A. No. H-88-1400 (S.D. Tex. Nov. 8, 1991). On a motion for summary judgment by Picker, the court found that a jury could reasonably find a single brand market with respect to the service of Picker CT Scanners, and that Picker had used its unique position as manufacturer in order to eliminate competition at the service market level. Picker's Appendix of Authorities, ("Auth. App."), Ex. 3 at 7. Therefore, the court denied the motion for summary judgment. *Id. at 7-8.* The jury, however, ultimately found that no single brand market for the service of Picker CT Scanners existed. Imaging's Appendix of

[**25] c. *There is inadequate evidence for a factfinder to conclude Picker engaged in exclusionary conduct*

Picker is entitled to summary judgment on the Sherman Act [§ 2](#) claims because Imaging has not offered sufficient evidence to prove that any monopoly power Picker may possess arose as a result of "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, [*961] business acumen, or historic accident." [Grinnell, 384 U.S. at 570-71](#); see also [Kodak, 112 S. Ct. at 2089](#). The Court of Appeals for the First Circuit has characterized [HN10](#)[↑] the willful acquisition or maintenance of monopoly power as "exclusionary conduct." [Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 \(1st Cir. 1983\)](#); see also [Town of Concord, 915 F.2d at 21](#). It has given content to the term by defining it as "'conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appears capable of making a significant [*26] contribution to creating or maintaining monopoly power.'" [Barry Wright, 724 F.2d at 230](#) (quoting 3 Areeda and Turner, *supra*, P 626 at 83). A practice is "anticompetitive" if it harms the competitive process, not if it merely harms competitors. [Town of Concord, 915 F.2d at 21](#); [R.W. International Corp. v. Welch Food, Inc., 13 F.3d 478, 487 \(1st Cir. 1994\)](#). This process is harmed when the conduct at issue "obstructs the achievement of competition's basic goals -- lower prices, better products, and more efficient production methods." [915 F.2d at 22](#).

Thus, the question is whether Picker's "conduct [was] reasonable in light of its business needs or did it unreasonably restrict competition?" [Barry Wright, 734 F.2d at 230](#); see also [Town of Concord, 915 F.2d at 21](#) (in making exclusionary conduct analysis, court compares challenged practice's likely anticompetitive effects with its potentially legitimate business justifications).

Imaging asserts in its counterclaim that Picker has engaged in seven types of exclusionary [*27] conduct: lockout specifications in Veterans Administration Hospital contracts for the service of Picker CT Scanners; defamation; unlawful refusals to deal; sham litigation; unauthorized removal of documents from customer sites; predatory pricing; and sabotage. As explained below, the evidence on these claims, individually and cumulatively, is insufficient to create a litigable issue concerning exclusionary conduct. Thus, Imaging is not entitled to a trial on its monopolization or attempted monopolization claims.

1. *The Veterans Administration's "Lockout Specifications"*

Imaging's strongest evidence of alleged exclusionary conduct relates to certain Veterans Administration ("VA") specifications for the servicing of Picker CT Scanners which the Department of Veterans Affairs subsequently found improperly restricted the ability of ISO's to compete for Veterans Administration service contracts. Department of Veterans Affairs, Office of the Inspector General, Special Review of VA's Service Contracts for the Picker CT Scanner, September 30, 1991, Ex. A to Ex. 1 of Imaging App. ("the Report"). The Department of Veterans Affairs, however, did not look for or find any irregular contracting [*28] practices on the part of Picker. Department of Veterans Affairs, Office of the Inspector General, Special Review of VA's Service Contracts for the Picker CT Scanner (Amended), September 30, 1991, Supp. App. Ex. 1 at i ("the Amended Report"). Rather, the Department of Veterans Affairs specifically noted that, "Picker's contracting practices are the subject of ongoing litigation between Picker and certain independent service organizations," *id.*, and implicitly left open for determination in this case the question whether Picker improperly caused the Veterans Administration to adopt the restrictive specifications.

Examination of the evidence indicates that a reasonable factfinder could conclude that Picker improperly caused the Veteran's Administration to adopt only one restrictive specification, regarding one contract. Such conduct is insufficient, both alone and in the context of all the other relevant evidence, to create a triable issue of whether Picker used exclusionary conduct to seek or acquire any monopoly power it might be found at trial to have concerning the servicing of all of its CT Scanners.

More specifically, the Department of Veterans Affairs issued, then amended, [**29] reports addressing allegations that the Veterans Administration had unnecessarily included in its specifications for the servicing of Picker CT Scanners requirements which only Picker could meet, thus "locking out" its competitors. Those reports would be admissible at trial pursuant to [HN11](#)⁴ [Fed. R. Evid. 803\(8\)\(C\)](#), [*962] which provides for the introduction of reports of a public agency containing factual findings resulting from an investigation made pursuant to law. See [Beech Aircraft Corp. v. Rainey](#), 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988); [Sabel v. Mead Johnson and Co.](#), 737 F. Supp. 135 (D. Mass. 1990). The statements in those reports attributed to Picker would also be admissible because, as statements by a representative of Picker, they would not, pursuant to [Fed. R. Evid. 801\(d\)\(2\)\(c\)](#), be hearsay. See [United States v. De Peri](#), 778 F.2d 963, 977 (3rd Cir. 1985), cert. denied sub nom., [Murphy v. United States](#), 475 U.S. 1110 (1986) (out-of-court [HN12](#)⁵) statements contained in public records require a separate hearsay exception before [**30] they can be admitted). The Report and Amended Report found that the Veterans Administration specifications in twenty-one of thirty-six contacts for the servicing of Picker CT Scanners improperly favored Picker in at least one of three ways. First, nine contracts required the use of the Mega H or Mega HD x-ray tubes produced by Picker's Dunlee division (the "Dunlee tube"). Report at 4. As described *infra*, Picker would not sell the Dunlee tube to ISOs. ISOs, however, could buy the EIMAC tube, produced by Varian Corporation, which the Report found to be an acceptable substitute for the Dunlee tube. *Id.* The Report cited direct evidence that, in one instance, Picker sought to influence the Veterans Administration to adopt the restrictive requirement concerning the Dunlee tube by writing, "in a letter dated November 12, 1986, to VAMC Indianapolis, indicating only Dunlee tubes are safe because the EIMAC tube introduced the potential for damage to the scanner and possible injury to the patient." *Id.* The Report found that in over half of the thirty-six contracts, including some which did not expressly require use of the Dunlee tube, ISOs were eliminated from receiving the award [**31] because they did not have access to the Dunlee tube. *Id.*⁴

The Report also found that ten Veterans Administration service contracts required that service technicians be trained by Picker. *Id.* at 5. Once again, only Picker could meet this requirement. The Report found, however, that the Veterans Administration could adequately train its in-house technicians to service Picker CT Scanners. *Id.* Therefore, it concluded that this specification, which excluded ISOs from receiving awards, was overly restrictive.⁵ *Id.* There is no evidence, however, that Picker made any misrepresentation which resulted in the Veterans Administration [**32] adopting this requirement.

The Report also found that thirteen contracts unnecessarily required that the servicing organization use Picker diagnostic and operational software. *Id.* As Picker did not license its software to ISOs, this specification eliminated ISOs from consideration for certain awards. Once again, however, there is no evidence that Picker improperly influenced the Veterans Administration to adopt this requirement.

In 1991, the Report recommended that the Veterans Administration develop unrestrictive specifications for all service contracts for Picker CT Scanners. There is no evidence suggesting that this has not been done.

The court has carefully considered the evidence concerning Picker's conduct with regard to the Veteran's [**33] Administration and concludes that it is not sufficient, alone or in conjunction with Imaging's other evidence, to create a litigable issue concerning whether Picker engaged in exclusionary conduct in the market for servicing all of its CT Scanners.

The Veterans Administration is only one customer for the Picker CT Scanner. It comprises some unspecified fraction of the [*963] total market of Picker CT Scanners which must be serviced.

⁴ There is no direct evidence that Imaging lost a VA award because it lacked access to the Dunlee tube. This fact, however, relates only to Imaging's potential damages and not to whether Picker violated [Section 2](#) -- a question which focuses on injury to competition rather than to a specific competitor. See, e.g., [Town of Concord](#), 915 F.2d at 21.

⁵ Imaging lost a Veterans Administration contract in Los Angeles, California because its representatives were not trained by Picker. VA Memorandum on Technical Evaluation of Imaging Equipment Services, Imaging App., Ex. B to Ex. 1; Quinn Aff.; Imaging App., Ex. 1, PP 13-14.

HN13 [↑] "Efforts to influence government officials acting under statutes requiring competitive bidding are within the scope of the antitrust laws." *Whitten v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 34 (1st Cir.), cert. denied, 400 U.S. 850, 27 L. Ed. 2d 88, 91 S. Ct. 54 (1970) and 421 U.S. 1004 (1975). It is, however, not improper for a producer to engage in an honest effort to persuade a government agency that specifications favoring it are appropriate. However, "efforts of any industry leader to impose his product specifications by guile, falsity, or threats are contrary to [the anti-trust] laws." *Id. at 31*; see also 3 Areeda and Turner, [**34] *supra*, § 738b at 280 ("Although the fact of influence or inducement cannot itself be wrongful, its manner can be improper.").

In this case, Picker was dealing with sophisticated purchasers, the many different procuring offices of the Veterans Administration. There is no evidence that Picker bribed or otherwise corrupted any Veterans Administration official. Nor is there any evidence of threats. The essence of Imaging's allegations is that Picker misled the purchasers.

After many years of discovery, except for the letter quoted in the Report concerning the EIMAC tube, there is no direct evidence regarding what Picker communicated to the various Veterans Administration procurement offices prior to their adopting what the Report found to be unnecessarily restrictive specifications. Although circumstantial evidence may be considered, it is axiomatic that in the absence of admissible evidence a jury would not be permitted to speculate or guess what Picker might have communicated to the Veterans Administration prior to the issuance of those specifications.

Picker's 1986 letter relating to one proposed contract, and stating that the EIMAC tube was not a suitable substitute for its Dunlee [**35] tube, was false. Indeed, as discussed *infra*, Picker now relies on the suitability of the EIMAC tube to defend against another form of alleged exclusionary conduct, its purportedly unlawful refusal to sell the Dunlee tube to ISOs. As Professor Areeda and Turner have written, however:

HN14 [↑] Many buyers . . . recognize disparagement [of a rival] as non-objective and highly biased. Although hardly a justification for falsehood, buyer distrust of a seller's disparaging comments about a rival seller should caution us against attaching much weight to isolated examples of disparagement. Essential, therefore, is a serious *de minimis* test. We would go further and suggest such claims should be presumptively ignored.

3 Areeda and Turner, *supra*, § 738c at 281.

In this case, the evidence depicts only a single instance of a false statement made to a sophisticated and presumably skeptical, independent purchaser. There is no evidence that Imaging and other ISOs did not have the opportunity to neutralize Picker's misstatement before the specification was issued. In any event, the Report recommending abandonment of the restrictive specifications was evidently a response to communications from [**36] ISOs to the Department of Veterans Affairs.

In these circumstances, the evidence is insufficient for a reasonable factfinder to conclude that Picker's conduct concerning the Veterans Administration "made a significant contribution to creating or maintaining monopoly power," *Barry Wright*, 724 F.2d at 230, in the market for servicing all Picker CT Scanners, of which those purchased by the Veterans Administration were only a fraction. See 3 Areeda and Turner, *supra*, § 738a at 278-79; *National Association of Pharmaceutical Manufacturers v. Ayerst Laboratories*, 850 F.2d 904, 916-17 (2d Cir. 1988) (citing Areeda and Turner in reversing the grant of motion to dismiss on basis that discovery to date was insufficient for evaluation of relevant factors under *de minimis* test); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 288 n.41 (2d Cir. 1979), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980) ("Before we would allow misrepresentations to buyers to be the basis of a competitor's treble damages action [**37] under § 2, we would at least require the plaintiff to overcome a presumption that the effect [**964] on competition of such a practice was *de minimis*.") (citing Areeda and Turner); *Data General Corp. v. Grumman Systems Support Corp.*, 761 F. Supp. 185, 189-90 (D. Mass. 1991).

(b) Defamatory Statements

Imaging alleges that Picker made defamatory statements to five customers which constituted, or contributed to, exclusionary conduct. There is, however, admissible evidence of one only negative statement to a customer; it was

not defamatory; and it was so innocuous that it is insufficient to constitute, or contribute to a finding of, exclusionary conduct by Picker.

Contrary to Imaging's contention, there is no evidence that Picker made negative statements about Imaging to potential customers Marie Gaborko, Rudolph Buck, or Ronald Heffner. Indeed, Buck and Gaborko deny ever having communications with Picker concerning Imaging. Picker Evid. App., Affidavit of Rudolph Buck, Ex. 1, PP 3-5; Affidavit of Marie Gaborko, Ex. 4, PP 4-6.

With regard to Jacqui Scymanski, Imaging offers only hearsay evidence from Quinn that Scymanski said a Picker employee told her that [\[**38\]](#) Quinn and his partner had split, and Imaging did not back its warranties. Quinn Dep., Picker Evid. App., Ex. 19 at 6-69 to 6-76. Scymanski, however, denies that Picker ever said anything to her about Imaging. Affidavit of Jacqui Scymanski, Picker Evid. App., Ex. 11, PP 3-5. Scymanski's assertion is not genuinely in dispute because Quinn's inadmissible hearsay may not be considered in deciding this motion for summary judgment. See [*Schwimmer v. Sony Corporation of America, 637 F.2d 41, 45 n.9 \(2d Cir. 1980\); Wiley v. United States, 20 F.3d 222, 225 \(6th Cir. 1994\)*](#).

One customer, A.V. Papa, Jr., did testify that Picker employees made comments that: Imaging "wouldn't do a good job;" Imaging didn't have the commercial "expertise to keep the equipment up and running without downtime;" and Imaging would not be at the "beck and call" of Papa. Deposition of A.V. Papa, Jr. ("Papa Dep."), Imaging's Evid. App., Ex. 27, at 75, 78, and 82. These comments are not, however, defamatory or libelous. [HN15](#)[↑] A communication is defamatory if it "discredits the plaintiff 'in the minds of any considerable and respectable segment in the community.'" [*Draghetti v. Chmielewski, 416 Mass. 808, 811, 812 n.4, 626 N.E.2d 862 \(1994\)*](#) [\[**39\]](#) (quoting [*Tropeano v. Atlantic Monthly Co., 379 Mass. 745, 751, 400 N.E.2d 847 \(1980\)*](#)). Generally, where the discussion involves a rival's services or product, it is not considered libelous unless it "imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct . . ." [*U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 924 \(3rd Cir.\), cert. denied sub nom., Independence Blue Cross v. U.S. Healthcare, Inc., 498 U.S. 816, 112 L. Ed. 2d 33, 111 S. Ct. 58 \(1990\)*](#). The statements reportedly made to Papa do not meet either of these standards.

Looking at the record in the light most favorable to Imaging, the comments which Papa attributes to Picker constitute at most commercial disparagement. [HN16](#)[↑] Commercial disparagement is defined by the [*Restatement \(Second\) of Torts, § 623A*](#) (1979), as a false statement intended to bring into question the quality of a rival's goods or services in order to inflict pecuniary harm. See also [*DeCosta v. Viacom International, Inc., 981 F.2d 602, 610 \(1st Cir. 1992\)*](#), [\[**40\]](#) cert. denied, 125 L. Ed. 2d 725, 113 S. Ct. 3039 (1993). Statements constituting commercial disparagement are generally regarded as conditionally privileged. See [*Restatement \(Second\) of Torts § 649*](#) (1979). This is because, as described earlier, many buyers . . . recognize disparagement [of a rival] as non-objective and highly biased." 3 Areeda and Turner, *supra*, § 738c at 281; see also [*R.W. Sims v. Mack Truck Corp., 488 F. Supp. 592, 605 \(E.D. Pa. 1980\)*](#), cert. denied, 445 U.S. 930, 63 L. Ed. 2d 764, 100 S. Ct. 1319 (1980). Indeed, in this case, Papa testified that none of Picker's statements caused him to change his mind about using Imaging. Papa Dep., Imaging's Evid. App., Ex. 27 at 79.

In these circumstances, Imaging's claim of defamation does not have sufficient substance to constitute, or contribute to a finding of, exclusionary conduct. See [*Data General Corp. v. Grumman Systems Support Corp., 761 F. Supp. 185, 189 \(D. Mass. 1991\); \[**965\] Falstaff Brewing Co. v. Stroh Brewery Co., 628 F. Supp. 822, 831 \(N.D. Cal. 1986\)*](#). [\[**41\]](#)

(c) Unlawful Refusal to Deal

Imaging contends that Picker's refusal to sell ISOs the Dunlee tube used in its CT Scanner constitutes exclusionary conduct. However, because the EIMAC tube is a suitable and available substitute for the Dunlee tube, Picker's consistent refusal to sell it to ISOs was permissible, rather than exclusionary, conduct. [HN17](#)[↑] A monopolist may not refuse to make an "essential facility" available to a competitor. [*Otter Tail Power Co. v. United States, 410 U.S. 366, 377-78, 35 L. Ed. 2d 359, 93 S. Ct. 1022 \(1973\); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132 \(7th Cir.\), cert. denied, 464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 \(1983\)*](#). Nor may a monopolist reverse a well-established practice of dealing with a competitor if the change in policy injures

competition, and there is no legitimate business reason for the change. *Aspen Skiing Co. v. Aspen Highlands Skiing Corporation*, 472 U.S. 585, 605-08, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985). [**42]

The Dunlee tube is a key component of Picker CT Scanners. Picker Evid. App., Ex. 13, P 30. Picker sold the Dunlee tube to end-users, regardless of whether they contracted with Picker for servicing. *Id. at P 32*(a). Claiming that it did not want to be blamed if faulty installation caused a problem, however, Picker would not sell the Dunlee tube to ISOs. *Id.* at 56. ISOs, however, had ready access to the EIMAC tube which, as described earlier, the Department of Veterans Affairs found is a fully acceptable substitute for the Dunlee tube. *Id. at P 34*. The parties do not dispute this fact.

Accordingly, the Dunlee tube was not an "essential facility" for the servicing of Picker CT Scanners. There is evidence that Picker may have inadvertently sold one Dunlee tube to Imaging. *Id. at P 33*; Ex. 19 at 5-26 to 5-27. This does not, however, place in genuine dispute the fact that Picker had a consistent policy and practice of not selling the Dunlee tube to ISOs. In these circumstances, Picker's conduct concerning its Dunlee tube could not be found to be an unlawful refusal to deal.

(d) *Sham Litigation*

Imaging alleges Picker initiated unfounded litigation to injure competition [**43] for the servicing of its CT Scanners. This allegation is unsupported.

HN18[] In the antitrust context, litigation may constitute, or contribute to a finding of, illegal conduct if: (1) "the lawsuit is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits;" and (2) the motive for the baseless lawsuit was "an attempt to interfere directly with the business relationships of a competitor." *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 123 L. Ed. 2d 611, 113 S. Ct. 1920, 1928 (1993) (quoting *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)). With regard to the second prong of this test, Imaging does not place in genuine dispute Picker's assertion that it has initiated all litigation in good faith. Picker Statement of Undisputed Facts P 39. In support of its claim of sham litigation, Imaging merely refers the court to certain exhibits, without focused citations, explanation, or argument. Imaging App., Ex. 2, Witt Aff. P 2; Imaging App., [**44] Ex. 23, ETEK Verdict; Imaging App., Ex. 27, Papa Dep. at 51-52. Having examined these materials, the court finds that they fail to place in dispute Picker's good faith in instituting any suit or alleging claims in this or any case on which Imaging relies.

Nor is the evidence adequate to place in genuine dispute whether Picker's claims in various cases had an objectively reasonable basis. There was plainly an objectively reasonable basis for Picker to institute the instant case. Imaging consented to a Partial Final Injunction restricting it from possessing items of Picker documents retained by Leavitt when he left Picker, although without prejudice to Imaging's right to contend that those documents did not contain trade secrets. See February 13, 1989 Partial Final Injunction. More significantly, Imaging has not sought summary judgment on Picker's claims because there are clearly material [*966] facts genuinely placed in dispute by the evidence Picker has offered.

The information furnished to the court indicates that Picker settled two other cases on a basis Picker regards as favorable. *Picker International, Inc. v. Robert Fiorino*, C.A. No. 144682 (C.P. Cuyahoga County Ohio) and [**45] *Picker International, Inc. v. R-Squared, Inc.*, C.A. No. C518629 (L.A. Super. Ct. Cal.). Picker prevailed at trial in a third case on which Imaging relies and which Picker did not even initiate. See Picker Auth. App., Ex. 7, *Witt v. Picker International, Inc.*, No. 3-88-0836 (D. Tenn. Feb. 14, 1989).

Picker did lose one case it initiated in which it was found that a covenant not to compete executed by a former employee of Picker was unenforceable. See Picker Auth. App., Ex. 4., *Picker Int'l, Inc. v. Radiological Imaging Services of Pa, Inc.*, C.A. No. 87-01282, slip op. at 1-2 (C.P. Lebanon County Pa. September 29, 1987). There is no evidence to prove, however, that it was objectively unreasonable for Picker to have instituted that action.

Accordingly, the evidence is insufficient to prove Imaging's claim that Picker initiated "sham" litigation as a form or exclusionary conduct.

(e) *Unauthorized Removal of Documents*

Imaging has also introduced no evidence to support its claim that Picker improperly removed its service documentation from customer sites in order to unlawfully frustrate competition. Picker contends that it retrieved its service documentation and materials [**46] from customer sites in order to prevent third parties, including customers, from using them and "free-riding" on the capital investment made by Picker. Picker Evid. App., Ex. 13, P 29. In the instances of claimed misconduct alleged by Imaging, Picker responds that it had received permission to remove its service materials from Leonard Morse Hospital, Universal Medical Scanners, and Lewiston Hospital. Picker Evid. App., Ex. 7, PP 6-7; Ex. 15 at I-65 to I-66; Ex. 26. As Imaging concedes, Picker merely unsuccessfully attempted to remove service materials from Physicians Medical Imaging and South County Hospital. Picker Evid. App., Ex. 21 at 4-5. In these circumstances, Picker's removal of materials from customer sites does not provide a basis for a finding of exclusionary conduct.

(f) *Predatory Pricing*

Imaging vaguely alleges Picker engaged in "predatory pricing." [HN19](#)[] Predatory pricing is the pricing of a product below its average total cost. See [Barry Wright, 724 F.2d at 231](#). In connection with the motion for summary judgment, however, Imaging has not disputed Picker's assertion that it priced its service contracts for CT Scanners above total cost. Statement [**47] of Material Facts P 48. Nor has Imaging argued the merits of this claim in its submissions. Thus, the allegation of predatory pricing is also unsupported.

(g) *Sabotage*

Imaging also alleges that Picker engaged in "sabotage." Picker, however, denies having sabotaged any of its CT Scanners which are serviced by ISOs. Statement of Material Facts P 28. There is no evidence of sabotage, no first-hand witness accounts of the alleged sabotage, and no complaints of sabotage by customers to either Picker or law enforcement officials. Picker Evid. App., Ex. 13, P 36. In addition, each of the Picker employees alleged to have participated in the purported sabotage deny having done so. Picker Evid. App., Ex. 3, PP 4-5; Ex. 8, PP 4-5; Ex. 9, PP 4-7. Imaging's submissions do not address Picker's denial of sabotage, let alone provide evidence to place this claim of sabotage genuinely in dispute. This claim, therefore, contributes nothing to Imaging's evidence concerning exclusionary conduct.

* * *

In view of the foregoing, Imaging has failed to offer evidence which, individually or cumulatively, is sufficient to put in genuine dispute its claim that Picker engaged in exclusionary conduct. Therefore, [**48] Picker's motion for summary judgment on Imaging's attempted monopolization and monopolization claims must be allowed.

[\[*967\]](#) 3. *Agreements in Restraint of Trade in Violation of Sherman Act* [§ 1](#)

Imaging also contends that Picker's agreements requiring that some, but not all, manufacturers of components of its CT Scanners sell them exclusively to Picker violates [§ 1](#) of the Sherman Act, which prohibits contracts "in restraint of trade or commerce." As set forth below, however, [§ 1](#) [HN20](#)[] has been interpreted to apply only to "unreasonable" restraints of trade. The evidence does not place in genuine dispute Picker's assertion that there are valid reasons for the contracts at issue. Thus, there is not a triable issue concerning Imaging's Sherman Act [§ 1](#) charges.

Picker is alleged to have agreements with seventeen suppliers of components for its CT Scanners. In eight instances, those manufacturers are permitted to sell Picker CT Scanner components to end-users and ISOs, including Imaging, either directly or through distributors, or no longer produce parts for Picker. Picker Evid. App., Ex. 5, PP 3-4; Ex. 14 at I-130 to I-133, I-172 to I-174, I-184 to I-185 and I-200; Ex. 19 at 5-177 to 5-179.

Picker [**49] has agreements with nine other manufacturers, which require them to sell the Picker CT Scanner components they produce only to picker.⁶ There is no allegation that those manufacturers are restricted in their ability to produce parts for Picker's competitors. Picker will sell the components to end-users and ISO's, including Imaging. Picker Evid., App. Ex. 5, P 5.

Imaging asserts, however, that Picker keeps an inadequate inventory of such components, so that ISOs cannot meet customers' needs in a timely manner. Mem. Opp'n at 11-12. Imaging also claims that Picker informed Quinn it would take twenty-six weeks to deliver one component he tried to buy. Quinn Aff., Ex. 1, at P 12. In one instance, Imaging claims it lost to Picker a contract to service a new Picker CT Scanner being purchased by one of Imaging's existing customers, the St. [**50] Francis Medical Center in Pittsburgh, because of Imaging's inability to minimize downtime by delivering essential parts promptly. Imaging App., Ex. 24, Ex. 4 thereto. It is undisputed, however, that ISOs such as Imaging could maintain an inventory of critical component parts if they were willing to make the necessary investment. Imaging, in effect, contends that Picker must make that investment instead.

Picker's exclusive agreements with nine manufacturers of its CT Scanner components are vertical restraints of trade. They are illegal under § 1 of the Sherman Act, however, only if they are unreasonable. Justice Louis Brandeis articulated the classic formulation of HN21[] the "rule of reason" test, stating:

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 [**51] believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918). HN22[] In applying this test, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). Thus, a vertical combination without a legitimate business justification which operates to the detriment of competition violates this standard. Business Electronics v. Sharp Electronics, 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988), cert. denied, 486 U.S. 1005, [*968] 108 S. Ct. 1727, 100 L. Ed. 2d 192 (1988). [**52]

For the reasons stated earlier, the court assumes for the purposes of deciding this motion for summary judgment that the relevant market is the servicing of Picker CT Scanners. There is not, however, sufficient evidence for a factfinder to conclude that Picker's exclusive agreements lacked a legitimate business justification or that they unreasonably injured competition.

Picker has invested considerable resources, ranging from \$ 100,000 to \$ 1,000,000 each, to develop the component parts for Picker CT Scanners which are manufactured by the nine suppliers with which it has exclusive agreements. Affidavit of Dr. Robert A. Cecil ("Cecil Aff."), Picker Evid. App., Ex. 2, P 3. Picker's expenditures in developing these component parts include its labor costs for research, development, and design, and the amounts Picker paid to some component part manufacturers for research, development and retooling. *Id.* Picker states that it made these arrangements with suppliers, rather than manufacturing the components itself, because it was more cost-effective to do so. Id. P 4. There is no evidence to place this contention in dispute.

Picker describes legitimate reasons for its exclusive arrangements. [**53] Essentially, Picker asserts that if these nine manufacturers were permitted to sell Picker CT Scanner components to ISOs and end-users, they could "free-

⁶ Picker, for purposes of this motion for summary judgment, has accepted as true Imaging's claim that it entered into the alleged exclusive agreements. Picker's Mem. of Law at 46 n.33.

ride" on Picker's substantial investment in research and development, and unfairly undercut the price Picker charges end-users and ISOs. See e.g., Richard Posner, *Antitrust Law: An Economic Perspective* 148-150 (1976).

HN23 [↑] It has generally been recognized that vertical agreements designed to prevent free-riding do not violate § 1 of the Sherman Act because free-riding discourages capital investment and product innovation. See *Monsanto Co. v. Spray-Rite*, 465 U.S. 752, 762-63, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984); *Continental T.V.*, 433 U.S. at 55. Imaging, however, argues that the Supreme Court in *Kodak* rejected "free-riding" as a legitimate justification for a restraint of trade. *Kodak*, however, is distinguishable from the present case. In *Kodak*, the defendant refused to sell to ISOs certain parts for its product which were not available from any other source. *112 S. Ct. at 2077*. [**54] The ISOs alleged that Kodak's conduct constituted an actionable refusal to deal under § 2 of the Sherman Act. *Id.* at 2078. Kodak claimed, among other things, that its policy was justified by its need to prevent ISOs from free-riding on its investment in the design and development of its replacement parts. *Id. at 2079*. In reversing a grant of summary judgment for Kodak, the Court held that there was a triable issue of whether prevention of free-riding in that instance justified Kodak's refusal to deal. *Id. at 2092*.

In the instant case there is no analogous § 2 claim because Picker will sell the components at issue to end-users and ISOs, including Imaging. Picker Evid. App., Ex. 5, P 5. Instead, Imaging contends that Picker's exclusive agreements with its suppliers violates § 1 by preventing ISOs from purchasing replacement parts directly from the suppliers. However, *Kodak* does not hold that a manufacturer can never enter into exclusive agreements with suppliers for whom it has provided customized specifications, developed by it at substantial cost. If this were the law, it appears that Picker would be forced to choose between manufacturing certain components itself [**55] at a higher cost and passing those additional costs on to consumers, or allowing suppliers to benefit unfairly from Picker's investment in developing the components by allowing them to sell these components at a lower cost than Picker.

In *Kodak*, the decision that the free-riding rationale did not entitle Kodak to summary judgment was based significantly on the concern that because Kodak would not sell parts to ISOs or allow its suppliers to do so, the ISOs would be compelled to enter the parts production market. *112 S. Ct. at 2091*. Thus, the vertical restraint in *Kodak* presented "one of the evils proscribed by the antitrust laws . . . the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously." [*969] *Id.* In contrast, in the present case, the evidence does not place in dispute the fact that Picker has a policy and practice of selling the components at issue to end-users and ISOs. Thus, Picker's exclusive agreements could not be found to create a barrier to entry in violation of § 1 of the Sherman Act.

If the evidence were sufficient to permit a reasonable factfinder to conclude that Picker [**56] did not really make the components at issue available to ISOs in a timely manner despite its stated policies, there might be a triable issue concerning whether Picker's conduct violates § 1. However, after discovery, Imaging cites only one instance in which it was told by Picker there would be a twenty-six week delay in getting a requested part, and one customer, St. Francis Medical Center, that Imaging claims to have lost to Picker because Imaging was too slow in acquiring needed components.⁷ In view of the fact that Imaging and other ISOs could maintain an inventory of key components if they were willing to make the necessary investment, the isolated instances cited by Imaging are insufficient to put the existence or legitimacy of Picker's policy of selling to end-users and ISOs genuinely in dispute. See *Abcor Corp. v. AM International, Inc.*, 916 F.2d 924, 929-30 (4th Cir. 1990) (parts sales policy which requires ISO to bear inventory costs is not anticompetitive under *antitrust law*).

[**57] Nor is there adequate evidence to support Imaging's additional claims that Picker's exclusive agreements with the manufacturers of its CT Scanner components have other anticompetitive effects. Those manufacturers are not restricted in their ability to produce components for CT Scanners which compete with Picker's. Nor is the evidence sufficient to prove that Picker charges ISOs a price for the components which is excessive in view of Picker's investment in the research and development which resulted in their design and manufacture. The exclusive

⁷ As described, *infra*, there is inadequate evidence to prove that misconduct by Picker caused Imaging to lose the St. Francis Medical Center contract.

agreements therefore, could not be found to be unreasonable. See [*Roland Machinery Co. v. Dresser, 749 F.2d 380, 394 \(7th Cir. 1984\)*](#); [*Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073, 1080 \(1st Cir. 1983\)*](#). Accordingly, the evidence concerning these vertical restraints is inadequate to create a litigable issue on Imaging's Sherman Act § 1 claim. Indeed, to the extent that the exclusive agreements permit Picker to acquire components for less than it would cost Picker to manufacture them and pass that savings on to its customers, those agreements have a favorable competitive [**58] effect.

In view of the foregoing, Picker's motion for summary judgment on Imaging's Sherman Act § 1 claim must be allowed.

C. State Law Claims

Imaging alleges several state law claims, to which it devoted little attention in opposing Picker's Motion for Summary Judgment. There is not sufficient evidence to create a litigable issue on any of those claims.

1. Interference with contractual relations

[**HN24**](#) [↑] In order to sustain a claim of interference with contractual relations, the plaintiff "must prove that: (1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; and (3) the plaintiff was harmed by the defendant's actions." [*United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 812, 551 N.E.2d 20, 21 \(1990\)*](#).

Imaging, however, has not offered evidence of any existing contract which was breached as a result of Picker's conduct. Therefore, summary judgment must be entered for Picker on this claim.

2. Interference with advantageous relationships

Imaging has also provided no evidence that improper conduct by Picker proximately caused its loss of any identifiable service contract [**59] which Imaging had a reasonable probability of successfully obtaining. Therefore, Imaging's claim of tortious interference with advantageous relationships may not be maintained.

[*970] [**HN25**](#) [↑] The elements of this business tort are that: (1) plaintiff had a business relationship or contemplated contract of economic benefit; (2) defendant knew of this relationship; (3) defendant intentionally and improperly interfered with it; and (4) plaintiff's injurious loss of advantage was a direct result of the defendant's conduct. [*American Private Line Services, Inc. v. Eastern Microwave, Inc., 980 F.2d 33, 36 \(1st Cir. 1992\); Geltman, 406 Mass. at 815.*](#)

In support of this claim, Imaging has produced a letter concerning a possible contract to service a Picker CT Scanner, with the St. Francis Medical Center, which Imaging lost to Picker. Deposition of Robert C. Clark, Imaging App., Ex. 24, Ex. 4 thereto. There is no evidence, however, that Picker won that contract improperly. The letter indicates that Imaging had a service contract for one Picker CT Scanner owned by the St. Francis Medical Center. *Id.* Picker offered to accept slightly [**60] less than Imaging to service the new Picker CT Scanner the St. Francis Medical Center was acquiring. *Id.* The committee established to recommend who should receive the award recognized the potential difficulty of having service contracts with different vendors for the two Picker CT Scanners at the same site. *Id.* Nevertheless, the committee reported that:

The CT contract should be awarded to Picker. The Committee felt that the quality of service offered by Picker would be superior to that offered by Mr. Quinn and his company. For example, the problems regarding "down time" due to unavailability of parts, and the recent experience of substandard parts being delivered to Mr. Quinn, would be alleviated using the manufacturer as the repair agent.

Id. As discussed earlier, there is no evidence that Picker improperly caused any problems Imaging had in obtaining parts for the St. Francis Medical Center.⁸ Similarly, there is no evidence to prove that Picker was the source of any

⁸ The instance in which Quinn states he was told by Picker that he would have to wait 26 weeks for a replacement part involved a Picker CT Scanner at Computer Design Associates. Quinn Aff., Imaging App., Ex. 1, P 2.

substandard parts delivered to Imaging. Thus, the St. Francis Medical Center matter does not present a litigable case of interference with advantageous relations.

[**61] Although Imaging does not make the claim expressly, the court has also considered whether the previously described loss by Imaging of the Los Angeles Veterans Administration contract as a result of the restrictive specifications that required training of service personnel by Picker provides a basis for such a claim. It does not because, as discussed earlier, there is no evidence that Picker improperly caused the restrictive specification to be adopted by the Veterans Administration.

There is, therefore, no litigable claim of interference with advantageous relations presented by the evidence in this case.

3. *Defamation.*

For the reasons described earlier in connection with Imaging's claims of exclusionary conduct, the evidence is also insufficient to permit a reasonable factfinder to conclude that Picker defamed Imaging. Accordingly, it is not necessary to decide Picker's contention that the defamation claim is barred by the statute of limitations.

4. *Mass. Gen. L. ch. 93A and Unfair Competition.*

Imaging alleges [HN26](#) [↑] unfair competition which, in Massachusetts, is addressed by Mass. Gen. L. ch. 93A. See, e.g., [*Smartfoods, Inc. v. Northbrook Property and Casualty Co.*, 35 Mass. App. Ct. 239, 244-45, 618 N.E.2d 1365 \(Mass. App. Ct. 1993\)](#) [**62] (analyzing common law unfair competition claim under the standards of Mass. Gen. L. ch. 93A). To maintain a claim that Mass. Gen. L. ch. 93A has been violated, the events allegedly constituting unfair competition must have occurred "primarily and substantially" in Massachusetts. [*Clinton Hospital Assoc. v. Corson Group, Inc.*, 907 F.2d 1260, 1265-66 \(1st Cir. 1990\)](#); [*Bushkin Associates, Inc. v. Raytheon Co.*, 393 Mass. 622, 473 N.E.2d 662, 671-72 \(Mass. 1985\)](#); see also [*Maruho Co., Ltd. v. Miles, Inc.*, 1993 U.S. Dist. LEXIS 3321, 1993 WL 81453, *5 \(D. Mass. Mar. 8, 1993\), aff'd, 13 F.3d 6 \[\[*971\]\(#\)\] \(1st Cir. 1993\)](#); [*Val Leasing, Inc. v. Hutson*, 674 F. Supp. 53, 56-57 \(D. Mass. 1987\)](#).

In this case, the evidence demonstrates that virtually all of Picker's purported misconduct, and any harm to Imaging, occurred outside of Massachusetts. Thus, Imaging has failed to present a claim under Mass. Gen. L. ch. 93A which can survive this motion for summary judgment.

III. ORDER.

For the foregoing reasons, Picker's motion for summary judgment on Imaging's counterclaims is hereby ALLOWED.

Mark [**63] L. Wolf

UNITED STATES DISTRICT COURT



Willman v. Heartland Hosp. E.

United States Court of Appeals for the Eighth Circuit

June 13, 1994, Submitted ; August 29, 1994, Filed

No. 93-3803

Reporter

34 F.3d 605 *; 1994 U.S. App. LEXIS 23507 **; 1994-2 Trade Cas. (CCH) P70,698

Charles R. Willman, M.D., Appellant, v. Heartland Hospital East; Heartland Hospital West; Heartland Health System, Inc.; Richard Craig, M.D.; Ernest Weinand, M.D.; Edward Beheler, M.D.; Edward Andres, M.D.; James McMillen, M.D.; Robert Stuber, M.D.; Orlyn Lockard, Jr., M.D.; Charles Mullican, M.D.; Wallace McDonald, M.D.; Steven C. Krueger, M.D., Appellees.

Subsequent History: [\[**1\]](#) Certiorari Denied March 20, 1995, Reported at: [1995 U.S. LEXIS 2040](#).

Prior History: Appeal from the United States District Court for the Western District of Missouri. District No. 89-CV-785. Honorable D. Brooke Bartlett, District Judge.

Disposition: Affirmed.

Core Terms

medical staff, privileges, cases, competitors, staff privileges, antitrust, conspire, motive, peer, Sherman Act, voted, district court, patient care, facilities, alleges, recommended, reviewers, substandard care, summary judgment, board-certified, state-law, terminate, patient, staff, pendent jurisdiction, peer review process, general surgeon, peer review, counterclaim, unanimously

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

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

[HN1](#) **Standards of Review, De Novo Review**

A court reviews a grant of summary judgment de novo.

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

34 F.3d 605, *605LÁ994 U.S. App. LEXIS 23507, **1

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

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

HN2 Entitlement as Matter of Law, Genuine Disputes

On a motion for summary judgment, the court must decide whether the record, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3 Sherman Act, Claims

To prove a violation of section one of the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff must show an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN4 Antitrust & Trade Law, Sherman Act

Unilateral actions of a single entity do not give rise to antitrust liability under section one of the Sherman Act, [15 U.S.C.S. §1](#). Section one of the Act applies only to concerted action. Proof of concerted action requires evidence of a relationship between two or more legally distinct persons or entities.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Antitrust & Trade Law > Sherman Act > General Overview

HN5 Sherman Act, Claims

An essential element of a section one Sherman Act, [15 U.S.C.S. §1](#) violation is proof of an unlawful objective.

Antitrust & Trade Law > Sherman Act > General Overview

34 F.3d 605, *605LÁ994 U.S. App. LEXIS 23507, **1

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

[HN6](#) Antitrust & Trade Law, Sherman Act

Corrective action against a physician does not violate the antitrust laws if the physician's peer reviewers had legitimate medical reasons to believe that the physician provided substandard care. A factfinder may infer the existence of an illegitimate motive if the peer group's conclusions are so baseless that no reasonable medical practitioner could have reached those conclusions after reviewing the same set of facts.

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

Antitrust & Trade Law > Sherman Act > General Overview

[HN7](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Antitrust law limits the range of permissible inferences from ambiguous evidence in a [§ 1](#) Sherman Act, [15 U.S.C.S. § 1](#) case. Conduct that is as consistent with a lawful motive as with an unlawful motive, standing alone, does not support the inference of an antitrust conspiracy.

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

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

[HN8](#) Summary Judgment, Entitlement as Matter of Law

Summary judgment is proper when physician merely alleges that his peer reviewers acted in bad faith and malice.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

[HN9](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The essential facilities doctrine requires those in possession of facilities which cannot practically be duplicated to share those facilities with their competitors.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN10 [down] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

To prevail under the essential facilities doctrine, the plaintiff must establish (1) control of an essential facility by a monopolist; (2) the inability to practically or economically duplicate the facility; and (3) the unreasonable denial of the use of the facility to a competitor when such use is economically and technically feasible.

Healthcare Law > ... > Actions Against Facilities > Standards of Care > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > Restrictions

HN11 [down] Actions Against Facilities, Standards of Care

Terminating the staff privileges of a physician who may be rendering substandard care does not constitute an unreasonable denial of the use of the hospitals' facilities.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN12 [down] Subject Matter Jurisdiction, Supplemental Jurisdiction

The decision to exercise pendent jurisdiction over state law claims is a matter of discretion for the district court.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > General Overview

HN13 [down] Subject Matter Jurisdiction, Supplemental Jurisdiction

If federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

Counsel: Counsel who presented argument on behalf of the appellant was David Harlan of St. Louis, MO and Julian Von Kalinowski of Culver City, CA. David Streubel of St. Louis appeared on the brief.

Counsel who presented argument on behalf of the appellee was George E. Leonard of Kansas City, MO. William Quirk and Lisa Eckold of Kansas City, MO appeared on the brief. R. Dan Boulware, and Mark Woodbury of St. Joseph, MO appeared on the brief.

Judges: Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN, Circuit Judge, and WELLFORD, * Senior Circuit Judge.

Opinion by: WOLLMAN

Opinion

* The HONORABLE HARRY W. WELLFORD, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

[*607] WOLLMAN, Circuit Judge.

Charles R. Willman, M.D. appeals from the district court's ¹ grant of summary judgment in favor of the defendants, Heartland Hospital East, Heartland Hospital West, and various physicians ² in an antitrust action arising from Willman's loss of medical staff privileges. We affirm.

[**2] I.

Willman, a board-certified general surgeon, had medical staff privileges at Methodist Medical Center and St. Joseph Hospital, [*608] the two acute care hospitals in St. Joseph, Missouri. In 1983, the two hospitals affiliated under common ownership. In 1985, Methodist Medical Center became Heartland Hospital West and St. Joseph Hospital became Heartland Hospital East. In 1990, the two hospitals merged.

The events that eventually led to the revocation of Willman's privileges began on February 19, 1982, when Willman treated nineteen-year-old Bobby Fanning, who had been admitted to Methodist Medical Center for treatment of a gunshot wound to the chest. The head nurse of the Critical Care Unit as well as another nurse who had assisted in the treatment of Willman expressed concern to Drs. Stuber and Andres about Willman's treatment of Fanning. Because of the nurses' complaint, Methodist's administrator, Dr. Andres, and Dr. Beheler, a board-certified thoracic surgeon and Chairman of the Intensive Care Subcommittee of the Methodist Critical Care Committee, met to discuss Willman's treatment of Fanning. Dr. Andres decided to contact Dr. Stuber, the Chairman of the Critical Care Committee. [***3] Dr. Stuber convened a special meeting of the committee, which concluded that Willman had mismanaged Fanning's treatment. After numerous hearings before various medical staff committees, the Board of Trustees of Methodist Medical Center voted unanimously by secret ballot in favor of a motion stating in part that

the finding of the Medical Executive Committee, that Dr. Charles Willman's clinical care of Bobby J. Fanning . . . was clearly different from that of his peers and potentially harmful, was supported by substantial evidence; it is further resolved that the action of the Medical Executive Committee in requiring that Dr. Charles Willman be required to obtain immediate consultation from a Board Certified general surgeon and/or thoracic surgeon on all cases of chest trauma requiring hospitalization and conducting a retrospective review of the Doctor's hospitalization cases for the year 1981 was warranted, appropriate and necessary.

After reviewing Willman's 1981 hospital admissions, the Quality Assurance Committee referred to the Medical Executive Committee eight of the fifty-three cases reviewed. Although the Medical Executive Committee concluded that four cases "did not [***4] reflect reasonable clinical judgment about serious clinical data" and cited five cases as examples of Willman's "consistent pattern of deficiency in completion of discharge summaries, history and physical, surgical reports, and progress notes," the committee voted to defer any action pending review of Willman's 1982 cases. The Quality Assurance Committee reviewed Willman's 1982 cases and determined that thirteen of the forty-one cases contained deficiencies. After considering the Quality Assurance Committee's report on the 1982 cases, the Medical Executive Committee adopted a proposal to reprimand Willman, discuss the findings of the Quality Assurance Committee with him, and conduct prospective periodic reviews of his hospital admissions. Willman, however, refused to discuss the proposal with the president of the medical staff. The Medical Executive Committee, therefore, unanimously voted, "based on medical evidence and in the interest of quality patient care," to suspend Willman's privileges. The Methodist Board of Trustees unanimously voted by secret ballot to affirm the committee's suspension of Willman's privileges. Pursuant to the board's instructions, the Medical Executive Committee [***5] re-reviewed with Willman the cases that the Quality Assurance Committee had forwarded to it. After this hearing, at which Willman was permitted to present evidence and call witnesses, the Medical Executive Committee determined

¹ The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

² Willman named as defendants ten physicians who had staff privileges at one or both of the defendant hospitals. The defendant physicians are Andres, Beheler, Craig, and Weinand (general surgeons), Krueger, McDonald, McMillen, Mullican, and Stuber (internists), and Lockard (gastroenterologist).

that in eight of the seventeen reviewed cases Willman had provided substandard care. The committee therefore recommended, and the board agreed, that Willman's privileges should remain suspended.

In late 1983, Willman applied to have his medical staff privileges reinstated. Various committees of the medical staff considered the application and recommended denial because Willman had not submitted any evidence indicating that the deficiencies that led to the suspension of his privileges had been corrected. Article II, section three of Methodist's medical staff bylaws in effect in 1983 provided that "the applicant shall provide adequate information for a proper evaluation of his application. If there is any doubt as to [*609] the competence, morals or ethics of the applicant, the burden shall be on him to resolve same." Willman requested and received a hearing before the Medical Executive Committee as well as before the Board of Trustees, following which both bodies voted [**6] to deny Willman's application for reinstatement. After a similar review process, Willman's June 1985 application for appointment to the medical staff of Methodist Medical Center (by then known as Heartland Hospital West) was also denied.

Because of Willman's treatment of Fanning, St. Joseph Hospital also reviewed Willman's staff privileges. In August 1982, the Executive Committee of the St. Joseph Board of Directors directed the medical staff to consider the chest trauma consultation requirement that had been placed on Willman at Methodist to determine if a similar requirement would be prudent at St. Joseph. After a series of committee meetings and hearings, the Executive Committee of the medical staff recommended that Willman be required "to obtain immediate consultation from a board-certified general surgeon and/or thoracic surgeon on all cases of chest trauma requiring hospitalization." The Board of Directors voted to adopt this recommendation.

In September 1982, the Chairman of the St. Joseph Board of Directors directed the medical staff to review Willman's cases to determine the appropriateness of his staff privileges. Dr. Weinand, the Chief of Staff and Chairman of the Medical [**7] Executive Committee, appointed a special subcommittee to review Willman's 1981 and 1982 cases. The subcommittee forwarded seventeen of the 1981 and 1982 cases to the Medical Executive Committee, which held hearings on May 31 and June 7, 1983. During the hearings, Willman indicated that he would not be willing to take steps to improve his surgical and medical knowledge. The committee then voted to revoke Willman's privileges at St. Joseph Hospital.

Willman then requested an ad hoc hearing. The ad hoc committee members voted to uphold the Medical Executive Committee's decision. Willman appealed to the Board of Directors, and the board appointed an Appellate Review Committee to review the decision. The committee, which consisted of one physician and two laypersons, found that the previous committees had been fair and impartial and that it would be in the best interests of patient care to affirm their decisions. The Board of Directors then voted unanimously by secret ballot to revoke Willman's medical staff privileges at St. Joseph Hospital.

In December 1983, the Circuit Court of Buchanan County, Missouri, ordered that Willman's privileges at St. Joseph Hospital be reinstated. Fourteen [**8] months later, however, the Missouri Court of Appeals reversed the Circuit Court's order, and Willman's privileges at St. Joseph were once again revoked. *State ex rel. Willman v. St. Joseph Hosp., 684 S.W.2d 408 (Mo. Ct. App. 1984)*. In June 1985, Willman applied for staff privileges at St. Joseph Hospital (by then known as Heartland Hospital East). Various committees reviewed the application and held hearings, but, as with his applications submitted at Methodist Medical Center, Willman failed to provide evidence of his current qualifications. On November 27, 1985, the Board of Directors upheld the recommendations of the reviewing committees and unanimously voted to deny Willman's application.

Willman then filed this action, which alleged that the defendants had violated sections one and two of the Sherman Act and had interfered without justification in his existing and prospective economic relationships with his patients in violation of state law. The defendant hospitals filed a counterclaim for abuse of process. The district court granted the defendants' motion for summary judgment on the Sherman Act claims and, declining to exercise pendent jurisdiction, [**9] dismissed without prejudice Willman's state-law claim and the counterclaim. *Willman v. Heartland Hosp. East, 836 F. Supp. 1522 (W.D. Mo. 1993)*.

II.

HN1 [↑] We review a grant of summary judgment de novo. *Grand Island Express v. Timpte Indus., Inc.*, 28 F.3d 73, 1994 U.S. App. LEXIS 16285, *3 (8th Cir. 1994). **HN2** [↑] We must decide whether the record, [*610] when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

A. Section One Allegations

HN3 [↑] To prove a violation of section one of the Sherman Act, [15 U.S.C. § 1](#), a plaintiff must show an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade.

HN4 [↑] Unilateral actions of a single entity do not give rise to antitrust liability under section one of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984). Section one of the Act applies only to concerted action. *Fisher v. City of Berkeley*, 475 U.S. 260, 266, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986); [\[**10\] Monsanto Co. v. Spray-Rite Serv. Corp.](#), 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984). Proof of concerted action requires evidence of a relationship between two or more legally distinct persons or entities. *Copperweld Corp.*, 467 U.S. at 769. The defendants argue that for purposes of section one a hospital and its medical staff are not separate entities when a medical staff recommends denial or revocation of a physician's staff privileges.

We have not decided whether a hospital has the capacity to conspire with its medical staff. *Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682, 685 n.3 (8th Cir. 1993). There is a split among the circuits that have considered the issue. Some courts hold that a hospital and its medical staff are not separate entities for purposes of section one because the medical staff acts as an agent of the hospital during the peer review process. See, e.g., *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 703 (4th Cir. 1991) (en banc), cert. denied, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992); [\[**11\] Weiss v. York Hosp.](#), 745 F.2d 786, 817 (3d Cir. 1984), cert. denied, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985). The Eleventh Circuit, on the other hand, has held that a hospital and the members of its medical staff are legally separate entities capable of conspiring with one another under the Sherman Act. *Bolt v. Halifax Hosp. Medical Ctr.*, 851 F.2d 1273, 1280 (11th Cir. 1988) (subsequent history omitted); cf. *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988) (holding that a hospital has the capacity to conspire with members of its medical staff, although not considering the issue in the context of peer review proceedings).

We need not decide whether a hospital can conspire with its medical staff, for even if we assume that the defendant hospitals had the capacity to conspire with their medical staffs, we conclude that Willman's section one claim fails. "Although revocation of a doctor's privileges may, perforce, eliminate competition by decreasing the number of doctors in a given specialty, [\[**12\]](#) this alone will not give rise to an antitrust violation." *Johnson v. Nyack Hosp.*, 964 F.2d 116, 121 (2d Cir. 1992). **HN5** [↑] An essential element of a section one violation is proof of an unlawful objective. *Monsanto Co.*, 465 U.S. at 768 (requiring proof of a "conscious commitment to a common scheme designed to achieve an unlawful objective"); *American Tobacco Co. v. United States*, 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946) (stating that "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement" is sufficient). Monitoring the competence of physicians through peer review is clearly in the public interest, *Lie v. St. Joseph Hosp.*, 964 F.2d 567, 570 (6th Cir. 1992), and revocation of a physician's privileges because of legitimate concerns about the quality of patient care that he rendered is obviously a lawful objective. Willman contends, however, that the peer review proceedings were a "sham" and that his privileges were terminated to prevent him from [\[**13\]](#) competing with the defendants rather than because of concerns about substandard patient care.

We first consider Willman's argument that there is a genuine issue of fact concerning whether the peer review process was a sham. Specifically, Willman contends that the evidence "creates a genuine issue as to whether the

peer reviewers reached the wrong result, and, as a consequence, removed a qualified physician." Based upon the record, we agree [[*611](#)] with Willman that whether he is a competent physician is in dispute. We do not agree, however, that this factual issue precludes summary judgment. An antitrust action is not the proper forum in which to evaluate a physician's competence. [Oksanen, 945 F.2d at 711](#) ("the antitrust laws were not intended to inhibit hospitals from promoting quality patient care through peer review nor were the laws intended as a vehicle for converting business tort claims into antitrust causes of action.").³ Accordingly, whether Willman actually provided substandard care is not the proper question. Rather, we must decide whether Willman's peer reviewers could have reasonably concluded that he provided substandard care.

[**14] Although the record contains evidence from physicians to the effect that in their opinion Willman had provided acceptable care, we nevertheless conclude that it would not have been unreasonable for Willman's peer reviewers to have doubts about the quality of Willman's patient care. Physicians who were not affiliated with the hospital defendants and who did not practice in St. Joseph and therefore did not compete with Willman agreed that in some cases Willman had rendered care that was below the acceptable standard. For example, Dr. Ben McCallister, a board-certified internist and cardiologist, reviewed the charts of nine of Willman's patients and found that three of these patients had received substandard care. Dr. Paul Koontz, a board-certified general surgeon, reviewed eight of Willman's charts and found that Willman's care was deficient in four cases. Dr. Alfred Gervin, who is board certified in general surgery, critical care medicine, and emergency room medicine, concluded that in twenty-three of the thirty-four charts that he had reviewed, Willman had either violated the acceptable standard of care or had rendered "terrible care." Dr. Kenneth Mattox, a board-certified general [[**15](#)] surgeon and thoracic surgeon, reviewed only the Fanning case and concluded that Willman's "lack of understanding of the potential ramifications to the patient, coupled with his actual mismanagement and mistreatment of the patient, demonstrate a careless and reckless disregard for the patient." Indeed, one of Willman's medical experts concluded that "some of the cases, you know, represent outer edges of what we perceive as standard of care."

[HN6](#) [↑] Corrective action against a physician does not violate the antitrust laws if the physician's peer reviewers had legitimate medical reasons to believe that the physician provided substandard care. [Johnson, 964 F.2d at 121](#). On the other hand, a factfinder may infer the existence of an illegitimate motive if the peer group's conclusions are so baseless that no reasonable medical practitioner could have reached those conclusions after reviewing the same set of facts. [Bolt, 891 F.2d 810, 821](#). [HN7](#) [↑] "[Antitrust law](#)" limits the range of permissible inferences from ambiguous evidence in a § 1 case." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#). [[**16](#)] Conduct that is as consistent with a lawful motive as with an unlawful motive, standing alone, does not support the inference of an antitrust conspiracy. *Id.*; see also [Lovett v. General Motors Corp., 998 F.2d 575, 579 \(8th Cir. 1993\)](#). Although Willman submitted affidavits to the contrary, we conclude that the opinions of Drs. McCallister, Koontz, Gervin, and Mattox established that the peer group's conclusions were not so baseless as to permit the inference of improper motive. Accordingly, we conclude that the limitation and eventual termination of Willman's staff privileges, in light of the conflicting medical opinions regarding the acceptability of Willman's care, is as consistent with the lawful motive of promoting quality patient care as with an anticompetitive motive and therefore, without more, does not give rise to an inference of an antitrust conspiracy.

[*612] Willman contends, however, that the record contains additional evidence of an unlawful motive. He first argues that the participation of his competitors in the peer review process is evidence of such a motive. Although physicians whom Willman alleges were his competitors participated at [[**17](#)] every stage of the review process,⁴

³ Recognizing that the possibility of antitrust liability may impede effective peer review, Congress enacted the Health Care Quality Improvement Act of 1986. [42 U.S.C. §§ 11101-11152](#). The Act immunizes medical peer review from antitrust liability if the challenged action is taken "in the reasonable belief that [it] was in the furtherance of quality health care." *Id.* § 11112(a). We need not consider the impact of the Act on Willman's claims, for the Act was enacted after the events at issue in this case and is not retroactive.

⁴ Approximately sixty-five physicians participated in the review and evaluation of Willman. Willman claims that forty-three of the reviewers were his competitors because they practiced in one or more of the areas in which Willman practiced: general surgery,

there is no evidence that the competitors acted in concert to pursue an unlawful motive. The record does indicate that Beheler, one of Willman's competitors, may have been biased against Willman. This evidence does not establish an anticompetitive motive among all of Willman's peer reviewers, however. Willman presented no evidence that any other competitors shared Beheler's sentiments, and Beheler submitted an affidavit stating that he never voted or participated in any deliberations concerning Willman's privileges to practice medicine at either Methodist or St. Joseph or their successors. Furthermore, Willman presented no evidence that Beheler or any other competitors attempted to unduly influence noncompetitor peer reviewers.

[**18] That the hospital boards and not the physicians whom Willman alleges were his competitors had authority to make the final decision concerning Willman's staff privileges further undermines Willman's theory of antitrust liability. Missouri law required that the hospital boards make the final decision. Mo. Code Regs. tit. 13, § 50-20.021(2)(A)15. Each surviving board member who participated in the decisions regarding Willman's staff privileges submitted an affidavit confirming that the boards had made the final decisions concerning Willman's staff privileges and that no physicians had attempted to pressure, coerce, or lobby the board members to terminate Willman's privileges. The affidavits further stated that no physicians had threatened to boycott or retaliate against the hospitals if the boards did not accept the medical staffs' recommendation to terminate Willman's privileges. Willman submitted no evidence to dispute the affidavits.

In addition to arguing that the medical staffs conspired with the defendant hospitals, Willman contends that the members of the medical staffs conspired among themselves to eliminate him as a competitor. Regardless of whether a hospital has the capacity [**19] to conspire with members of its medical staff, the staff physicians can conspire among themselves, giving rise to section one liability. See, e.g., [Oksanen, 945 F.2d at 706](#); [Bolt, 891 F.2d at 819](#); [Weiss, 745 F.2d at 814](#). That the members of the medical staff can conspire among themselves, standing alone, however, does not permit a reasonable jury to conclude that the physicians acted in concert in pursuit of an unlawful objective. As we have previously discussed, the physicians' actions during the peer review process are as consistent with the lawful purpose of promoting quality patient care as with the unlawful purpose of eliminating potential competitors. Willman's bare, unsupported allegations that his competitors acted in concert to insulate themselves from competition are not adequate responses to the defendants' summary judgment motion and supporting evidence. See [Everett v. St. Ansgar Hosp., 974 F.2d 77, 80 \(8th Cir. 1992\)](#) (holding that [HN8](#) [↑] summary judgment is proper when physician merely alleges that his peer reviewers acted in bad faith and malice).

[**20] Accordingly, we conclude that the grant of summary judgment on Willman's section one claims was proper. See [Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 617 \(6th Cir. 1990\)](#), cert. denied, 116 L. Ed. 2d 355, 112 S. Ct. 406 (1991).

B. Section Two Allegations

In addition to his section one claim, Willman raised two claims alleging a violation of section two of the Sherman Act, [15 U.S.C. § 2](#). Willman alleges that in terminating his staff privileges, the defendants denied him access to the hospitals' facilities, which are essential for him to compete. [HN9](#) [↑] The essential facilities doctrine requires those in possession of facilities which cannot practically [*613] be duplicated to share those facilities with their competitors. [City of Malden, Mo. v. Union Elec. Co., 887 F.2d 157, 160 \(8th Cir. 1989\)](#). [HN10](#) [↑] To prevail under the essential facilities doctrine, the plaintiff must establish "(1) control of an essential facility by a monopolist; (2) the inability to practically or economically duplicate the facility; and (3) the unreasonable denial of the use of [**21] the facility to a competitor when such use is economically and technically feasible." *Id.*

The defendants argue that the essential facilities doctrine does not apply to a hospital's facilities in a staff privilege revocation case. We need not decide this question, however, for, as we have discussed above, the defendants' concerns about the care provided by Willman were legitimate. [HN11](#) [↑] Terminating the staff privileges of a physician who may be rendering substandard care does not constitute an unreasonable denial of the use of the hospitals' facilities.

Willman also asserts a section two claim for monopoly leveraging. The elements of a monopoly-leveraging claim are (1) monopoly power in one market, (2) the use of that power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another distinct market, and (3) injury caused by the challenged conduct. [Carleton v. Vermont Dairy Herd Improvement Ass'n, 782 F. Supp. 926 \(D. Vt. 1991\)](#). The defendants contend that the doctrine is not applicable in the present case and, alternatively, that monopoly leveraging is not an independent basis for liability [**22] under section two of the Sherman Act. Assuming that monopoly leveraging is a cognizable section two claim, we agree that Willman has failed to show that the doctrine is applicable. As we have already discussed, Willman did not present sufficient evidence to support his allegations that the defendants acted with an anticompetitive motive. Accordingly, he cannot satisfy the second element.

C. Pendent Jurisdiction

Having disposed of all of the federal claims, the district court declined to exercise jurisdiction over the remaining state-law claim and the counterclaim. Willman argues that the district court should not have declined to exercise supplemental jurisdiction. The proper question, however, is whether the district court should have exercised pendent jurisdiction over the state-law claim and the counterclaim. The Judicial Improvements Act of 1990 codified the former common law doctrines of pendent and ancillary jurisdiction under the new rubric of supplemental jurisdiction. See [28 U.S.C. § 1367](#). See also [McLaurin v. Prater, 30 F.3d 982, 1994 U.S. App. LEXIS 18619, *6](#) (8th Cir. 1994). The Act applies to actions commenced on or [**23] after December 1, 1990. This action was commenced in 1989, so we review the district court's ruling on this issue under pre-Act case law.

[HN12](#) [↑] "The decision to exercise pendent jurisdiction over state law claims is a matter of discretion for the district court." [Hassett v. Lemay Bank & Trust Co., 851 F.2d 1127, 1130 \(8th Cir. 1988\)](#). In [United Mine Workers v. Gibbs](#), the Supreme Court recognized that [HN13](#) [↑] "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." [383 U.S. 715, 726 \(1966\)](#). Willman nevertheless contends that because the parties had completed a lengthy and complex discovery process and because the district court granted the defendants' motion for summary judgment less than two weeks before trial, the district court should have exercised jurisdiction over the state-law claims. Recognizing the district court's broad discretion in deciding whether to exercise pendent jurisdiction, we have upheld the refusal to exercise jurisdiction over a state-law claim even though the federal claims were disposed of late in the proceedings and [**24] the court had already devoted significant judicial resources to the state claim. [Marshall v. Green Giant Co., 942 F.2d 539, 549 \(8th Cir. 1991\)](#). So also in this case, we hold that the district court did not abuse its discretion by declining to exercise jurisdiction over the state-law claim and counterclaim in this case, a decision that we note would have fallen within one of the exceptions to the exercise of supplemental jurisdiction contained in the [*614] 1990 Act. See [28 U.S.C. § 1367\(c\)\(3\); McLaurin](#), slip op. at 6.

The judgment is affirmed.

Concur by: HARRY W. WELLFORD

Concur

WELLFORD, Senior Circuit Judge, concurring.

I join in Judge Wollman's comprehensive opinion, except that I would join the Fourth Circuit (en banc) and the Third Circuit in concluding that for Sherman Act purposes, absent special circumstances not present in this case, "the peer review process does not represent the sudden joining of independent economic forces that section one [of the Sherman Act] is designed to deter and to penalize." [Oksanen v. Page Memorial Hospital, 945 F.2d 696, 703 \(4th Cir. 1991\)](#) (en banc), cert. denied, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992). [**25] See also [Weiss v. York Hospital, 745 F.2d 786, 814 \(3d Cir. 1984\)](#), cert. denied, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985).

Accordingly, I would conclude that the medical staffs and review committees of the defendant hospitals, as a matter of law, cannot be held to conspire with the hospitals in conducting a good faith peer review of a staff member whose medical conduct is under investigation.

End of Document

S-2 Yachts v. WMJB Marine

United States District Court for the Western District of Michigan

August 30, 1994, Decided ; August 31, 1994, Filed

File No. 1:93:CV:535

Reporter

1994 U.S. Dist. LEXIS 14725 *

S-2 YACHTS, INC., a Michigan corporation, Plaintiff, v. WMJB MARINE, INC., a Florida corporation d/b/a Palm Beach Yacht Center, Defendant.

Core Terms

arbitration, antitrust claim, parties, termination, antitrust, arbitration clause, disputes, Dealer, anti trust law, nonarbitrable, Manufacturer, contends, state court, summary judgment motion, statutory claim, Counts

LexisNexis® Headnotes

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

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

HN1[

In reviewing a motion for summary judgment pursuant to [Fed. R. Civ. P. 56\(c\)](#), the court should only consider the narrow questions of whether there are genuine issues as to any material fact and whether the moving party is entitled to judgment as a matter of law. On a [Rule 56](#) motion, the court cannot resolve issues of fact, but is empowered to determine only whether there are issues in dispute to be decided in a trial on the merits. The crux of the motion is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

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

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

HN2[

A motion for summary judgment requires the court to view inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion. On the other hand, the opponent has the burden to show that a rational trier of fact could find for the non-moving party or that there is a genuine issue for trial.

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

[HN3](#)[] Summary Judgment, Entitlement as Matter of Law

Recent United States Supreme Court decisions encourage the granting of summary judgments where there are no material facts in dispute.

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

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

[HN4](#)[] Summary Judgment, Entitlement as Matter of Law

The summary judgment motion may be an appropriate avenue for the just, speedy and inexpensive determination' of a matter. Consistent with the concern for judicial economy, the mere existence of a scintilla of evidence in support of the non-moving party's positions will be insufficient. Mere allegations do not suffice. The party with the burden of proof at trial is obligated to provide concrete evidence supporting its claims and establishing the existence of a genuine issue of fact.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > General Overview

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Business & Corporate Compliance > ... > Contracts Law > Breach > Nonperformance

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

[HN5](#)[] Contract Conditions & Provisions, Arbitration Clauses

The Federal Arbitration Act, [9 U.S.C.S. §§ 1-16](#), provides that a party aggrieved by the alleged failure neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same is in issue, the court shall proceed summarily to the trial thereof. [9 U.S.C.S. § 4](#).

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

HN6 [down arrow] **Contract Conditions & Provisions, Arbitration Clauses**

Although it is created by contract, the duty to arbitrate does not necessarily end when the contract is terminated.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN7 [down arrow] **Arbitration, Arbitrability**

The arbitrability determination is to be made by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Federal Arbitration Act, [9 U.S.C.S. §§ 1-16](#). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. The parties' intentions control, but those intentions are generously construed as to issues of arbitrability.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Governments > Legislation > Statutory Remedies & Rights

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > General Overview

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN8 [down arrow] **Contract Conditions & Provisions, Arbitration Clauses**

Although arbitration clauses in contracts are most often contemplated for resolving disputes of contract interpretation and possible breaches, the Federal Arbitration Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitration. [9 U.S.C.S. §§ 1-16](#). The federal policy favoring arbitration is not diminished when a party bound by an agreement raises a claim founded on statutory rights. On the other hand, not all controversies implicating statutory rights are suitable for arbitration. The court must conduct a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

[**HN9**](#) **Regulated Practices, Private Actions**

Domestic antitrust claims are arbitrable.

Judges: [*1] ENSLEN

Opinion by: RICHARD A. ENSLEN

Opinion

OPINION

This matter is before the Court on petitioner's motion for summary judgment to decide petition to compel arbitration. Also, respondent has moved to dismiss the petition. This matter relates to the complaint filed by respondent in the Palm Beach County, Florida Circuit Court, case no. CA 92-9937 AH, against petitioner and two other corporations.

FACTS

Petitioner is a manufacturer of boats and yachts under the trade name "Tiara Yachts." In June 1991, it entered into an exclusive Dealer Agreement with respondent. Respondent's territory initially covered Palm Beach County and later was expanded to include Martin County. The Agreement was terminated in November 1991. Petitioner contends that the termination was by mutual agreement. Respondent contends that petitioner unilaterally and unlawfully terminated the contract after effectively shifting respondent's territory to one of two corporations who were also Tiara dealers in Southeast Florida. These two corporations were also named as defendants in the state court suit.

In its suit in the Florida court, respondent contends that petitioner breached the contract by wrongfully terminating it. Also, respondent [*2] contends that petitioner combined or conspired with the two other defendants to procure termination of the Dealer Agreement and allow either or both of these other defendants to have a monopoly on the Tiara Yacht market in Southeast Florida. The amended complaint contends that these actions constitute restraints of trade in violation of the state's antitrust laws, [Fla. Stat. ch. 542.18](#) and [542.19](#). There is no allegation of a violation of federal antitrust laws.

Counts II and III of the state suit are directed solely at the other two defendants, alleging that they tortiously interfered with a contractual and advantageous business relationship between petitioner and respondent.

The Dealer Agreement between petitioner and respondent includes an arbitration clause, in paragraph 16, entitled "Dispute Resolution" which provides as follows:

In the event a dispute arises between the parties with respect to the interpretation, performance or breach of this Agreement, or any legal obligation between the parties arising out of their relationship as described herein, or with respect to a decision by Manufacturer not to renew this Agreement, that cannot be resolved between Dealer and Manufacturer's [*3] representative who is the regular contact responsible for Dealer, Manufacturer agrees not to terminate this Agreement, or implement its decision not to renew, until Manufacturer has first given Dealer an opportunity to discuss the matter directly with Manufacturer's Vice President of Sales. *Any dispute that is not resolved pursuant to the foregoing procedure shall be resolved exclusively by arbitration* under the Rules for Commercial Arbitration promulgated by the American Arbitration Association. The arbitration shall be conducted in Grand Rapids, Michigan, and the award shall be final and binding on the parties, enforceable in any court of competent jurisdiction. The arbitration award shall designate which party is the prevailing party, and that party shall be reimbursed its reasonable attorney fees by other party.

Also, the Agreement, in paragraph 19, contains an integration clause entitled "Entire Agreement that provides: "this agreement contains the entire Agreement between parties with respect to its subject matter, and this Agreement may be amended or modified only by written instrument signed by both parties."

Standard for Summary Judgment

HN1[] In reviewing a motion for summary [*4] judgment pursuant to [Rule 56](#), this Court should only consider the narrow questions of whether there are "genuine issues as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56\(c\)](#). On a [Rule 56](#) motion, the Court cannot resolve issues of fact, but is empowered to determine only whether there are issues in dispute to be decided in a trial on the merits. [Gutierrez v. Lynch](#), 826 F.2d 1534, 1536 (6th Cir. 1987); [In re Atlas Concrete Pipe, Inc.](#), 668 F.2d 905, 908 (6th Cir. 1982).

The crux of the motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); [Booker v. Brown & Williamson Tobacco Co., Inc.](#), 879 F.2d 1304, 1310 (6th Cir. 1989).

HN2[] A motion for summary judgment requires this Court to view "inferences to be drawn from the underlying facts . . . in the light [*5] most favorable to the party opposing the motion." [Matsushita Electric Ind. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting [United States v. Diebold, Inc.](#), 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)), quoted in [Historic Preservation Guild v. Burnley](#), 896 F.2d 985, 993 (6th Cir. 1989). On the other hand, the opponent has the burden to show that a "rational trier of fact [could] find for the non-moving party [or] that there is a 'genuine issue for trial.'" [Historic Preservation](#), 896 F.2d at 993 (quoting [Matsushita](#), 475 U.S. at 587).

As the Sixth Circuit has recognized and consistently emphasized, **HN3**[] recent Supreme Court decisions encourage the granting of summary judgments where there are no material facts in dispute. [Historic Preservation](#), 896 F.2d at 993 (citing [Celotex Corp. v. Catrett](#), 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); [*6] [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)).

The courts have noted that **HN4**[] the summary judgment motion may be an "appropriate avenue for the 'just, speedy and inexpensive determination' of a matter." [Cloverdale Equipment Co. v. Simon Aerials, Inc.](#), 869 F.2d 934, 937 (6th Cir. 1989) (quoting [Celotex](#), 477 U.S. at 327). Consistent with the concern for judicial economy, "the mere existence of a scintilla of evidence in support of the [non-moving party's] positions will be insufficient." [Anderson](#), 477 U.S. at 252. "Mere allegations do not suffice." [Cloverdale](#), 869 F.2d at 937. "The party with the burden of proof at trial is obligated to provide concrete evidence supporting its claims and establishing the existence of a genuine issue of fact." *Id.*

DISCUSSION

The facts relevant to the determination of whether to compel arbitration do not appear to be in dispute.¹ As set forth above, the contract clearly [*7] has a broadly worded arbitration clause and an integration clause. The lawsuit in the Florida court, as it is directed at petitioner, clearly concerns a breach of contract claim and two counts alleging antitrust violations related to the allegedly wrongful termination of the contract and the transference of the Palm Beach and Martin County market territories to other dealers. Finally, petitioner agrees that Magistrate Judge Rowland was correct in holding that the claims asserted against the other dealers, Counts II and III, are not subject to the arbitration agreement between petitioner and respondent.

As an initial matter, the Court must determine whether the arbitration clause is valid and enforceable. If so, then the Court must decide whether the breach of contract claim [*8] and the state-based antitrust claims must be arbitrated in Grand Rapids. The antitrust issue involves determining whether such claims are arbitrable and whether the existence of codefendants who are not subject to arbitration has any effect on whether the claims, as between petitioner and respondent, must be arbitrated.

Federal Arbitration Act

Petitioner seeks to compel arbitration under the Federal Arbitration Act, [9 U.S.C. §§ 1-16. HN5↑](#) The Act provides as follows:

A party aggrieved by the alleged failure neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration [*9] in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

[9 U.S.C. § 4.](#)

Respondent contends that no valid agreement to arbitrate exists because of the alleged unilateral repudiation of the Agreement by petitioner. It asserts that by terminating the contract, petitioner invalidated the Agreement, including the arbitration provision, by acting inconsistent with the terms of the Agreement.

It is notable that respondent, in its motion to dismiss, stated that petitioner's actions terminating the Agreement were unilateral and that petitioner cited "none of the enumerated conditions for termination" that are set out in the Agreement.

I agree with petitioner that respondent's position on this particular issue is untenable. The arbitration provision sets forth a mechanism for deciding disputes concerning whether provisions of the contract have been violated. [*10] Here, respondent has filed suit alleging that petitioner wrongfully terminated the contract by not citing any of the enumerated reasons in the contract which would permit such a termination and because the termination was done for illegal purposes.

As the Sixth Circuit has stated: [HN6↑](#) "although it is created by contract, the duty to arbitrate does not necessarily end when the contract is terminated." *Aspero v. Shearson American Express*, 768 F.2d 106, 108 (6th Cir.), cert. denied, 474 U.S. 1026, 88 L. Ed. 2d 564, 106 S. Ct. 582 (1985). By its terms, the arbitration clause applies to disputes concerning the "interpretation, performance or breach" of the Agreement, as well as "any legal obligation

¹ Clearly, the parties do not agree on the facts as they relate to the underlying claims in the state case. However, these disagreements do not appear to be material to the determination of whether the claims against petitioner must be arbitrated.

between the parties arising out of their relationship." Clearly, the arbitration clause is not rendered invalid as a result of a termination that is allegedly contrary to the terms of the Agreement.

Respondent contends that petitioner is attempting to use the contract as both a "sword" and a "shield" by invoking terms that are beneficial while repudiating the remaining terms. It claims that enforcing the [*11] arbitration clause would be inequitable.

Notably, respondent does not argue that the arbitration clause was included in the contract over its objections, such as might be the result of unequal bargaining power. Apparently, the clause was bargained for as a mutually agreed upon means of resolving possible future disputes related to the business relationship of the two parties. It certainly has not been shown that compelling the use of the arbitration mechanism agreed upon by respondent would be inequitable. I find that the arbitration clause remains fully enforceable.

Arbitrability of claims

The next issue is whether the contract claim or the state-based antitrust claims are within the scope of the arbitration provision and are, in fact, arbitrable. This Court must determine whether the "parties agreed to arbitrate [the disputes]." [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 \(1985\)](#).

HN7 [↑] The arbitrability determination is to be made by "applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" [*12] *Id.* (quoting [Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 \(1983\)](#)). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . ." *Id.* (quoting [Moses, 460 U.S. at 24-25](#)). "The parties intentions control, but those intentions are generously construed as to issues of arbitrability." *Id.*

Wrongful Termination of Contract

Respondent's state court suit, in Count I, alleges that petitioner terminated the contract in violation of the provisions of the Agreement. Clearly, this dispute is squarely within the scope of the arbitration provision discussed above. Therefore, pursuant to the Federal Arbitration Act, the dispute in Count I of the state case must be arbitrated pursuant to the terms of the Agreement.

State Antitrust Issues

Respondent, in Counts IV and V of the amended complaint, alleges that petitioner and the two other defendants combined or conspired to terminate the contract with respondent and to create a monopoly over the Tiara Yacht [*13] market in Southeast Florida for one or both of the defendants who were dealers. These actions were alleged to violate Florida's antitrust statutes, [Fla. Stat. ch. 542.18](#) and [542.19](#), not federal statutes.

HN8 [↑] Although arbitration clauses in contracts are most often contemplated for resolving disputes of contract interpretation and possible breaches, the Federal Arbitration Act "itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitration." [Mitsubishi, 473 U.S. at 627](#). The "federal policy favoring arbitration . . . is not diminished when a party bound by an agreement raises a claim founded on statutory rights." [Nghiem v. NEC Electronic, Inc. 25 F.3d 1437, 1442 \(9th Cir. 1994\)](#) (quoting [Shearson/American Express v. McMahon, 482 U.S. 220, 226, 96 L. Ed. 2d 185, 107 S. Ct. 2332 \(1987\)](#)).

On the other hand, "not all controversies implicating statutory rights are suitable for arbitration." [Mitsubishi, 473 U.S. at 627](#). [*14] The Court must conduct a "two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." [Id. at 628](#).

In *Mitsubishi*, the Court stated that "insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability." [*Id. at 625 n. 13.*](#)

Respondent provides no argument that the broadly worded arbitration clause would not cover statutory claims. Paragraph 16 provides that arbitration would apply to "any dispute" concerning interpretation, performance, obligations, or non-renewal by the manufacturer would be subject to arbitration that had not been resolved by the less formal methods earlier specified in that paragraph. I believe that the clause can fairly be considered to include disputes as to whether actions and inactions by petitioner constitute violations of state [*15] antitrust laws. In any case, the paragraph is so broadly worded that it cannot be said that the parties intended to exclude antitrust claims from being resolved through the arbitration procedure.

Respondent cites two state court cases for the proposition that a Florida antitrust claim is not arbitrable. See [*Sabates v. International Medical Centers, Inc., 450 So.2d 514 \(Fla. Dist. Ct. App. 1984\)*](#) and [*Montgomery Distributors, Inc. v. G. Heileman Brewing Co., Inc., 505 So.2d 443 \(Fla. Dist. Ct. App. 1986\)*](#).

Petitioner asserts that *Mitsubishi* foreclosed states from having the power to require a judicial forum for antitrust claims by holding that "any contention that the local anti-trust claims are non-arbitrable would be foreclosed by this court's decision in *Southland Corp. v. Keating* . . . where we held that the Federal Arbitration Act 'withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" [*Mitsubishi, 473 U.S. at 623 n. 10*](#) (quoting [*Southland, 465 U.S. 1, 10 \(1984\)*](#)). [*16]

I agree with petitioner that, pursuant to *Mitsubishi* and the [*Supremacy Clause*](#), the Florida court decisions do not bind this Court to find the state antitrust statutory claims nonarbitrable. However, I also do not find that *Mitsubishi* affirmatively held that state antitrust claims were always arbitrable. In fact, the Court specifically held that it found it "unnecessary to assess the legitimacy of the *American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2nd Cir. 1968)*" doctrine as applied to agreements to arbitrate arising from domestic transactions." [*Id. at 629.*](#)

Mitsubishi reasoned that respect for foreign tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, combined with skepticism concerning the reasoning relied upon in *American Safety* in finding federal antitrust claims to be nonarbitrable, led to the conclusion that the agreement to submit disputes to arbitration should be enforced. [*Id. at 629, 632-33.*](#) Here, there are no concerns about respect for international commercial systems or tribunals. Therefore, I find that the arbitrability [*17] of the state antitrust statutory claims remains an open issue. However, I also find that many of the statements in *Mitsubishi* are instructive on this issue.²

[*18] Respondent cites some state court decisions which indicated that Florida antitrust statutes are based on the federal statutes. See, e.g., [*Sabates, 450 So.2d at 516-17*](#). In *Sabates*, the court found the state antitrust laws to be non-arbitrable by relying on federal authority holding that federal antitrust laws were not arbitrable. *Id.* Florida courts have reaffirmed this holding since *Mitsubishi*. *Montgomery*, 505 So.2d at 445 (holding that *Mitsubishi* recognized the continued viability of *American Safety* concerning the nonarbitrability of domestic antitrust claims); and *Noe v. Dean, Witter, Reynolds, Inc., 599 So.2d 786 (Fla. Dist. Ct. App. 1986)*.

² Because the parties had not, in their original briefs, discussed substantive reasons concerning whether antitrust claims should or should not be considered arbitrable, this Court, on July 7, 1994, ordered the parties to brief the issue. Although the parties filed supplemental briefs, respondent's brief provides absolutely no reasons to this Court for finding antitrust claims non-arbitrable, contrary to the Order. Instead, respondent merely rehashes the argument in its original brief that *Mitsubishi* did not expressly overrule *American Safety*. Perhaps counsel for respondent agrees with the holding in *Nghiem* and the criticisms of *American Safety* included in *Mitsubishi*. The brief provides no counter-argument, presumably relying on the arguments in *American Safety* itself as sufficient rebuttal. Perhaps, respondent is also relying also on the dissent in *Mitsubishi*, although it never refers to the legislative history and policy arguments raised by the dissent in opposing the arbitrability of federal antitrust claims.

Respondent appears to argue that because the state antitrust claims are of the same nature as federal antitrust claims, the resolution of the issue of arbitrability of a state claim should mirror the resolution of similar federal claims. Respondent also asserts that forum shopping problems would arise should this Court accept petitioner's invitation to find state antitrust claims arbitrable when federal antitrust claims are not arbitrable.

[*19] Certainly, petitioner is correct that *Mitsubishi* makes clear that state law is preempted should it seek to require a judicial forum for resolving antitrust claims, while federal law remains free to require a judicial forum. However, as noted above, this does not resolve the issue of whether antitrust claims are appropriate for resolution by arbitration.

I agree with respondent that if an antitrust claim based upon federal law which is similar to the state antitrust claims actually brought by respondent would not be arbitrable, then, in the absence of international concerns present in *Mitsubishi*, the resolution of the arbitrability issue should be the same with respect to the state-based claims. However, in light of *Mitsubishi*'s criticisms of the reasoning in *American Safety*, and the very recent opinion from the Ninth Circuit in *Nghiem*, I am not convinced that a similar claim based on federal antitrust law would be nonarbitrable.

The issue of the arbitrability of federal antitrust claims is not before this Court. However, I note that neither party nor this Court's own research has found any binding precedent on that issue. Rather, *American Safety*, a Second Circuit [*20] case from 1968, is relied upon by respondent for the proposition that federal antitrust claims are nonarbitrable. Other subsequent cases cited in the briefs relied upon *American Safety* as the basis for also finding nonarbitrability.

In *Mitsubishi*, the Supreme Court, in weighing the international concerns against possible non-arbitrability, considered what it found to be the four ingredients to the *American Safety* holding that antitrust claims were not arbitrable: 1) private parties play a pivotal role in aiding enforcement of antitrust laws by private actions for treble damages; 2) the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract; 3) antitrust issues, prone to complication, require sophisticated legal and economic analysis and are ill-adapted to strengths of the arbitral process -- such as simplicity, expedition, minimal need for written rationale, resort to basic common sense, and simple equity; and 4) decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community. *Id. at 632*; see also, *Nghiem*, 25 F.3d at 1442. [*21]

The Supreme Court stated that the second of these concerns was unjustified as the party seeking to resist enforcement of an arbitration clause "may attack directly the validity of the agreement to arbitrate" or attack the location of the selected forum as being "so gravely . . . inconvenient" that it would deprive it of its day in court. *Id.* As to the issue of complexity, the Court noted that the subject matter may be taken into account when arbitrators are selected and that experts typically may be employed or appointed under arbitral rules. *Id. at 633*. The Court determined that complexity alone was not enough to persuade it that an arbitral tribunal could not properly handle an antitrust matter. *Id.*

The *Mitsubishi* Court also rejected the proposition that an "arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes." *Id. at 634*. Finding that arbitrators were "frequently drawn from the legal as well as the business community," and so declined "to indulge the presumption that the parties and arbitral body conducting a proceeding [would] be unable or unwilling to retain competent, conscientious, [*22] and impartial arbitrators." *Id.*

Finally, with regard to the importance of the private right of action in the enforcement of antitrust laws, *Mitsubishi* found that such importance did "not compel the conclusion that it may not be sought outside an American court." *Id. at 635*. The Court noted that there was "no reason to assume at the outset of the dispute that . . . arbitration [would] not provide an adequate mechanism." *Id. at 636*. It noted that the arbitral body "should be bound to decide the dispute in accord with the . . . law giving rise to the claim." *Id.* "So long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.*

The dissent in *Mitsubishi* noted that as of 1985, the six circuits to consider the arbitrability issue had all ruled that federal antitrust claims were not subject to arbitration. [*Id. at 656*](#) (Stevens, J., dissenting). Justice Stevens stated that the Sherman Act, [15 U.S.C. § 1](#), provided for a special statutory enforcement scheme, and such special remedies have repeatedly been [*23] held to render private agreements to arbitrate violations of the act unenforceable. [*Id. at 650*](#).

Justice Stevens noted that the mandatory treble damages provision was intended to encourage private enforcement of the Sherman Act, as well as to deter potential violators. [*Id. at 653*](#). He also noted that the Sherman Act provides that such a treble-damages case can only be brought in the federal district courts, not the state courts. He reasons that because jurisdiction was denied to the state courts, then it should be clear that private arbitrators should not be able to assume such jurisdiction.

I must disagree with Justice Stevens. I find no reason why the purposes of the antitrust acts would be undermined by parties agreeing to submit their disputes to an impartial arbitration panel, rather than the courts. As the majority opinion in *Mitsubishi* noted, private parties in a suit in federal court need "no executive or judicial approval before settling . . ." [*Id. at 636*](#). If parties choose, in advance, to submit disputes to a procedure intended to streamline disposition and to minimize costs which would be incurred, I perceive no harm to the public interest. The antitrust claim [*24] has not been foreclosed; just the forum has been changed, as agreed by the parties.

The court in *Nghiem* found that *Mitsubishi* effectively overruled *American Safety* and its progeny, including a previously-decided Ninth Circuit case that held against arbitrability of antitrust claims. [25 F.3d at 1441-42](#) (referring to [Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473 \(9th Cir. 1984\)](#)). It found that arbitrators are not precluded from entertaining federal antitrust claims, overruling *Lake Communications*. *Id.* at 1442. Recently, a district court within the Second Circuit found that in light of *Mitsubishi*, the Second Circuit, which authored *American Safety*, would now probably hold that domestic antitrust claims are arbitrable. [Syscomm International Corp. v. SynOptics Communications, Inc., 856 F. Supp. 135](#) No. CV 94-2025, 1994 WL 288484 at *4 (E.D. N.Y. June 28, 1994). I agree with *Nghiem* and *Syscomm* that [HN9](#) domestic antitrust claims are arbitrable. As noted above, I believe that there is no reason to treat state antitrust claims differently from federally-based claims [*25] concerning the determination of arbitrability.

Finally, I note that the existence of third parties in the Florida suit does not alter the arbitrability determination as the Florida case can be stayed pending arbitration. See [Sibley v. Tandy Corp., 543 F.2d 540, 542-44 \(5th Cir. 1976\)](#), cert. denied, 434 U.S. 824, 54 L. Ed. 2d 82, 98 S. Ct. 71 (1977).

Consequently, I find that the state antitrust claims, as well as the contract claim, are arbitrable. The parties agreed to arbitrate such claims in Grand Rapids, Michigan. Pursuant to the Federal Arbitration Act, these claims should be arbitrated as agreed in the contract. Therefore, petitioner's motion to compel arbitration is granted, and respondent's motion to dismiss the petition is denied.

DATED in Kalamazoo, MI:

August 30, 1994

RICHARD A. ENSLEN

U.S. District Judge

JUDGMENT - August 31, 1994, Filed

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that petitioner's motion for summary judgment, filed March 31, 1994 (dkt. # 16), is GRANTED;

IT IS FURTHER ORDERED that respondent's motion to dismiss the petition, filed [*26] August 16, 1993 (dkt. # 4), is DENIED;

IT IS FURTHER ORDERED that the petition for an order compelling arbitration, filed July 7, 1993 (dkt. # 1), is GRANTED;

IT IS FURTHER ORDERED that Counts I, IV, and V of respondent's complaint against petitioner that is being tried in the Florida Circuit Court, case no. CA 92-9937 AH, shall be submitted to arbitration in accordance with the contract provisions and the Federal Arbitration Act.

DATED in Kalamazoo, MI:

August 31, 1994

RICHARD A. ENSLEN

U.S. District Judge

End of Document



Serfecz v. Jewel Food Stores

United States District Court for the Northern District of Illinois, Eastern Division

August 30, 1994, Decided ; August 31, 1994, Docketed

No. 92 C 4171

Reporter

1994 U.S. Dist. LEXIS 12239 *; 1994 WL 478576

JOSEPH SERFECZ and FIRST CHICAGO TRUST COMPANY, Trustee of Trust No. 684, Plaintiffs, v. JEWEL FOOD STORES, INC., et. al., Defendants.

Core Terms

Mall, lease, antitrust, conspiracy, grocery, grocery store, plaintiffs', antitrust violation, premises, consumer, sentence, injuries, retail, summary judgment, space, breach of lease, defendants', competitor, anti trust law, damages, tenants, retail shopping, Lessee, leased premises, listing service, relevant market, probable cause, anchor tenant, Sherman Act, monopolize

Judges: [*1] Grady

Opinion by: JOHN F. GRADY

Opinion

MEMORANDUM OPINION

This case comes before the court on the motion of defendants Jewel Food Stores, Inc., and American Stores Properties, Inc., for summary judgment. For the reasons discussed below, we grant the motion for summary judgment on the antitrust and malicious prosecution claims in Counts I, II, and III. Summary judgment on the breach of lease claim in Count IV is granted in part and denied in part.

BACKGROUND

Plaintiff First Chicago Trust Company of Illinois, as trustee, is the title holder of the Grove Mall Shopping Center ("Grove Mall") in Elk Grove Village. Plaintiff Joseph Serfecz is the beneficial owner of this trust. In 1963 defendant Jewel Food Stores, Inc. ("Jewel") entered into a lease with plaintiffs' predecessor-in-interest for retail space in the Grove Mall in which to operate a grocery store. When Serfecz purchased the Grove Mall in 1977, he assumed all existing leases, including the Jewel lease. Jewel's original lease ran until 1986 and provided Jewel three five-year options to renew. Jewel has exercised two of those options. Thus, its current lease runs until 1996, and it has one remaining option to renew until 2001. Defendant [*2] American Stores Properties, Inc. ("American Stores") is the real estate management and development arm of American Stores Company and its subsidiaries, of which Jewel is one, and is engaged in managing properties owned or rented by Jewel.

Up until October 1987, Jewel owned and operated a grocery store in its leased space in the Grove Mall and was the mall's anchor tenant. In October of 1987, Jewel vacated the premises and moved its grocery operation to a building in the newly constructed Elk Crossing Mall, directly across the street from the Grove Mall. Since that time, the

space formerly occupied by Jewel at the Grove Mall has remained vacant, and Jewel has refused to give up its leasehold interest in the premises, thereby preventing Serfecz from securing another grocery store as an anchor tenant. Since vacating its space, Jewel has continued to pay rent and has exercised its second option to renew the lease. Jewel proposed to sublet the space to defendant United Skates of America ("United Skates"), for use as a roller rink and games arcade. Serfecz objected to the proposed sublease because he considered United Skates to be an "obnoxious" tenant and because he was concerned that [*3] occupancy by United Skates would result in higher insurance rates. In February 1990, Jewel filed suit seeking a declaratory judgment regarding its right to sublet to United Skates. The trial court ruled against Jewel, and the appellate court affirmed.

Plaintiffs bring suit against Jewel, American Stores, and United Skates, and against the developers, owners and operators of the Elk Crossing Mall (collectively referred to herein as the "Elk Crossing defendants"), alleging that the defendants conspired to keep the Jewel space at the Grove Mall vacant, to prevent a major anchor tenant from taking over the space, to prevent Serfecz from re-developing the mall, to coerce Serfecz's other tenants to leave the Grove Mall and move across the street to the Elk Crossing Mall, and to otherwise devalue and destroy the Grove Mall. Plaintiffs maintain that this conspiracy is part of an overall marketing strategy of restricting the use of property in order to keep out competitors. In support of this claim, plaintiffs offer evidence of other similar restrictive lease arrangements throughout Illinois involving Jewel.

In Counts I and II of their complaint, plaintiffs maintain that defendants have violated [*4] [Sections 1](#) and [2](#) of the Sherman Antitrust Act, [15 U.S.C. §§ 1, 2](#), by conspiring to restrain trade by eliminating competition in the grocery store and retail shopping center markets, and attempting to monopolize the grocery store business, the sale and development of commercial real estate, and the business of operating a retail shopping center within the relevant geographic market. Plaintiffs also bring state law claims in Count III for malicious prosecution based on the February 1990 declaratory judgment suit brought by Jewel,¹ and in Count IV for breach of lease. Before the court is the motion for summary judgment of defendants Jewel and American Stores.²

[*5] DISCUSSION

I. Antitrust Standing

Defendants move for summary judgment on Counts I and II, claiming that plaintiffs lack standing to bring antitrust claims against Jewel. Private civil actions to enforce the Sherman Act are allowed under Section 4 of the Clayton Act, [15 U.S.C. § 15\(a\)](#), which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue there for . . . and shall recover threefold the damages by him sustained" However, despite this seemingly broad grant of authority to sue, the Supreme Court has emphasized 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." [Associated General Contractors of California v. California State Counsel of Carpenters](#), 459 U.S. 519, 534, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) (internal quotation marks and citation omitted). Thus, even though a plaintiff might suffer sufficient harm to satisfy the constitutional standing requirement of injury [*6] in fact, "the court must make the further determination whether the plaintiff is a proper party to bring a private antitrust action." [Id. at 535 n. 31](#). Even when an antitrust violation under the Sherman Act has clearly occurred, Section 4 of the Clayton Act allows only certain private parties to bring suit on the basis of that violation.³ The Supreme Court recognized that given "the infinite variety of claims" that might arise under Section 4,

¹ Defendants correctly point out that in our previous opinion of March 26, 1993, we ruled that no other litigation could serve as a basis for plaintiffs' charge of malicious prosecution. Thus, we consider the malicious prosecution claim only insofar as it is based on the February 1990 declaratory judgment action.

² Also pending is the motion of the Elk Crossing defendants for summary judgment. However, due to repeated extensions in the briefing schedule, that motion is not yet fully briefed and thus is not considered by the court at this time.

³ As the Seventh Circuit explained in [Indiana Grocery v. Super Valu Stores](#), 864 F.2d 1409 (7th Cir. 1989), "While [sections 1](#) and [2](#) of the Sherman Act focus on competitive conditions in the marketplace as a whole, . . . section 4 of the Clayton Act focuses on the type of injury claimed by a particular plaintiff and demands that it be an 'antitrust injury.'" [Id. at 1419](#) (emphasis in

it would be "virtually impossible to announce a black-letter rule that will dictate the result in every case." *Id. at 536*. Thus, the Court rejected rigid, one-dimensional tests for standing such as the "target area," "zone of interests," or "directness of injury" tests. *Southaven Land Co. v. Malone & Hyde*, 715 F.2d 1079, 1085 (6th Cir. 1983) (citing *Associated General Contractors*, 459 U.S. at 536 n.33). The Court instead identified various factors that should guide a case-by-case inquiry into whether a particular party has standing [*7] to seek an antitrust remedy. *Id.* (citing *Associated General Contractors*, 459 U.S. at 537). It is important to note at the outset that no single factor is decisive; rather, the court must balance all of the factors. *R.C. Dick Geothermal v. Thermogenics*, 890 F.2d 139, 146 (9th Cir. 1989). See also, *Los Angeles Memorial Coliseum v. N.F.L.*, 791 F.2d 1356, 1363 (9th Cir. 1986), cert. denied, 484 U.S. 826 (1987) ("Most cases will find some factors tending in favor of standing . . . and some against . . . and a court may find standing if the balance of factors so instructs.").

[*8] The antitrust standing factors outlined by the Supreme Court in *Associated General Contractors* have been described and interpreted in various ways by the different circuit courts. However, as our colleague noted in *American Agriculture Movement v. Board of Trade*, 848 F. Supp. 814, 823 (N.D. Ill. 1994) (Marovich, J.), "the differences between the expressions of the *Associated General Contractors* factors are ones of form rather than substance." Thus we refer to cases from several different circuits in our effort to better understand and apply the guidelines established in *Associated General Contractors*.

The first *Associated General Contractors* factor to be considered is whether there is a causal connection between the antitrust violation and the harm to the plaintiff, and whether the defendant intended to cause that harm. *459 U.S. at 537*. Without elaborating in any detail, we believe that plaintiffs in the present case have presented enough evidence for the trier of fact to find a causal connection between the absence of a grocery store anchor tenant and the slow demise of the Grove [*9] Mall. There is also evidence that Jewel acted deliberately to prevent a competitor from occupying the space in the mall.

Another factor considered important by the Supreme Court in *Associated General Contractors* is the nature of the plaintiff's injury. The Court considered whether the injury was "of a type that Congress sought to redress in providing a private remedy for violations of Antitrust laws," *Associated General Contractors*, 459 U.S. at 537 (citing *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982), bearing in mind the central policy underlying the Sherman Act of "assuring customers the benefits of price competition," and "protecting the economic freedom of participants in the relevant market." *Associated General Contractors*, 459 U.S. at 538 (emphasis added).

In *Southaven Land Co. v. Malone & Hyde*, 715 F.2d 1079 (6th Cir. 1983), a case strikingly similar to the one now before us, the Sixth Circuit considered [*10] the nature of the injury when evaluating the standing of a lessor of retail commercial space to challenge the alleged antitrust behavior of an owner and operator of retail grocery stores. Defendant leased premises from plaintiff Southaven for the purpose of operating a retail grocery business. Defendant then executed a series of subleases with successive third parties to operate grocery stores at the Southaven location. At the time defendant entered into its lease with plaintiff and thereafter, defendant also owned and operated other retail grocery outlets in the same geographical area. The last of defendant's successive subtenants went bankrupt, and defendant did not arrange for a replacement grocery store. Following the business demise of the last sublessor, plaintiff sought to negotiate a cancellation of defendant's lease so that plaintiff could replace defendant with a viable grocery operator, but defendant refused to execute the proposed cancellation agreement or otherwise surrender the premises, and removed its equipment, thereby rendering the premises unfit for use as a grocery. Like plaintiff Serfecz in the present case, Southaven claimed that defendant intended to destroy [*11] the site as a location for the operation of a retail grocery outlet and to monopolize the grocery store market in the area. *Id. at 1081*.

original). The Seventh Circuit elaborated further on this important distinction: "It is tempting when performing an antitrust injury analysis to look first at the substantive antitrust provision the defendant allegedly has violated, to note next the harmful effects on competition the substantive provision is designed to prevent, to note further that some of those harmful effects might fall on parties such as the plaintiff, and to conclude, therefore, that the plaintiff should have standing to vindicate the substantive antitrust provision." Such an approach, according to the Seventh Circuit, "stand[s] the antitrust injury inquiry on its head." *Id. at 1419 n. 6*.

Following the Supreme Court's guidance in *Associated General Contractors*, the Sixth Circuit in *Southaven* analyzed the nature of the plaintiff's injury by examining the status of the plaintiff in relationship to the relevant market. *Id. at 1085-86*. The court defined the relevant market as the retail grocery industry in the geographical area of the Southaven property, *id. at 1086*, and found that Southaven, as a lessor of retail commercial premises to grocery stores, did not qualify as a "competitor, purchaser, consumer or other economic actor in the grocery industry," even though its former and prospective grocery store tenants did compete in that market. *Id. at 1081, 1086*.

The Sixth Circuit noted, however, that under *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982), a plaintiff who is not, himself, a direct "participant" [*12] in the market, still may have standing if his injury is "'inextricably intertwined' with the injury sought to be inflicted upon the relevant market or participants therein." *Southaven*, 715 F.2d at 1086 (citing *McCready*, 457 U.S. at 483). In *McCready*, plaintiff, a psychotherapy patient, challenged her health insurance provider's practice of covering only the costs of seeing a psychiatrist, not the expenses of a psychologist. The Supreme Court found that plaintiff's injury as a consumer of psychotherapeutic services was "inextricably intertwined" with the injury sought to be inflicted on the suppliers of psychological services, and thus, granted plaintiff standing to complain that Blue Shield violated the antitrust laws by acting to restrain competition in the market for psychotherapeutic services. *McCready*, 457 U.S. at 483-84.

The Sixth Circuit applied the analysis of *McCready* to the facts in *Southaven*, in order to determine whether the plaintiff lessor's injury was "inextricably intertwined" with the injury to the grocery [*13] market. The court noted that the primary class of persons injured by an antitrust violation are those adversely affected as a result of controlled prices or an exclusion of competition. *Southaven*, 715 F.2d at 1087 n. 10. Because Southaven was not alleged to be a "member of a class of 'consumers' of grocery products or a class otherwise manipulated or utilized by (defendant) as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets," the Sixth Circuit concluded that the injuries suffered by the plaintiff as an owner and lessor of retail space were not sufficiently intertwined with the injuries to the grocery market to give plaintiff standing under the rule of *McCready*. *Id. at 1086*. The Sixth Circuit further explained: "Although Southaven's injury may be a tangential [sic] by-product of [defendant's] averred monopolistic conduct, such injury is not *inextricably* intertwined to any injury inflicted upon the relevant market. . . . Its injury is not sufficiently linked to the pro-competitive policy of the antitrust laws." *Id. at 1086-87* [*14] (emphasis in original).

In another case of warring grocery stores, the Southern District of New York applied the rules of *Associated General Contractors*, *McCready*, and *Southaven*, to evaluate the standing of the owner and developer of a shopping mall to complain that the defendant supermarkets conspired to prevent a grocery store from opening in its mall by filing state court lawsuits and attending local planning commission hearings to prevent the issuance of necessary permits. *Rosenberg v. Cleary, Gottlieb*, 598 F. Supp. 642 (S.D.N.Y. 1984). The court dismissed the antitrust counts because the alleged violation related to "the retail grocery business," and plaintiff, as a mall developer and owner, was not a direct participant in that market. *Id. at 645*. Rather, plaintiff's injuries related to its role as a participant in the construction and real estate market, and as such, were only tangentially related to the alleged antitrust violations and resulting lack of competition in the grocery market. *Id.* Thus, the court found plaintiff to be an "inappropriate" antitrust complainant. *Id.*

We turn now to examine the [*15] case law in our own circuit regarding the nature of the injury aspect of the standing analysis. A leading Seventh Circuit case on the issue is *Southwest Suburban Bd. of Realtors v. Beverly Area Planning Assoc.*, 830 F.2d 1374 (7th Cir. 1987). In *Southwest Suburban*, the Seventh Circuit evaluated the standing of a trade association that provided listing services to real estate brokerage firms to challenge the defendant neighborhood planning association and defendant brokers' purported antitrust violations. The complaint alleged that the defendants conspired to boycott the plaintiff's listing service, and encouraged consumers to boycott the listing service as well. *Id. at 1379*. As a result of the Conspiracy, the plaintiff was no longer able to provide a comprehensive listing of properties to its subscribers.

Like the Sixth Circuit in *Southaven*, the Seventh Circuit's inquiry into the nature of the plaintiff's injury in *Southwest Suburban* focused on plaintiff's status in relationship to the relevant market. The *Southwest Suburban* court

concluded that the plaintiff trade association lacked standing to sue for antitrust [*16] violations because it was neither a supplier nor a purchaser in the market for real estate brokerage services. *Id. at 1379*. Rather, the plaintiff acted as a supplier of a product, its list, to brokers. Noting the general rule in the Seventh Circuit that "suppliers of an injured customer may not seek recovery under the antitrust laws because their injuries are too 'indirect, secondary, or remote,'" *id.* (citing *In re Industrial Gas Litigation*, 681 F.2d 514, 519-20 (7th Cir. 1982), cert. denied, 460 U.S. 1016 (1983)), the court held that "any injury which [plaintiff] sustained by virtue of defendants' alleged boycott of the [listing service] was only indirectly related and incidental to the anticompetitive scheme, the intent and effect of which was . . . to gain control of the real estate brokerage services market." *Id.*

The paramount status of the consumer in **antitrust law** is made clear by other cases in the Seventh Circuit applying and interpreting the nature of the injury factor. The court closely scrutinizes whether the interests of the plaintiff are in line with the interests of consumers: [*17] "'When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust.'" *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555, 1564 (7th Cir. 1991) (citation omitted). As the Seventh Circuit explained in *Ball Memorial Hosp. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1338 (7th Cir. 1986), even a competitor in the market does not necessarily share the consumer's interest (and the antitrust laws' interest) in the protection and promotion of competition: "Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition." *Id. at 1338* (emphasis in original). After all, the antitrust laws were designed to protect competition, not individual competitors. *Id.* (citing *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)).

In *Garot Anderson Marketing v. Blue Cross*, 772 F. Supp. 1054, 1062 (N.D. Ill. 1990), a colleague in this district [*18] applied the antitrust standing rules established in *McCready* and *Southwest Suburban* to determine whether the plaintiff insurance agents and agencies who sold the insurance products of one of the defendant insurance companies had standing to challenge the actions of the defendants in allegedly conspiring not to compete with each other for a particular business. Plaintiffs alleged that they were injured by the loss of sales commissions resulting from the termination of a certain insurance product. The court concluded that the rule of *Southwest Suburban* did not bar the plaintiffs' suit. The court explained that "the plaintiff need not be the target of the alleged conduct. . . . It is sufficient that the plaintiff participated in some relevant way in the part of the market endangered by the alleged antitrust violation." *Id. at 1062*. Apparently, the court found that the plaintiffs' status as sellers of insurance qualified them as "participants" in the same market as the defendant suppliers of insurance.

Underlying the courts' efforts in *Associated General Contractors*, *McCready*, and their progeny, to limit antitrust standing to marketplace [*19] participants is the awareness that without such limits, the courts would be overwhelmed with duplicative antitrust litigation, and the knowledge that Congress did not intend the antitrust laws to provide a catch-all remedy for every injury remotely linked to an antitrust violation. The Supreme Court in *Associated General Contractors* noted the "strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *459 U.S. at 543*. As the Court explained in *McCready*,

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 [the Clayton Act] there is a point beyond which the wrongdoer should not be held liable. . . . It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for [his] injury.

457 U.S. at 476-77 (internal quotation marks and citation omitted).⁴

⁴ Fear of opening the floodgates was obviously a motivating factor behind the Sixth Circuit's denial of standing in *Southaven*. The Sixth Circuit worried that if it were to permit the shopping center landlord to sue the vacating grocery store for damages predicated upon diminished lease revenue resulting from reduced consumer activity at his shopping center, it would also have to grant standing to the other lessees as well, predicated upon their diminished sales. *Southaven*, 715 F.2d at 1088 n.12. In *Alpha Shoe Service v. Fleming Companies*, 849 F.2d 352 (8th Cir. 1988), cert. denied, 488 U.S. 942 (1988), the Eighth Circuit rejected just such a suit brought by shopping center tenants against a grocery store anchor tenant who vacated its space and left it empty for an extended period of time. The court declined to adopt plaintiffs' broad characterization of the relevant market as "the attraction of consumers," and found that the tenants lacked standing because they "were not competitors, participants, or

[*20] We turn now to the arguments in this case regarding the nature of Serfecz's injury as reflected by his status in relationship to the relevant marketplace, and the connection between his injury and the injury to that market. Defining the relevant market as the retail grocery industry, we, like the Sixth Circuit in *Southhaven*, find that Serfecz, as a lessor of retail premises, does not qualify as a competitor or consumer in this industry, even though his former and prospective future tenants compete in that market. The case law in our own circuit supports this conclusion. In *Southwest Suburban*, 830 F.2d 1374 (7th Cir. 1987), the Seventh Circuit concluded that the plaintiff trade association, which supplied a real estate listing service to brokers, could not sue certain brokers for antitrust violations in the brokerage market because it was neither a direct supplier nor a purchaser in the relevant market. Similarly, Serfecz is neither a direct supplier nor purchaser in the grocery market. Rather, Serfecz, like the listing service, can be thought of as a supplier to the grocery stores which do directly compete in the market: he supplies retail space. [*21] Under the general rule stated in *Southwest Suburban*, the injuries of suppliers such as Serfecz are too indirect to support standing.

Serfecz argues that under *McCready* he has standing to sue because even though he is not a direct market participant, his injury is "inextricably intertwined" with the injury to the grocery market. Serfecz offers a creative argument regarding the close business tie that exists between a shopping mall developer and a grocery store anchor tenant; however, according to the case law, this does not qualify him as inextricably intertwined with the grocery market under the rule of *McCready*. As we explained above, the plaintiff in *McCready*, while not herself a competitor in the market for psychotherapeutic services, was actually a *consumer* of such services.

Plaintiffs also argue that Serfecz has standing because Jewel's actions were "aimed squarely at Serfecz and the Grove Mall, and *not* directly at a competitor." They cite *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967), as a source for their reasoning. Plaintiffs' Memorandum in Support of its Response to the Motion for Summary Judgment ("Plaintiffs' [*22] Response") at 5-6. However, the "target area" test for standing employed by the Ninth Circuit in *Hoopes* was rejected by the Supreme Court in *Associated General Contractors*, 459 U.S. at 536 n.33.⁵

[*23] In its desire to keep antitrust litigation within judicially manageable bounds and avoid duplicative suits, without forcing antitrust violations to go unchallenged altogether, the Supreme Court in *Associated General Contractors* also considered whether a party more directly injured by the violations might file suit as another factor relevant to the standing inquiry. "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." 459 U.S. at 542. If more direct victims exist, denial of standing to those only tangentially injured "is not likely to leave a significant antitrust violation undetected or unremedied." *Id.* Applying a similar rationale in a case which foreshadowed the Supreme Court's reasoning in *Associated General Contractors*, the Seventh Circuit emphasized the importance of limiting antitrust standing to those plaintiffs able to most efficiently vindicate the antitrust laws. *In re Industrial Gas Litigation*, 681 F.2d 514, 516 & 520 (7th Cir. 1982). [*24] Thus, the standing inquiry focuses "not only on whether there has been an 'antitrust injury,' but also on whether the particular plaintiff is the appropriate antitrust enforcer." *Id.* at 520. Like the Supreme Court in *Associated General Contractors*, the Seventh Circuit strove to strike a balance between the interest in "deterrence through private antitrust enforcement and redress for injury," on the one hand, and "the avoidance of excessive treble damages litigation," on the other hand. *Id.* The court concluded that the proper compromise could best be achieved by granting standing "only to those who, as consumers or competitors, suffer immediate injuries . . . while excluding person whose injuries were more indirectly caused by the antitrust conduct."

consumers in the relevant market." *Id.* at 534. The court rejected plaintiffs' broad definition of the market for fear of "expanding the scope of the private antitrust action far beyond its intended bounds." *Id.*

⁵ Responding to the emphasis in the case law and defendants' memorandum in support of their motion for summary judgment on the market status of an antitrust plaintiff, Serfecz also resorts to the argument that he is in fact a consumer in the market because he shops for groceries in Elk Grove Village, and that, in order to sustain his shopping center, he is "willing" to become a competitor in the market by opening his own grocery store in the Grove Mall. Plaintiffs' Response at 7. However, the antitrust allegations in the complaint frame this case as a suit to remedy the injuries suffered by Serfecz as the owner of a competing shopping mall, not the injuries he may have suffered as a grocery consumer or prospective grocery store competitor. Thus, we reject Serfecz's last ditch efforts to obtain standing by re-casting his case in a manner unsupported by the complaint.

Id. The court believed that "this select class of plaintiffs" would be able to "impose the deterrent sting of treble damages at the smallest cost of enforcement." *Id.* The Seventh Circuit thus reduced this aspect of the inquiry to a basic costs/benefits analysis.

Under the rationale articulated in *Associated General Contractors* and *Industrial Gas*, the courts search for the most directly [*25] injured -- and thus, presumably, the best -- plaintiff. Accordingly, the Seventh Circuit in *Southwest Suburban* concluded that brokers who subscribed to plaintiff's listing service and whom might have been hurt by the boycott of the listing service would serve as more appropriate plaintiffs than the listing service itself, because their injuries were more direct. [830 F.2d at 1379-80](#). The Ninth Circuit in [*R.C. Dick Geothermal Corp. v. Thermogenics*, 890 F.2d 139 \(9th Cir. 1989](#)), considered the standing of the landlord of one of the defendants to complain that the defendants' conspiracy to restrain trade by slowing production injured the landlord by reducing the royalties it received under the lease. The Ninth Circuit denied standing because the landlord, although injured by his decreased royalties revenue, was not the most directly injured potential plaintiff; rather, the court concluded that other sellers in the market would be "in a far better position to champion the public interest in vigorous **antitrust law** enforcement." [*Id. at 148*](#). Likewise, in *Rosenberg*, the Southern District of New [*26] York observed that both supermarket consumers and the plaintiff shopping mall developer's prospective grocery store tenant would be more suitable complainants regarding the defendant supermarket's alleged actions in restraint of trade in the grocery store market. And, finally, in *Southaven*, the Sixth Circuit briefly noted that consumers and other market participants would be more direct victims, and thus, by implication, better plaintiffs.

We now consider whether a similar rationale can be applied to the present case: Is there an identifiable class of potential plaintiffs who might be better suited than Serfecz by virtue of their more direct injuries to bring suit and whose self-interest would motivate them to do so? In the case most directly on point, *Southaven*, the Sixth Circuit rather summarily concluded that consumers or other market participants would be more appropriate plaintiffs to seek a remedy for restraint of trade or monopolization in the grocery market. While, in theory, we agree with the Sixth Circuit, we lack that court's confidence that either of these two groups of potential plaintiffs would be sufficiently motivated to actually bring suit. We suspect that [*27] Serfecz might be correct that a competing grocery store not yet operating in the area, such as Dominicks, would be more likely to forgo a location than to incur the high start-up costs of litigation. Indeed, according to plaintiffs, the fact is that no Competitor has filed an antitrust lawsuit against Jewel although there is evidence that Jewel has been restricting locations throughout Illinois for the last ten years. As regards a consumer suit, the degree of harm suffered by an individual consumer as a result of reduced competition in the grocery market in Elk Grove Village would probably not be sufficiently great to give him incentive to sue. Thus, we fear that there is a high risk that a significant antitrust violation will go unremedied if we do not grant plaintiffs standing to sue in this case. However, the case law in the various circuits, including our own, makes it clear that the mere existence of competitors or consumers in the relevant market who *could* sue is considered a factor in favor of denying standing. Where a more directly injured class of potential plaintiffs exists, we are left with very little leeway to address the likelihood of whether any members of that [*28] class would actually bring suit. While the result may be somewhat frustrating in this particular case, it does provide a straightforward rule of law and eliminates the need for us to consider evidence on the speculative question of whether and when a more appropriate plaintiff might sue.

The Supreme Court in *Associated General Contractors* examined the directness of the plaintiff's injury as a factor in the standing analysis not only to prevent excessive and duplicative litigation, but also to avoid highly complicated damage determinations. [459 U.S. at 542-544](#). As the Sixth Circuit explained in *Southaven*, "indirect injuries may render damages highly speculative or create situations of complexity that would foreclose an equitable determination and apportionment of damages." [715 F.2d at 1087](#). The Sixth Circuit reviewed the damages sustained by the plaintiff shopping center lessor in *Southaven*, and noted that there had been no breach or failure to perform under the lease; in fact, the defendant grocery store operator had continued to tender rental payments when due even though it was no longer [*29] operating at the Southaven location. Rather, the plaintiff complained of its inability to command premium rent from its other lessees (or perhaps to even attract lessees at all) due to the reduced consumer traffic at a shopping center without an operating grocery store. The Sixth Circuit believed that "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." *Southaven*, 715 F.2d at 1087. Thus, at the heart of the Sixth Circuit's preference for antitrust plaintiffs with direct injuries, is the difficulty inherent in establishing causation of an indirect injury, which in turn creates difficulty in determining damages. Thus, the existence of a causal connection between the antitrust violation and the harm to the plaintiff is not only an independent factor in the *Associated General Contractors* analysis, *supra* p. 6-7, but also underlies the examination, under *Associated General Contractors*, of the directness of the plaintiff's injury.

In *Greater Rockford Energy & Technology v. Shell Oil Co.*, 998 F.2d 391 (7th Cir. 1993), [*30] cert. denied, 127 L. Ed. 2d 375, 114 S. Ct. 1054 (1994), the Seventh Circuit, too, acknowledged the difficulty of proving that the harm suffered by a plaintiff resulted from the alleged antitrust activity. "An antitrust violation need not be the sole cause of the alleged injuries, but the plaintiff must establish, with a fair degree of certainty, that the violation was a material element of, and substantial factor in producing, the injury." *Id.* at 401. Where there was not just one, but numerous intervening economic and market factors which could offer an alternative explanation for plaintiff's injuries, the Seventh Circuit observed that it would be difficult for the plaintiff to prove that the antitrust violations were the cause of the injuries. *Id.* at 402-404.

We turn now to the present case, and consider the difficulties facing Serfecz in attempting to prove that the injuries he suffered resulted from Jewel's alleged antitrust violations. Defendants argue that numerous factors might explain Serfecz's inability to attract either tenants or developers to the Grove Mall, including [*31] its aging, dilapidated condition, its poor design, and the presence of a new, more attractive competing mall across the street. Defendants are correct that in light of these possible independent reasons for the decline of the Grove Mall, it may be difficult for Serfecz to prove that his injuries were caused by antitrust violations. However, as we mentioned when discussing causation as an independent factor in the *Associated General Contractors* analysis, we believe that plaintiffs have cited enough evidence to raise a material issue of fact regarding causation. For example, in a sworn declaration, plaintiffs' retail shopping center expert explained that because of Jewel's actions in continuing to claim a leasehold interest in the premises, commencing various litigation against Serfecz, and attempting to sublet to a roller rink with arcade games, prospective tenants and redevelopers would have no interest in the Grove Mall. Plaintiffs' Exhibits to Plaintiffs' Response, Declaration of Kenneth Leonard. However, there is still room for the kind of concern raised in both *Southaven* and *Greater Rockford Energy & Technology* regarding the difficulties of allocating the damages amongst [*32] the "myriad" possible causes.

In summary, applying the factors established by the Supreme Court in *Associated General Contractors*, we find that plaintiffs lack standing to challenge Jewel's antitrust activity in the retail grocery market. We believe that Serfecz has raised a dispute of material fact regarding whether Jewel's alleged antitrust conduct caused his harm. However, we are ultimately persuaded by the Sixth Circuit's reasoning in *Southaven*, as well as that of the Southern District of New York in *Rosenberg*, that plaintiffs' injuries were too indirect to be considered inextricably intertwined with the injury to the relevant marketplace, the retail grocery business, and thus the plaintiffs are not the proper plaintiffs to challenge antitrust activity in that market. The emphasis in our own circuit on the interests of the consumer and the status of a plaintiff in relation to the marketplace persuades us that the approach to the shopping center/grocery store battle taken by the Sixth Circuit in *Southaven* and the Southern District of New York in *Rosenberg* would be good law here in the Seventh Circuit. Thus, we grant Jewel's motion for summary judgment and dismiss [*33] for lack of standing plaintiffs' antitrust claims against both Jewel and American Stores in Counts I and II of the complaint insofar as they pertain to Jewel's alleged antitrust activities in the retail grocery market.⁶

However, plaintiffs' antitrust claims against Jewel are not limited to the grocery business. Plaintiffs also have clearly alleged that Jewel participated in a Conspiracy with the Elk Crossing [*34] defendants and United Skates to restrain trade and monopolize sales and development in the business of operating a retail shopping center and

⁶ In arguing the motion for summary judgment brought by Jewel and American Stores, the parties have made no attempt to distinguish the situation of Jewel from that of its property manager and sister company, American Stores. Apparently, the parties view the role of these two defendants as identical. Therefore, even though very little information has been provided to the court regarding American Stores, as distinguished from Jewel, we assume that its responsibility for the alleged antitrust activities is the same of that of Jewel, and we treat it identically for purposes of this motion for summary judgment.

leasing commercial premises to retail tenants. See, e.g., Complaint at PP 25, 40, 85, 86. Defendants have offered no dispute regarding the direct injuries suffered by plaintiffs as participants in that market,⁷ and thus, we conclude that plaintiffs have standing to challenge Jewel's actions in relation to the market for operation of retail shopping centers. However, our determination that plaintiffs have standing to assert limited antitrust claims against Jewel does not end our review of the motion for summary judgment. The motion raises substantive challenges to the antitrust claims which go beyond the question of standing. These challenges will be discussed *infra* in Part II of this opinion.

[*35] *II. The Merits of Plaintiffs' Claims of Antitrust Violations*

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548, (1986). A "genuine issue of material fact exists only where 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Dribeck Importers, Inc. v. G. Heileman Brewing Co.*, 883 F.2d 569, 573 (7th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). In considering such a motion, the court must view all inferences in the light most favorable to the nonmoving party. See *Regner v. City of Chicago*, 789 F.2d 534, 536 (7th Cir. 1986). [*36] Summary judgement will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Defendants argue that even if plaintiffs have standing to bring antitrust claims against Jewel, plaintiffs have failed to make a factual showing sufficient to establish the essential elements of those claims. In order to establish a violation of Section 1 of the Sherman Act, plaintiffs must establish the existence of a contract, combination or conspiracy intended to restrain competition. *Greater Rockford Energy & Technology*, 998 F.2d at 396. Plaintiffs claim that Jewel and American Stores participated in a conspiracy to restrain trade in the retail shopping center market in violation of Section 1 by helping to destroy the viability of the Grove Mall. In furtherance of that conspiracy, Jewel ceased operations at Grove Mall, vacated the premises and moved across the street to the newer Elk Crossing Mall, yet continued to renew its lease at the [*37] Grove Mall, thereby tying up the anchor tenant space and preventing another grocery store from moving in. Subsequently, Jewel attempted to sublet to United Skates for the "obnoxious" use of operating a roller rink with arcade games.

The plaintiff bears the ultimate burden of proving that there was in fact such a conspiracy. *Market Force v. Wauwatosa Realty*, 906 F.2d 1167, 1170 (7th Cir. 1990) (citing *Monsanto v. Spray-Rite Serv.*, 465 U.S. 752, 763, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)). However, a conspiracy to engage in anti-competitive conduct "need not, and generally will not, be established by direct evidence." *Contractor Utility Sales v. Certain-teed Products*, 638 F.2d 1061, 1074 (7th Cir. 1981). Rather, "the requisite concerted action may be inferred from . . . circumstantial evidence." *Id.* Following the holdings of the Supreme Court in *Matsushita Elec. Indus v. Zenith Radio*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), and *Monsanto* regarding the sufficiency of the standard [*38] of proof in a Section 1 claim, the Seventh Circuit has adopted a three-step inquiry. The court first reviews the plaintiff's evidence of a conspiracy. The court then considers whether the plaintiff's evidence of conspiracy is ambiguous; that is, is it as consistent with the defendants' permissible, legitimate independent business interests as with an illegal conspiracy? If the defendants can show a plausible and justifiable reason for their conduct that is consistent with proper business practice, the burden then shifts to the plaintiff to come forward with direct or circumstantial evidence that tends to exclude the possibility that defendants were pursuing these independent interests. *Market*

⁷ Indeed, defendants, themselves, at one point acknowledge that Jewel might be found liable for antitrust violations in the market for retail shopping centers on a conspiracy theory. See Defendants' Memorandum in Support of Motion for Summary Judgment ("Defendants' Memorandum") at 12 n.1. ("Because Jewel does not compete in the market for retail shopping centers . . . Jewel cannot be found to have monopolized . . . this market. . . . Jewel can only be found liable on a monopolization theory in this market by virtue of a conspiracy.")

Force, 906 F.2d at 1170-71. If the plaintiff cannot do so, a grant of summary judgment for the defendant is appropriate. *Id.*

In *Monsanto*, a price-fixing case, the Supreme Court applied this standard, and concluded that there was a triable issue of fact regarding the existence of a conspiracy. The evidence in that case included direct evidence of agreements to maintain prices, such as testimony from a district manager that defendant Monsanto approached price-cutting [*39] distributors and warned them that if they did not maintain the suggested resale price, they would not receive adequate supplies of a certain product. When one of the distributors did not agree, Monsanto complained to the distributor's parent company, and the parent company instructed its subsidiary to comply; the distributor then informed Monsanto that it would charge the suggested price. The Court found this evidence "plainly . . . persuasive as to a meeting of minds." *Monsanto*, 465 U.S. at 765. In *Market Force* by contrast, the Seventh Circuit noted that evidence of informal communications and meetings among defendants, and of similarity in policies, for example, would not be considered unambiguous support for a inference of conspiracy. *Market Force*, 906 F.2d at 1172-73.

We apply the analytical framework of *Monsanto* and *Matsushita*, as set forth in *Market Force*, to the facts of the present case. Plaintiffs' *prima facie* evidence of Jewel's involvement in the averred conspiracy is the fact that Jewel benefitted greatly from the slow but steady demise of the Grove Mall and the [*40] resulting increase in consumer traffic at the Elk Crossing Mall. Therefore, plaintiffs argue, Jewel had a compelling motive to participate in a conspiracy. When considering whether a genuine issue for trial exists on a claim of antitrust conspiracy, the Supreme Court views evidence of motive to conspire, or lack thereof, as "highly relevant." *Matsushita*, 475 U.S. at 595-97. "Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id. at 596-97*.

Defendants argue that Jewel's purported actions in furtherance of the alleged conspiracy were entirely consistent with Jewel's permissible independent business interests. Jewel maintains that it moved to the Elk Crossing Mall in order to take advantage of the newer, larger, and overall more attractive facilities and open a companion Osco drugstore (which was prohibited under [*41] its lease at the Grove Mall). Jewel further maintains that it attempted to sublet to United Skates simply to fulfill its legitimate business interest in earning some rent on the property. Similarly, Jewel's departure from the Grove Mall to serve as the anchor tenant at Elk Crossing also served the legitimate business interests of Jewel's alleged co-conspirators, the Elk Crossing defendants. However, what Jewel has failed to satisfactorily explain to the court is its legitimate interest in continuing to pay rent on a vacant store and its refusal to cancel the lease or accept Serfecz's offer to pay the rent Jewel would have received from United Skates. Certainly, the rational trier of fact might conclude that Jewel's motive in refusing was purely anticompetitive.

However, plaintiffs are not yet over the hurdle in terms of meeting their burden of proof of conspiracy under *Section 1* of the Sherman Act. A "fundamental prerequisite" of a *Section 1* violation "is unlawful conduct by two or more parties pursuant to an agreement, explicit or implied." *Contractor Utility Sales*, 638 F.2d at 1074. Thus, evidence that two defendants each benefitted from anticompetitive [*42] practices does not itself establish an unlawful conspiracy; evidence of an agreement is critical. *Id. at 1075*. "Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited by *Section 1*. Rather . . . there must be evidence that two or more parties have knowingly participated in a common scheme or design to accomplish an anti-competitive purpose." *Id. at 1074*.

It is on this issue that plaintiffs' response to the defendants' summary judgment motion is notably silent. Certainly, there is evidence that both Jewel and the Elk Crossing defendants reaped the benefits of the demise of the Grove Mall. But on the issue of Conspiracy, plaintiffs offer only speculation, hunch, and theory.⁸ For example, as evidence

⁸ We note also that what few arguments plaintiffs do advance regarding the existence of a conspiracy concern only Jewel and the Elk Crossing defendants and United Skates; no attempt has been made by plaintiffs to suggest that their claim of a *Section 1* violation might be based on a conspiracy between Jewel and its sister company, American Stores. In fact, as discussed earlier,

of the Elk Crossing defendants' participation in the purported anticompetitive scheme, plaintiff emphasizes that the Elk Crossing defendants planned from the start to duplicate the tenant mix of the Grove Mall. Plaintiffs maintain that "no rational real estate developer would *duplicate* the tenant mix of a mall directly across the street unless he knew the existing mall was going to be devalued [*43] and prohibited from competing and obtaining new tenants," Plaintiffs' Response at 16, and ask us to infer from the duplication a conspiracy to devalue the Grove Mall. In support of their theory, plaintiffs cite the opinion of their shopping center expert that "the way the center was planned clearly showed a 'very strong, very confident pattern of activity that showed [defendants] had no fear of competition coming from the old center.'" Plaintiff's Response at 16 (citing Leonard Deposition at 114). The persuasiveness of this opinion is doubtful, given the commonplace appearance of look-alike strip-malls on opposite corners of busy intersections throughout the suburbs. Be that as it may, the fact that the Elk Crossing defendants may have been fairly confident that they would be able to successfully compete with the dilapidated mall across the street is not itself sufficient evidence of a conspiracy between Jewel and American Stores and these defendants. Plaintiffs emphasize also the close business tie between a grocery anchor tenant and the shopping center location it occupies, characterizing Jewel as a "partner in interest" with the owners and developers of the Elk Crossing Mall. While [*44] it is true that the business interests of the anchor tenant and the interests of the landlord shopping mall may be aligned, this "confluence of interest," to quote plaintiffs, is not, alone, sufficient evidence to support an inference of participation in an illegal antitrust conspiracy.

In the absence of evidence of an agreement between Jewel and American Stores and their co-defendants to destroy competition, we must grant the motion for [*45] summary judgment as to plaintiffs' claims of Sherman Act Section 1 violations in Count I.⁹

[*46] For similar reasons, we must also grant defendants' motion for summary judgment on plaintiffs' claims in Count II of monopolization in violation of Section 2 of the Sherman Antitrust Act. Section 2 of the Sherman Act, unlike Section 1, does not require proof of a conspiracy between two or more parties; rather, the focus of this section is on the actions of a single firm to control a market. [15 U.S.C. § 2](#); [Okansen v. Page Memorial Hosp., 945 F.2d 696, 710 \(4th Cir. 1991\)](#), cert. denied, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992). However, because of our findings in Part I of this opinion, *supra* pp. 22-24, regarding standing, evidence of a conspiracy between defendants Jewel and American Stores and the Elk Crossing defendants would be required. We found that plaintiffs had standing to challenge Jewel's actions only in relation to the retail shopping center market, not the grocery market. Obviously, Jewel and American Stores could not, by themselves, illegally monopolize the market for retail shopping centers. They could, however, be found liable for Section 2 violations by [*47] virtue of a conspiracy between themselves and players in the retail shopping center market, the Elk Crossing defendants. Because the plaintiffs have not presented sufficient evidence to raise a genuine issue of concerted action between the two sets of defendants, we must grant summary judgment for Jewel and American on Count II as well.

III. The Breach of Lease Claim

In Count IV of their complaint, plaintiffs claim that Jewel's actions in keeping its space at the Grove Mall dark and vacant in furtherance of its alleged antitrust goals constitutes a breach of requirements in its lease that the premises be used only to operate a grocery store and only for lawful purposes.

⁹ *supra* note 6, very little at all has been said by either party about American Stores. Thus, we do not address whether evidence of such a conspiracy would constitute a proper basis for a Section 1 claim.

⁹ Plaintiffs complain repeatedly of delays in production of various discovery materials and their inability to take the deposition of defendant Patrick F. Daly, real estate developer and president of the beneficial owner of the Elk Crossing Mall. Yet, it was upon plaintiffs' own motion that the court agreed to consider this motion on an expedited basis. See order of June 29, 1994. Thus, it would be difficult for plaintiffs now to argue that the matter was not yet ripe for summary judgment due to incomplete discovery. However, we can make no definitive assessment regarding the status of discovery because on October 20, 1993, we referred all discovery disputes to the designated Magistrate-Judge. If, after additional discovery, plaintiffs are able to present evidence in support of their conspiracy claim, and can demonstrate why this evidence was not available earlier, we would be willing to entertain a motion to reconsider.

A. Unlawful Use

The first sentence of Paragraph 1 of Jewel's lease ("sentence 1") provides:

Lessee shall not use the demised premises for any unlawful purpose nor shall it commit waste.
and the second sentence ("sentence 2") provides:

It shall comply with all lawful requirements of the local Board of Health, Police and Fire Departments, and state and federal authorities, respecting the manner in which it uses the leased premises.

Defendants' Memorandum, Exhibit 4 ("Lease"). Plaintiffs [*48] maintain that Jewel's use of the premises to restrain trade and to monopolize the grocery store business violates [Sections 1](#) and [2](#) of the Sherman Act, and thus constitutes an unlawful use of the premises in violation of sentence 1 of paragraph 1 of the lease. Because we have found in Part II of this opinion that plaintiffs have not met their burden of proof of conspiracy and, thus, have not established a [Section 1](#) violation, [Section 1](#) cannot serve as a basis for plaintiffs' breach of lease claim. As regards the alleged [Section 2](#) violation, we found that plaintiff had standing to challenge Jewel only in relation to the retail shopping center market, not the grocery market, and that Jewel could be found liable for monopolistic conduct in this market only on a theory of conspiracy. Again, because there was insufficient evidence of a conspiracy, we granted summary judgment as to [Section 2](#) as well. However, [Section 2](#), unlike [Section 1](#), does not itself require proof of a conspiracy. Thus, plaintiffs' lack of standing under the Clayton Act to sue Jewel for monopolizing the grocery market does not mean that a violation of [Section 2](#) of the Sherman Act has not occurred; it means only that plaintiffs [*49] are not the appropriate parties to bring a civil action for antitrust remedies on the basis of such a violation. Nor does plaintiffs' lack of antitrust standing mean that they lack standing as parties to the lease to sue for breach of a lease provision relating to violations of the law, arguably including violations of Sherman Antitrust Act [Section 2](#).¹⁰ But because of their position that plaintiffs lack standing to bring an *antitrust* suit on this basis, defendants have not even addressed the question of whether there is sufficient evidence that Jewel illegally monopolized the grocery market in violation of [Section 2](#). For purposes of considering defendants' motion regarding the breach of lease claim, and in the absence of contrary arguments by defendants, we assume that there is sufficient evidence of monopolistic conduct in the grocery market by Jewel in violation of [Section 2](#).

[*50] We must next consider whether this type of illegal act was the type of act contemplated by the language of the lease prohibiting the use of the premises for unlawful purposes. Neither party has offered much case law to guide our interpretation of this language. The only relevant case cited is [Deutsch v. Phillips Petroleum Co., 56 Cal. App. 3d 586, 128 Cal. Rptr. 497, 498 \(Cal. App. 2d Dist. 1976\)](#). In *Deutsch*, the Court of Appeals of California interpreted a lease provision somewhat similar to sentence 2 of paragraph 1 of the Jewel lease, and concluded that the alleged antitrust violations did not constitute a breach of the lease. However, the California court's analysis rested primarily on language which is not present in the provision of the Jewel lease regarding unlawful use. The *Deutsch* lease stated that the lessee "shall conduct its business on the said demised premises in conformity with all State or Federal Statutes and Municipal Ordinances applicable thereto . . ." [Id. at 499](#). The California court made much of the concluding words "applicable thereto," which it found to modify the word "premises." Based on this wording, [*51] the *Deutsch* court concluded that a breach of this provision of the lease could result only from a violation of a statute directly "applicable to the premises," and that the antitrust violation in question did not meet this requirement because it had no significant relation to the premises. [Id. at 500-501](#). The court further noted that the purpose of such a provision was to "ensure[] that the lessee will harm neither the physical attributes nor the reputation of the property." [Id. at 501](#).

¹⁰ Defendants might argue that because plaintiffs lack standing to sue for the underlying antitrust violations, plaintiffs also lack standing to sue for breach of the unlawful use covenant based on these antitrust violations. However, plaintiffs' standing as lessors to sue on the lease is independent of the question of standing to sue on the underlying violations. For example, even though a lessor lacks standing to prosecute his tenant for operation of a drug dealership or gambling ring on the leased premises under the criminal code, he could sue for breach of an unlawful use covenant in the lease. Indeed, defendants appear to concede that plaintiffs have standing to bring exactly this type of suit. Defendants' Memorandum at 23. Applying similar reasoning, we believe plaintiffs have standing to sue for breach of the lease based on their tenant's alleged illegal antitrust behavior.

The Jewel lease, unlike the lease described in *Deutsch*, has two separate sentences dealing with use of the premises, the first restricting unlawful use and the second dealing with compliance with various laws relating to the premises. It is sentence 2 which corresponds to the lease provision at issue in *Deutsch*. However, plaintiffs' claim of breach of lease is based primarily on sentence 1's prohibition of unlawful use, and not sentence 2's requirement of compliance with the requirements of various governmental authorities. Thus, the *Deutsch* holding is on point here only insofar as sentence 1 of the Jewel lease is similar in language and purpose to sentence 2 and the analogous [*52] *Deutsch* provision. There is no reason to believe that sentence 1 of the Jewel lease is merely an introduction to or duplication of sentence 2; more likely, it has a separate and somewhat different focus from sentence 2. Otherwise, its presence in paragraph 1 would be redundant and somewhat meaningless. Moreover, by contrast to the disputed provision in the *Deutsch* lease, sentence 1 of the Jewel lease is a general provision prohibiting the use of the premises "for any unlawful purpose." Sentence 1 of the Jewel lease has no clause restricting its application to laws "applicable to the premises," and thus, we believe that breaches of this provision, unlike the *Deutsch* provision, need not necessarily involve violations of laws directly related to the premises. We find that sentence 1 is not analogous to the provision at issue in the *Deutsch* lease, and accordingly, we decline to follow the ruling in *Deutsch*.

In a further attempt to escape the application of sentence 1, defendants argue that this provision relates to the use of the premises only for such activities as prostitution, drug-dealing, or gambling. While it is true that these activities might be more traditionally [*53] and typically characterized as "criminal" or "illegal," as compared to antitrust conduct, defendants have offered no evidence to support their narrow interpretation of "unlawful purpose."

In light of the unambiguous,¹¹ broad and non-restrictive wording of sentence 1, we conclude that use of the leased premises in furtherance of a [Section 2](#) antitrust violation could indeed constitute a breach of the lease. Thus, we deny the motion for summary judgment on the claim of breach of lease in Count IV insofar as it is based on the illegal use provision of the lease.

B. Continuous Operation

Plaintiffs also argue that by acting to keep the premises vacant, Jewel has breached paragraph 28 of the lease, which provides that "Lessee shall use the leased premises only for the operation [*54] of a grocery supermarket." Plaintiffs contend that the requirement in paragraph 28 that the premises be used "only for the operation of a grocery" implies that the premises must be occupied and used, as opposed to left dark and vacant. In other words, plaintiffs infer into paragraph 28 a continuous use requirement although one is not expressly provided.

However, not only does paragraph 28 not expressly require continuous use, but elsewhere, the lease actually anticipates a situation of extended vacancy and contains express provisions to address just these circumstances. In paragraph 17, the lease provides that in addition to a minimum base rental, "lessee covenants to pay as percentage rental an amount equal to one percent (1%) of all sales in excess of four million four hundred forty thousand and no/100 Dollars . . . made in or from the leased premises per lease per year." Paragraph 17 further states that "the obligation to pay percentage rental shall not be deemed to require Lessee to conduct business on the leased premises nor to operate its business so as to produce percentage rental."

Also directly relevant is paragraph 30, which provides that "in the event that the Lessee [*55] allows the leased premises to remain vacant or fails to open for business for a period of sixty (60) consecutive days or more during the term, Lessee shall for the purpose of calculating the percentage rental be deemed during each week that it is not open for business . . . to have made sales in an amount equal to the amount of the average sales per week made during the three (3) years prior to such time."

¹¹ If there were any ambiguity, we would follow the general rule of contract interpretation which requires courts to construe an ambiguity against the drafter. However, there is no evidence as to which party drafted the lease at issue in this case.

Because paragraphs 17 and 30 explicitly and specifically address the situation of extended vacancy and inoperation, these two paragraphs override any suggestion that a continuous use requirement might be inferred from the "use for operation as a grocery" provision in paragraph 28. Thus, it is clear from the express language of the lease that Jewel's behavior regarding its leased premises at the Grove Mall is well within its rights under the lease.

Plaintiffs cannot avoid this harsh result by resort to the covenant of good faith and fair dealing. A covenant to deal fairly and in good faith is implied in every contract in Illinois, *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1443 (7th Cir. 1992) (citing *Martindell v. Lake Shore Nat'l Bank*, 15 Ill. 2d 272, 154 N.E.2d 683 (1958)), [*56] including property leases. See, e.g., *Abbott v. Amoco Oil*, 249 Ill. App. 3d 774, 619 N.E.2d 789, 798, 189 Ill. Dec. 88 (Ill. App. 2nd Dist. 1993), appeal denied, 624 N.E.2d 804 (1993); *P.M.C. v. Ekstein*, No. 91 C 3709, *1992 U.S. Dist. Lexis 7306*, *6 (N.D. Ill. May 13, 1992). However, the implied covenant of good faith and fair dealing is not an independent source of duties for either party to a contract. *Beraha*, 956 F.2d at 1443. Rather, it is an interpretive rule of construction, which "comes into play in defining and modifying duties which grow out of specific contract terms and obligations." *Id.* (citing *Gordon v. Matthew Bender & Co.*, 562 F. Supp. 1286, 1289 (N.D. Ill. 1983)). The covenant, then, is merely "an estimate of 'what parties would agree to if they dickered about the subject explicitly.'" *Continental Bank, N.A. v. Everett*, 964 F.2d 701, 705 (7th Cir. 1992) (quoting *Jordan v. Duff & Phelps*, 815 F.2d 429, 435-36 (7th Cir. 1987)), [*57] cert. denied, 113 S. Ct. 816 (1992). The covenant is thus used to fill contractual gaps. Where the disputed issue in a contract is governed by express terms, however, there is no gap to be filled, and the parties' behavior is assessed according to the express provisions, without resort to an implied covenant of good faith and fair dealing. *Continental*, 964 F.2d at 705. Unfortunately for plaintiffs, this is just such a situation. The express language of paragraphs 17 and 30 leaves no room for the implied covenant of good faith and fair dealing to step in. Serfecz has inherited a highly unfavorable lease, and we cannot rewrite the contract now.

Defendants' motion for summary judgment on the claim of breach of lease in Count IV must be granted insofar as it is based on Jewel's failure to continue operating or release its space at the Grove Mall.

IV. The Malicious Prosecution Claim

In February 1990, Serfecz learned that Jewel was in the process of negotiating a sublease with United Skates. To prevent the proposed sublease, Serfecz changed the locks to the facility. Jewel then brought a declaratory judgment action [*58] against Serfecz in state court regarding its right to sublease its premises to United Skates. Plaintiffs maintain that the lawsuit was devised solely for the purpose of harassing and intimidating Serfecz and his attorneys, and otherwise interfering with Serfecz's efforts to redevelop the Grove Mall. Accordingly, in Count III of their complaint, plaintiffs charge Jewel with malicious prosecution.

"Actions for malicious prosecution of a civil proceeding are not favored in Illinois on the ground that courts should be open to litigants for resolution of their rights without fear of prosecution for calling upon the courts to determine their rights." *Keefe v. Aluminum Co. of America*, 166 Ill. App. 3d 316, 519 N.E.2d 955, 956, 116 Ill. Dec. 740 (Ill. App. 1st Dist. 1988), appeal denied, 526 N.E.2d 831 (1988). A malicious prosecution claimant must prove the following five elements:

(1) Institution and prosecution of judicial proceedings by the defendant;

(2) Lack of probable cause for those proceedings;

(3) Malice in instituting the proceedings;

(4) Termination of the prior cause in plaintiff's [*59] favor; and

(5) Suffering by plaintiff of some special injury, beyond the anxiety, loss of time, attorney fees and necessity for defending one's reputation which are the common incidents of most lawsuits.

There is no question in the present case as to proof of elements (1) and (4), regarding institution and prosecution of judicial proceedings and termination of the suit in plaintiffs' favor. Additionally, we find that plaintiffs have sufficient evidence to create a factual dispute as to the third element, malicious intent, especially given the requirement that on summary judgment the court must view all inferences in the light most favorable to the nonmoving party. See [Regner v. City of Chicago, 789 F.2d at 536](#). In support of their interpretation of events, plaintiffs point to Jewel's misconduct during discovery in the state court suit, implying that Jewel's dilatory discovery tactics were intended primarily to exacerbate the harassment suffered by plaintiffs as a result of the litigation. Plaintiffs also note that prior to trial in the state court action, Jewel rejected Serfecz's offer to pay Jewel the same rent it would have received from [*60] United Skates, a decision by Jewel which further implies that Jewel's true goal in bringing suit was not to sublet to United Skates and earn rental income but to harass Serfecz. Paragraph 31 of the Jewel lease states that "no sublease shall be made . . . which increases the insurance rates with respect to the leased premises without Lessor's written consent." A major focus of the lawsuit concerned the impact that the subtenancy of a roller rink and games arcade would have had on the Grove Mall's property insurance rates. Plaintiffs point to evidence that despite the importance of the insurance issue, Jewel's primary witness had no idea what the effect on insurance rates would be. This ignorance on Jewel's part suggests a lack of preparation and investigation. Plaintiffs also note that Jewel waived its right to use an insurance expert. This evidence further supports plaintiffs' position that the lawsuit was merely a "sham" brought primarily for purposes of harassment and intimidation.

Probable cause in the context of a malicious prosecution claim means the existence of facts "that would lead a person of ordinary caution and prudence to believe that he had a justifiable claim." [Keefe, 519 N.E.2d at 956](#). [*61] We find that plaintiffs have sufficient evidence to support a finding of lack of probable cause, the second element of malicious prosecution. At trial, the state court directed a finding for Serfecz, concluding that Jewel had presented no evidence to support its case. Plaintiffs' Response, Exhibits (*Jewel v. Serfecz*, No. 90 CH 7124, (Circuit Court of Cook County 7/13/90)). The appellate court affirmed the trial court, noting that Jewel had presented "no competent testimony" regarding the insurance rates. Plaintiffs' Response, Exhibit 5 (*Jewel v. Serfecz*, No. 1-90-2576, (Ill. App. 1st Dist. May 31, 1991)). We agree with plaintiff that the fact that Jewel did not thoroughly research or present evidence on the insurance question supports an inference that it lacked probable cause to believe that it would win the case.

Defendants note that Jewel succeeded in its quest for a temporary restraining order ("TRO") against plaintiffs, and argue that as a matter of law, this preliminary success conclusively establishes probable cause. In *Keefe*, the court held that a civil judgment entered by the circuit court would constitute conclusive evidence of probable [*62] cause, even though that judgment was subsequently reversed on appeal. [519 N.E.2d at 956](#). The Illinois Appellate Court said nothing, however, about the evidentiary impact of the issuance of a TRO. While obviously a grant of a TRO would be some evidence of probable cause, we do not believe it to have the same *per se* conclusive weight as a final judgment by the trial court, presumably reached after a period of more careful and thorough consideration of all the issues than is typical at the TRO stage of litigation. Moreover, defendants have not presented much information regarding the nature of the TRO that was issued. We know only that Serfecz attempted to oust Jewel from the premises by changing the locks, and that as a result of the TRO, Jewel regained control of the property it leased in the Grove Mall. The mere fact that the trial court concluded that Jewel was entitled to access to its leased property does not conclusively establish that Jewel had probable cause to believe that it was entitled to a declaratory judgment regarding its right to sublet to United Skates. Thus, we conclude that there remains a material factual [*63] dispute on the issue of probable cause.

Finally, we consider the element of special injury. Defendants argue that plaintiffs have failed to present evidence of some unique injury, such as seizure of property or personal arrest, that differs from the usual stresses and demands inherent in defending a law suit. The Illinois Appellate Court explained in [Equity Assoc. v. Village of Northbrook, 171 Ill. App. 3d 115, 524 N.E.2d 1119, 121 Ill. Dec. 71 \(Ill. App. 1st Dist. 1988\)](#), *appeal denied*, 530 N.E.2d 243 (1988), that special injury involves interference with property so great as to "suspend" the victim's "right to the free use of his own property during the pendency" of the prosecution. *Id. at 1123* (citing [Lasswell v. Ehrlich, 92 Ill. App. 3d 935, 416 N.E.2d 423, 48 Ill. Dec. 392 \(1981\)](#) (citing [Norin v. Scheldt Manufacturing, 297 Ill. 521, 130 N.E. 791 \(1921\)](#))). The result is either an actual seizure or an effective or constructive seizure of the property, far beyond mere "interference." [*64] [Equity Assoc., 524 N.E.2d at 1123](#). Unless a plaintiff can prove such special

injury, "the institution of an ordinary civil action or proceeding, no matter how unfounded, vexatious or malicious it may be, does not give rise to an action for malicious prosecution." *Bank of Lyons v. Schultz*, 78 Ill. 2d 235, 399 N.E.2d 1286, 1288, 35 Ill. Dec. 758 (1980) (internal quotation marks and citation omitted). Plaintiffs' argument regarding injury focuses on the harm Serfecz suffered in his efforts to redevelop the Grove Mall as a result of the litigation. However severe this injury may have been, it is simply not the type of "special injury" envisioned by the Illinois courts.¹²

[*65] Thus, we must grant defendants' motion for summary judgment on the claim of malicious prosecution in Count III for failure to prove special injury.

CONCLUSION

For the reasons discussed above, the motion of defendants Jewel and American Stores for summary judgment on the antitrust and malicious prosecution claims in Counts I, II, and III is granted. Summary judgment is also granted on Count IV insofar as the breach of lease claim is based on Jewel's failure to continue operating a grocery store at the Grove Mall, and denied insofar as it is based on the unlawful use provision in the lease. The only claim remaining against Jewel and American Stores, then, is the state law claim in Count IV for breach of lease based on Jewel's alleged use of the premises in furtherance of a monopolistic scheme in violation of Sherman Antitrust Act § 2. We have supplemental jurisdiction over this claim pursuant to *28 U.S.C. § 1337(a)*. *Timm v. Mead Corp.*, Slip Op. No. 93-3629 at 7 (7th Cir. Aug. 9, 1994).¹³

[*66] DATED: August 30, 1994

ENTER:

John F. Grady, United States District Judge

End of Document

¹² We note that a preliminary injunction which prevents a plaintiff from using his property would constitute a special injury under Illinois law. *Bank of Lyons*, 399 N.E.2d at 1288-89. However, the temporary restraining order issued in this case does not constitute such an injury. While the state court ultimately concluded that Jewel was not entitled to sublet to United Skates, there is no indication that plaintiffs were injured by the TRO which, apparently, merely gave their legal tenant, Jewel, access to and control of its leased premises.

¹³ Even were we to dismiss all the federal claims against the other defendants, we would decline to exercise our discretion under § 1337(c) to dismiss the remaining pendent state law claims, but rather, weighing concerns of judicial economy, fairness and comity, we would continue to exercise supplemental jurisdiction. This case is well over a year old, and, like the court in *Timm*, we see "no need to delay the resolution of this matter (and add to the burdens of the Illinois court system) by having the parties litigate the . . . state law issues anew in state court," *id.* at 8-9, especially given the fact that the remaining state law breach of lease claim involves a claim of violations of federal antitrust law.



G.E.E.N. Corp. v. Southeast Toyota Distrib.

United States District Court for the Middle District of Florida, Orlando Division

August 31, 1994, Decided ; August 31, 1994, Filed

CASE NUMBER: 93-632-CIV-ORL-19

Reporter

1994 U.S. Dist. LEXIS 21553 *; 1994 WL 695364

G.E.E.N. CORPORATION, f/d/b/a ENGLANDER TOYOTA; TRAIL TOYOTA, INC.; and EDWARD W. ENGLANDER, Plaintiffs, v. SOUTHEAST TOYOTA DISTRIBUTORS, INC.; J.M. FAMILY ENTERPRISES, INC.; TENDER LOVING CARE CORP. k/n/a Fidelity Warranty Services, Inc.; WORLD OMNI LEASING, INC., k/n/a World Omni Financial Corp.; JOYSERV CO., LTD; JOHN MCNALLY as trustee of the dissolved corporation CARNETT-PARTSNETT SYSTEMS, INC.; JIM MORAN & ASSOCIATES, f/k/a JIM MORAN INSURANCE COMPANY; JAMES M. MORAN; TOYOTA MOTOR SALES U.S.A., INC. and TOYOTA MOTOR CREDIT CORPORATION, Defendants.

Disposition: [*1] Defendants' Motion for Summary Judgment (Doc. No. 62) GRANTED. Judgment entered on behalf of the Defendants, Southeast Toyota Distributors, Inc., J.M. Family Enterprises, Inc., Tender Loving Care Corp k/n/a Fidelity Warranty Services, Inc., World Omni Leasing, Inc., k/n/a World Omni Financial Corp., Joyserv Co., Ltd; John McNally as trustee of the dissolved corporation Carnett-Partsnett Systems, Inc., Jim Moran & Associates, f/k/a Jim Moran Insurance Company, James M. Moran, Toyota Motor Sales U.S.A., Inc., and Toyota Motor Credit Corporation and against plaintiffs, G.E.E.N. Corporation, f/d/b/a Englander Toyota; Trail Toyota, Inc.; and Edward W. Englander.

Core Terms

instant case, antitrust, duress, parties, floor plan, summary judgment, terminate, Plaintiffs', conspiracy, settlement, floorplan, revision, invalid, lease, counterclaim, financing, theaters, pull, settlement agreement, general release, part and parcel, misrepresentation, allegations, Renewed

LexisNexis® Headnotes

[Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview](#)

[Civil Procedure > ... > Discovery > Methods of Discovery > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof](#)

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes](#)

[Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview](#)

[**HN1**](#) [down arrow] Summary Judgment, Opposing Materials

Summary judgment is authorized if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material facts and that the moving party is entitled to a judgment as a matter of law. [*Fed. R. Civ. P. 56\(c\)*](#). The moving party bears the burden of proving that no genuine issue of material fact exists. In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN2**](#) [down arrow] Affirmative Defenses, Fraud & Misrepresentation

A plaintiff must prove four elements to establish a cause of fraudulent misrepresentation. Plaintiff must show that the defendant (1) made a false representation of fact; (2) that the defendant knew the representation was false when it was made; (3) that the representation was made for the purpose of inducing the plaintiff to act in reliance of it; and (4) that the plaintiffs' justifiable reliance on the representation resulted in injury.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

[**HN3**](#) [down arrow] Types of Contracts, Settlement Agreements

The United States Court of Appeals for the 11th Circuit treats settlement agreements as contracts and decides questions regarding settlements by looking to state law applicable to contracts in general.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN4**](#) [down arrow] Affirmative Defenses, Fraud & Misrepresentation

Reasonable reliance cannot be established where the relationship between the parties has been plagued with distrust.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Settlements > Releases From Liability > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN5 Regulated Practices, Private Actions

An adequately drawn and validly executed release will bar antitrust claims. However, a release which was secured as part of an anticompetitive attempt to drive the other party out of business can be voided on the ground that it is "part and parcel" of an antitrust conspiracy.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Civil Procedure > ... > Pleadings > Complaints > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN6 Distributorships & Franchises, Causes of Action

Section 1223 of the Federal Automobile Dealer Day in Court Act, [15 U.S.C.S. § 1221 et seq.](#), provides that any action brought shall be forever barred unless commenced within three years after the cause of action shall have accrued.

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

HN7 Affirmative Defenses, Coercion & Duress

To prove duress under Florida law it must be shown (1) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will and (2) that this condition of mind was caused by some improper and coercive conduct of the opposite side. However, it is not improper and therefore not duress to threaten what one has a legal right to do.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

Contracts Law > Contract Modifications > General Overview

HN8 Types of Contracts, Express Contracts

Florida law provides that parties to contracts can modify express provisions in those contracts by a course of dealing. A course of dealing may modify express contract terms, but when the express terms of a contract and the course of dealing cannot be reasonably reconciled, the express terms of the contract control.

Business & Corporate Law > Distributorships & Franchises > Assignments & Transfers

HN9 Distributorships & Franchises, Assignments & Transfers

[Fla. Stat. ch. 320.643](#) (1989) provides in pertinent part: Notwithstanding the terms of any franchise agreement, a licensee shall not, by contract or otherwise, fail to give effect to, prevent, prohibit, or attempt to penalize, any motor vehicle dealer from selling, assigning, transferring, alienating, or otherwise disposing of, in whole or in part, the equity interest unless the licensee proves at a hearing pursuant to this section that such sale, transfer, alienation, or other disposition is to a person who is not of good moral character.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Releases

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

Contracts Law > Remedies > Ratification

HN10 [L] **Types of Contracts, Releases**

A contract or release which is induced by duress is voidable, not void, and the person claiming duress must act promptly to repudiate the contract or release, or he will be deemed to have waived his right to do so.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Releases

Contracts Law > Remedies > Ratification

HN11 [L] **Types of Contracts, Releases**

A party who retains the benefits of a contract cannot escape the obligations imposed by the contract. If a releasor retains the consideration after learning that the release is voidable, the continued retention of the benefits constitutes a ratification of the release.

Counsel: For G.E.E.N. CORPORATION, TRAIL TOYOTA, INC., EDWARD W. ENGLANDER, plaintiffs: Robert Cintron, Jr., Bruce Culpepper, Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Tallahassee, FL USA.

For G.E.E.N. CORPORATION, TRAIL TOYOTA, INC., EDWARD W. ENGLANDER, plaintiffs: R. Stuart Huff, Law Office of R. Stuart Huff, P.A., Coral Gables, FL.

For G.E.E.N. CORPORATION, TRAIL TOYOTA, INC., EDWARD W. ENGLANDER, plaintiffs: Mark L. Ornstein, Killgore, Pearlman, Stamp, Ornstein & Squires, Usher L. Brown, Brown, Ward, Salzman & [*2] Weiss, P.A., Orlando, FL.

For EDWARD W. ENGLANDER, plaintiff: Peter N. Hill, Wolff, Hill, McFarlin & Herron, P.A., Orlando, FL.

For SOUTHEAST TOYOTA DISTRIBUTORS, INC., J.M. FAMILY ENTERPRISES, INC., TENDER LOVING CARE CORP., WORLD OMNI LEASING, JOYSERV CO., LTD., JOHN MCNALLY, JIM MORAN & ASSOCIATES, JAMES M. MORAN, defendants: Douglas B. Brown, Rumberger, Kirk & Caldwell, P.A., Orlando, FL USA.

For SOUTHEAST TOYOTA DISTRIBUTORS, INC., J.M. FAMILY ENTERPRISES, INC., TENDER LOVING CARE CORP., WORLD OMNI LEASING, JOYSERV CO., LTD., JOHN MCNALLY, JIM MORAN & ASSOCIATES, JAMES M. MORAN, defendants: Raymond W. Bergan, Daniel F. Katz, Timothy S. Driscoll, Williams & Connolly, Washington, DC.

For TOYOTA MOTOR CREDIT CORPORATION, TOYOTA MOTOR SALES U.S.A., INC., defendants: Francis Edmund Pierce, III, Gurney & Handley, P.A., Orlando, FL USA.

For TOYOTA MOTOR CREDIT CORPORATION, TOYOTA MOTOR SALES U.S.A., INC., defendants: Stephen G. Morrison, Nina Nelson Smith, S. Keith Hutto, Steven A. McKelvey, Jr., Carey T. Kilton, Nelson, Mullins, Riley & Scarborough, Columbia, SC.

For TALON ACCEPTANCE CORPORATION, garnishee: Lawrence Howard Katz, Law Office of Lawrence H. [*3] Katz, Maitland, FL.

For SUNSHINE COMPANIES, INC., garnishee: Ross B. Ward, Jr., The Ward Law Group, PA, Clearwater, FL.

For ROBERT B. BURANDT, garnishee: Robert Barry Burandt, Roosa, Sutton, Burandt & Adamski, Cape Coral, FL USA.

For WOLFF, HILL, MCFARLIN & HERRON, P.A., garnishee: Peter N. Hill, Wolff, Hill, McFarlin & Herron, P.A., Orlando, FL.

For SOUTHEAST TOYOTA DISTRIBUTORS, INC., J.M. FAMILY ENTERPRISES, INC., TENDER LOVING CARE CORP., WORLD OMNI, LEASING, JOYSERV CO., LTD., JOHN MCNALLY, JIM MORAN & ASSOCIATES, JAMES M. MORAN, counter-claimants: Douglas B. Brown, Rumberger, Kirk & Caldwell, P.A., Orlando, FL USA.

For SOUTHEAST TOYOTA DISTRIBUTORS, INC., J.M. FAMILY ENTERPRISES, INC., TENDER LOVING CARE CORP., WORLD OMNI LEASING, JOYSERV CO., LTD., JOHN MCNALLY, JIM MORAN & ASSOCIATES, JAMES M. MORAN, counter-claimants: Raymond W. Bergan, Daniel F. Katz, Timothy S. Driscoll, Williams & Connolly, Washington, DC.

For G.E.E.N. CORPORATION, TRAIL TOYOTA, INC., EDWARD W. ENGLANDER, counter-defendants: Usher L. Brown, Brown, Ward, Salzman & Weiss, P.A., Orlando, FL.

Judges: PATRICIA C. FAWSETT, UNITED STATES DISTRICT JUDGE.

Opinion by: PATRICIA C. FAWSETT

Opinion

[*4] ORDER

This case comes before the Court upon the following matters:

(1) Defendants the JM FAMILY, et. al.'s Motion for Summary Judgment and Supporting Memorandum (Doc. Nos. 62 and 63, filed February 11, 1994); Plaintiffs G.E.E.N. CORPORATION, et. al.'s Memorandum in Opposition to the JM Family Defendants' Renewed Motion for Summary Judgment (Doc. No. 83, filed March 15, 1994); The JM FAMILY Defendants' Reply to Plaintiffs' Opposition to the JM Family Defendants' Motion for Summary Judgment (Doc. No. 82, filed March 14, 1994).¹

BACKGROUND

Plaintiffs in this case are two former Toyota dealerships, Englander Toyota and [*5] Trail Toyota ("TRAIL"), and Ed Englander ("ENGLANDER"). Englander owned Englander Toyota and 90 per cent of Trail Toyota. The JM Family Defendants distributed Toyotas and provided related services to both dealerships.

On February 22, 1990, Southeast Toyota Distributors, Inc. ("SET") filed a lawsuit against Englander Toyota and Englander in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. On May 23, 1990, Englander Toyota and Englander filed a counterclaim and third-party claim against SET, J.M. Family Enterprises, Inc. ("JMFE"), World Omni Leasing, Inc., James M. Moran, and John Joseph McNally. The counterclaim alleged: (1) breach of contract; (2) fraud; (3) violation of Florida **antitrust law**; and (4) tortious interference with business and contractual relationships.

¹ Defendants filed an earlier motion for summary judgment with memorandum in support thereof on August 27, 1993 (Doc. Nos. 20 and 21), and a supplemental memorandum in support of the motion for summary judgment on October 13, 1993 (Doc. No. 41). Those motions are incorporated by reference herein, as is Plaintiffs' response which was filed on October 15, 1993 (Doc. No. 42).

On or about June 7, 1990, the parties began negotiating a settlement of the SET lawsuit and Englander counterclaims. The parties ultimately signed a Settlement Agreement which required each side to execute a General Release of any and all claims which the parties had against each other. The parties signed the General Release on July 17, 1990. Following the execution of the Settlement [*6] Agreement, the parties submitted to the Circuit Court a Joint Stipulation for Voluntary Dismissal with Prejudice. Pursuant to the Joint Stipulation, Circuit Court Judge Muszinski ordered that the action be dismissed with prejudice.

On August 2, 1993, Plaintiffs filed the instant action. Defendants have moved for summary judgment on the ground that the instant case is barred by the General Release which concluded the original state court litigation. Plaintiffs argue that the release does not bar Plaintiffs' claims in the instant action because the release is invalid.

As the factual basis for their claim that the release is invalid, Plaintiffs contend the following:

As early as April of 1989, Trail Toyota began experiencing difficulties with the JM Family companies. Trail's new and used car inventory was financed under a wholesale floor plan financing arrangement with World Omni Financing Corporation ("WOFCO"), a subsidiary of JM Family Enterprises, Inc. In early 1989, WOFCO began criticizing Trail's financial performance as reflected in the monthly financial statements submitted by Trail to SET and WOFCO. Appendix A To Plaintiff's Memorandum in Opposition to the JM Family Defendants' [*7] Renewed Motion for Summary Judgment Exhibits (3) through (11). WOFCO's primary concern was deficiencies in Trail's net working capital. WOFCO repeatedly threatened to pull Trail's floorplan if Trail Toyota did not increase its net working capital. Id. at Plaintiff's App. A (3)(5)(7)(10). Between April 4, 1989 and August 9, 1989, Englander injected approximately \$ 900,000.00 into Trail.

In December, 1989, G.E.E.N. Corporation d/b/a "Englander Toyota" entered into a contract to sell all of its assets. At the time, Englander was the majority owner of Englander Toyota and its chief operating officer. The closing of the sale of Englander Toyota took place in January 1990. At the closing, representatives of the JM Family companies attempted to obtain a general release from Englander, but Englander refused.

In February of 1990 SET filed suit against Englander Toyota and Englander in state court. The suit sought damages from Englander Toyota for violating terms of the Toyota Rental Car Program and for failure to pay for goods and services ordered from SET. Englander and Englander Toyota filed a counterclaim which alleged virtually the same facts and causes of action on behalf of Englander [*8] Toyota as are alleged in the instant case. Trail did not join the counterclaim.

Trail's problems with the JM Family companies continued in 1990. In April of 1990, WOFCO conducted an audit of Trail's books and found that Trail's net working capital was approximately \$ 512,600.00 short. Id. at Plaintiff's App. A (12).

In June, 1990, the parties began settlement negotiations. Englander offered to settle his counterclaim for \$ 3 million, which SET refused. On June 19, 1990, WOFCO once again threatened to cut off Trail's floorplan, citing a bounced check and the failure to comply with contractual obligations as reasons. On the same day, Englander made a new offer to settle the state court action.² On July 3, 1990, WOFCO again wrote to Trail informing it that WOFCO was terminating Trail's floorplan on July 9, 1990. A week later, Englander and officials of WOFCO reached their global settlement. The parties signed the General Release on July 17, 1990. All parties were represented by counsel. Shortly thereafter, Englander sold Trail.

[*9] Plaintiffs assert several grounds for rescission of the release including: (1) that the release was the result of fraudulent misrepresentation; (2) that the release was "part and parcel" of an antitrust conspiracy; (3) that the release was procured by "threats and coercion" in violation of 15 U.S.C. § 1221 and § 320.641, Florida Statutes, (1989); and (4) that the release was procured by duress.

² Plaintiffs' memorandum alleges that WOFCO made the threat to cut off Trail's floorplan a day before Englander made his second settlement offer on June 19. However, the letter from WOFCO attached as Plaintiffs' App. A(15) is dated June 19.

CONCLUSIONS OF LAW

HN1 Summary judgment is authorized if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material facts and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; accord *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts [*10] in a light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255.

Fraudulent Misrepresentation

In the instant case, Plaintiffs contend that Defendants knew they had no legal right to terminate Trail's floor plan, but they told Englander that they had the right. This misrepresentation induced him to sign the release in order to keep Trail going until he could find a buyer for it.

Florida law requires that **HN2** a plaintiff prove four elements to establish a cause of fraudulent misrepresentation.³ Plaintiff must show that the defendant (1) made a false representation of fact; (2) that the defendant knew the representation was false when it was made; (3) that the representation was made for the purpose of inducing the plaintiff to act in reliance of it; and (4) that the plaintiffs' justifiable reliance on the representation resulted in injury. *Uvanile v. Denoff*, 495 So. 2d 1177 (Fla. 4th DCA 1986); See also *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985).

[*11] In the instant case, Plaintiffs cannot meet the fourth requirement.⁴ Several Florida and Eleventh Circuit cases have held that **HN4** reasonable reliance cannot be established where the relationship between the parties has been "plagued with distrust." *Bakker Mgmt., Inc. v. First Fed. Sav. & Loan*, 541 So. 2d 1334, 1335 (Fla. 3d DCA 1989); *Uvanile v. Denoff*, 495 So. 2d 1177 (Fla. 4th DCA 1986); *Zelman v. Cook*, 616 F. Supp. 1121 (S.D. Fla. 1985)(applying Florida law); *Pettinelli v. Danzig*, 722 F.2d 706 (11th Cir. 1984)(applying Florida law). The relationship between Plaintiffs and Defendants in the instant case was nothing if not distrustful. At the time the settlement agreement was signed, Englander and Englander Toyota were involved in a bitter lawsuit with Defendants in which they accused Defendants of fraud, breach of contract, tortious interference with business relationships, and antitrust violations. Both sides were represented by separate counsel. Englander and Englander Toyota made many of the same factual allegations regarding Defendants' illegal and unethical conduct in the original case as they now make in the [*12] instant case. Under those circumstances it defies logic and the case law for Plaintiffs to assert that they reasonably relied on Defendants' assertions about WOFCO's right to terminate Trail's floorplan.

Release Part of Antitrust Conspiracy

Plaintiffs allege that the release in the instant case was obtained as "part and parcel" of an antitrust conspiracy and therefore may be avoided. As evidence, Plaintiffs essentially repeat the allegations they made to support their claim

³ **HN3** The Eleventh Circuit treats settlement agreements as contracts and decides questions regarding settlements by looking to state law applicable to contracts in general. *Blum v. Morgan Guaranty Trust Company of New York*, 709 F.2d 1463 (11th Cir. 1983). Consequently, Plaintiffs' challenge of the instant settlement agreement on grounds of fraudulent misrepresentation and duress are governed by Florida law.

⁴ As explained below, since the floor plan agreement had a provision allowing WOFCO to terminate the floor plan, it is doubtful whether Plaintiffs could meet the first three requirements of a claim for fraudulent misrepresentation.

of fraudulent misrepresentation. They again allege that Defendants had no legal ability to terminate Trail's financing plan but that they nevertheless threatened to terminate the financing unless Englander signed the release. Plaintiffs allege that this illegal threat to pull Trail's financing was part [*13] of a larger antitrust conspiracy to derive illegal profits and drive Plaintiffs out of business.

Federal courts have supported a policy which encourages the amicable settlement and release of antitrust claims. See [Redel's Inc. v. General Electric Company, 498 F.2d 95, 99 \(5th Cir. 1974\)](#). The Courts have repeatedly held that [HN5](#) an adequately drawn and validly executed release will bar antitrust claims. E. g. [Ingram Corp. v. J. Ray McDermott & Company, Inc., 698 F.2d 1295 \(5th Cir. 1983\)](#); [Richard's Lumber & Supply Co. v. United States Gypsum Co., 545 F.2d 18 \(7th Cir. 1976\)](#), cert. denied, 430 U.S. 915, 51 L. Ed. 2d 593, 97 S. Ct. 1326 (1977); [Oskey Gasoline and Oil Co., Inc. v. Continental Oil Co., 534 F.2d 1281 \(8th Cir. 1976\)](#); [Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885 \(3d Cir. 1975\)](#); [Schott Enterprises, Inc. v. Pepsico, Inc., 520 F.2d 1298 \(6th Cir. 1975\)](#); [Virginia Impression Products Co. v. SCM Corp., 448 F.2d 262 \(4th Cir. 1971\)](#), cert. denied, 405 U.S. 936, 30 L. Ed. 2d 811, 92 S. Ct. 945 (1972). However, the Courts have [*14] articulated the principle that a release which was secured as part of an anticompetitive attempt to drive the other party out of business can be voided on the ground that it is "part and parcel" of an antitrust conspiracy.

In [Carter v. Twentieth Century-Fox Film Corporation, 127 F. Supp. 675 \(W.D. MI 1955\)](#), a federal court invalidated a release clause contained in a lease on the ground that it was part and parcel of an antitrust conspiracy. The plaintiff in [Carter](#) had leased two movie theaters to Fox. When the leases expired, plaintiff refused to renew them at a lower rental rate and tried to operate the theaters on her own. Fox would not give her any first-run films, and plaintiff was eventually forced to close her theaters and to sign an option to lease them to Fox at a lower rate. The contract provided that if plaintiff chose to sell the theaters to a third party, the theaters could not be used for any moving picture, theater, or amusement purpose during the term of the lease. Also included in the contract was a release by plaintiff of all claims against Fox. Plaintiff complained of economic coercion and duress at the time of entering the contract. The judge [*15] ruled that because the release was an integral part of the contract which, on its face, created an unreasonable restraint of trade, the release was invalid.

[Carter](#) is the only case the Court has been able to find in which a release has been invalidated for being "part and parcel" of an antitrust conspiracy, and it is obviously distinguishable from the instant case. In [Carter](#), the release was one clause of a contract which itself was the very restraint of trade complained of by the plaintiff. Plaintiffs in the instant case have not shown a similar nexus between the release Englander signed and their antitrust allegations. They make sweeping allegations that the release was part of a pattern of illegal activities designed to force Plaintiffs out of business, but, in fact, the release allowed Plaintiffs to remain in business. There is no evidence to show that the release was anything other than a bargained for settlement of the parties' claims, entered into knowingly and voluntarily.

Federal Automobile Dealer Day in Court Act

Plaintiffs suggest that the release is invalid because it was procured by threats and wrongful demands in violation of the Federal Automobile [*16] Dealer Day in Court Act ("the ACT"), [15 U.S.C. 1221 et. seq.](#) It appears to the Court that any claims Plaintiffs might bring under the Act are barred by the applicable statute of limitations. [HN6](#) Section 1223 of the Act provides that any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued. In the instant case, all the actions Plaintiffs complain of took place before July 17, 1990, the date on which the release was signed. The instant action was filed on August 2, 1993. Since the alleged acts of coercion and intimidation occurred more than three years prior to the commencement of this action, the action is barred.

Duress

The heart of Plaintiffs' attempt to invalidate the release is contained in their allegation that the release was procured by economic duress.

HN7 To prove duress under Florida law it must be shown (1) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will and (2) that this condition of mind was caused by some improper and coercive conduct of the opposite side. *City of Miami v. Kory*, 394 So. 2d 494, 497 (Fla. 3d DCA 1981) [*17] (citing *Herald v. Hardin*, 95 Fla. 889, 116 So. 863 (1928)). However, it is not improper and therefore not duress to threaten what one has a legal right to do. *Id.*; *Spillers v. Five Points Guaranty Bank*, 335 So. 2d 851 (Fla. 1st DCA 1976) and cases cited therein.

Although Plaintiffs have made voluminous filings regarding their claim of duress, their claim rests on two essential allegations of misconduct: (1) that WOFCO's threat to terminate Trail's floor plan was illegal and coercive conduct which forced Englander to sign the release against his will; and (2) that SET'S alleged threats to kill the sale of Trail unless Englander agreed to the release violated [§ 320.641 Florida Statutes](#) (1989).

Plaintiffs repeatedly assert that WOFCO had no legal right to pull Trail's floor plan. However, the floor plan document states that in the event that WOFCO deems itself insecure, it may terminate the floor plan "without demand or further notice and without legal process." Appendix B to Plaintiffs' Memorandum in Opposition to the JM Family Defendants' Renewed Motion for Summary Judgment Exhibit 4A. In their Memorandum in Opposition to the JM Family Defendants' [*18] Renewed Motion for Summary Judgment (Doc. No. 83) Plaintiffs state: "It is true that the WOFCO's floorplan documents purport to be demand instruments and therefor the floor plan purports to be terminable at will." Plaintiffs only explanation for how WOFCO's threat to exercise its right to pull Trail's floor plan "at will" could be illegal is to assert that the contract had been changed through course of dealing. Plaintiffs point out that beginning in 1989 and continuing into 1990, WOFCO threatened to pull Trail's floor plan, but that each time the threats were not carried out. Plaintiffs suggest that these repeated threats which were not enforced modified the contract so that WOFCO no longer had the right to terminate Trail's floor plan.

HN8 Florida law does provide that parties to contracts can modify express provisions in those contracts by a course of dealing. *Flagship National Bank v. Gray Distribution Systems, Inc.*, 485 So. 2d 1336 (Fla. 3d DCA 1986) rev. denied 497 So. 2d 1217 (Fla. 1986). In *Flagship*, a family business had borrowed money from the bank and signed a note which containing a demand provision. For a four month period the bank extended [*19] credit beyond the loan limit, but when the borrower began experiencing financial difficulty, the bank refused to continue extending credit and demanded payment. The trial court held that the bank's conduct during the period in which it extended credit beyond the loan limit constituted a course of dealing which modified the existing agreement and bound the bank to continue extending credit. The appellate court disagreed. It acknowledged that a course of dealing may modify express contract terms, but it held that when the express terms of a contract and the course of dealing cannot be reasonably reconciled, the express terms of the contract control. The Court found that the express terms of the loan agreement providing for payment on demand overrode any inconsistent interpretation of the agreement which might have been inferred from the parties' dealings.

Similarly, in the instant case, the terms of the floorplan agreement are clear. The fact that WOFCO agreed to forebear from exercising its rights to pull Trail's floorplan on several occasions does not override the express contract provisions. The timing of WOFCO's decision to finally exercise its rights may have placed Englander under [*20] great financial strain, but Plaintiffs have not presented sufficient evidence to show that it was illegal conduct which forced Englander to sign the release against his will.

Plaintiffs final argument is that SET threatened, through its subsidiary WOFCO, to withhold approval of the sale of Trail unless Englander agreed to the settlement. Plaintiffs allege that this interference with Englander's efforts to sell Trail was a violation of Florida law.

HN9 [Section 320.643 Florida Statutes](#) (1989) provides in pertinent part:

Notwithstanding the terms of any franchise agreement, a licensee shall not, by contract or otherwise, fail to give effect to, prevent prohibit, or attempt to penalize, any motor vehicle dealer...from selling, assigning, transferring, alienating, or otherwise disposing of, in whole or in part, the equity interest...unless the licensee proves at a hearing pursuant to this section that such sale, transfer, alienation, or other disposition is to a person who is not...of good moral character.

Plaintiffs allege that SET was aware by June and July 1990, that Englander had decided to sell Trail. SET had to approve any sale of Trail. Plaintiffs allege that SET threatened [*21] to withhold its approval unless Englander signed the release. As evidence, Plaintiffs cite the following deposition testimony from Bruce Wohlleb, a high-level official of WOFCO:

Our relationship, at that point, was certainly not a good relationship...and in order for us to try to accommodate him in his request to continue to operate and try to sell the dealership, we felt that we needed to -- we needed to get a -- release from him with regard to the lawsuit that he had filed against our companies.

[England] had a request to continue to do business, and we -- we wanted a release in order for us to continue to try to get to the point, the ending point, where he would -- he would try to sell the dealership.

Wohlleb pp. 32-36.

[England] had sued our companies and we were going to require a release from him in an attempt to assist him to get to Point B, which is what he was trying to do, to get to a sale.

Wohlleb p. 48.

Plaintiffs point out that the state court action to which Wohlleb refers did not name WOFCO as a defendant, nor was Trail a party to that action. Therefore, Plaintiffs contend that when Wohlleb said "we were going to require a release [*22] ...to assist him...to get a sale," he was speaking for SET.

If SET did demand a release of Englander's state court claims as a condition for approving the sale of Trail, it could be a violation of [§ 320.643 Florida Statutes](#) (1989). If SET extracted the release from Englander by violating Florida law, the release could be voided. While Wohlleb's deposition statements do not expressly state that SET would not approve a sale of Trail without a release from Englander, the Court finds that they raise a genuine issue of material fact as to whether SET violated [§ 320.643 Florida Statutes](#) (1989).

There is another aspect of Plaintiffs' claim of duress which must be addressed, however. [HN10](#) A contract or release which is induced by duress is voidable, not void, and the person claiming duress must act promptly to repudiate the contract or release, or he will be deemed to have waived his right to do so. [DiRose v. PK Management Corp., 691 F.2d 628, 633 \(2d Cir. 1982\)](#) cert. denied 461 U.S. 915, 77 L. Ed. 2d 285, 103 S. Ct. 1896 (1983). Both federal and Florida courts have rejected claims for revision where parties waited too long to assert their rights. See e. g. [Grillet v. Sears, Roebuck & Co., 927 F.2d 217, 221 \(5th Cir. 1991\)](#) (Two and one half year delay in seeking revision too long); [Henkin v. General Electric Credit Corp., 925 F.2d 231, 233 \(7th Cir. 1991\)](#) (Two and one half year delay in repudiating release unreasonable); [In re Boston Shipyard Corp., 886 F.2d 451 \(1st Cir. 1989\)](#) (One and one half years too long to delay bringing duress challenge); [Baker v. Penn Mutual Life Insurance Co., 788 F.2d 650, 662 \(10th Cir. 1986\)](#) (Claim for revision brought eight years after contract was effective untimely); [Mariner Water Renaturalizer v. Aqua Purification Systems, 214 U.S. App. D.C. 248, 665 F.2d 1066 \(D.C. Cir. 1981\)](#) (Time lapse of 5-8 weeks between buyer's discovery of grounds for revision of contract and buyer's notification of seller was not reasonable for purposes of election to rescind); [Steinberg v. Bay Terrace Apartment Hotel, Inc., 375 So. 2d 1089 \(Fla. 3d DCA 1979\)](#) (Remedy of revision disfavored when complaining party fails to promptly deny the contract as binding on him and fails to follow a course of conduct manifesting disavowal of it) (citing [Rood Company, Inc. v. Board of Public Instruction of Dade County, 102 So. 2d 139, 141-42 \(Fla. 1958\)](#)).

Additionally, [HN11](#) a party who retains the benefits of a contract cannot escape the obligations imposed by the contract. [Grillet v. Sears, Roebuck & Co., 927 F.2d 217 at 220](#). If a releasor retains the consideration after learning that the release is voidable, the continued retention of the benefits constitutes a ratification of the release. *Id.*; See [In re Boston Shipyard Corp., 886 F.2d 451 at 455](#); [*23] [Morta v. Korea Ins. Corp., 840 F.2d 1452 \(9th Cir. 1988\)](#); [Steinberg v. Bay Terrace Apartment Hotel, Inc., 375 So. 2d 1089 at 1092](#).

In the instant case, Englander signed the release on June 17, 1990. He sold Trail Toyota shortly thereafter. Plaintiffs filed the instant suit on August 2, 1993. There is no evidence that Englander promptly denied the release's effect and followed a course of conduct manifesting a disavowal of it. To the contrary, it appears that Englander remained silent while retaining the benefits of the release for three years.

The Court has not found an instance where a party's claim for revision of a release or contract was upheld after a delay of three years. In the instant case, Plaintiffs' allegations of duress are simply too little, too late. To allow

Plaintiffs to rescind this settlement agreement would undermine the well-established policy favoring settlement of disputes and would inject an element of uncertainty into all settlement agreements.

Accordingly, Defendants' Motion for Summary Judgment (Doc. No. 62) is **GRANTED**.⁵ The Clerk shall enter judgment in favor of Defendants and against Plaintiffs on their claims.

[*24] **DONE AND ORDERED** at Orlando, Florida, this 31st day August, 1994.

PATRICIA C. FAWSETT

UNITED STATES DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

. **Decision by Court.** This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That judgment is entered on behalf of the Defendants, **Southeast Toyota Distributors, Inc., J.M. Family Enterprises, Inc., Tender Loving Care Corp k/n/a Fidelity Warranty Services, Inc., World Omni Leasing, Inc., k/n/a World Omni Financial Corp., Joyserv Co., Ltd; John McNally as trustee of the dissolved corporation Carnett-Partsnett Systems, Inc., Jim Moran & Associates, f/k/a Jim Moran Insurance Company, James M. Moran, Toyota Motor Sales U.S.A., Inc., and Toyota Motor Credit Corporation and against plaintiffs, G.E.E.N. Corporation, f/d/b/a Englander Toyota; Trail Toyota, Inc.; and Edward W. Englander.**

August 31, 1994

Date

End of Document

⁵ Any issues not addressed in this Order were not deemed necessary to the opinion due to the Court's ruling herein.



TCA Bldg. Co. v. Northwestern Resources Co.

United States District Court for the Southern District of Texas, Galveston Division

August 31, 1994, Decided ; September 1, 1994, Entered

CIVIL ACTION NO. G-93-265

Reporter

861 F. Supp. 1366 *; 1994 U.S. Dist. LEXIS 12644 **; 1995-1 Trade Cas. (CCH) P70,864

TCA BUILDING COMPANY, v. NORTHWESTERN RESOURCES CO., et al.

Core Terms

lignite, tracts, Defendants', leases, Sherman Act, monopoly, antitrust, interstate commerce, conspiracy, mining, competitor, options, parties, damages, coal, sham, ratifications, seller, summary judgment, cause of action, price-fixing, alleges, collateral estoppel, anti trust law, state court, monopolize, generating plant, conspired, motions, alleged conspiracy

LexisNexis® Headnotes

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

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

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

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

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

HN1 [] Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56](#). A genuine issue of material fact exists if there is a genuine issue for trial that must be decided by the trier of fact. In other words, summary judgment should not be granted if the evidence indicates that a reasonable fact-finder could find in favor of the nonmoving party.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

861 F. Supp. 1366, *1366L^A 1994 U.S. Dist. LEXIS 12644, **12644

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

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

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

HN2 [down arrow] **Summary Judgment, Evidentiary Considerations**

In ruling on a motion for summary judgment, the court must accept the evidence of the nonmoving party and draw all justifiable inferences in his favor. Credibility determinations, the weighing of the evidence, and the drawing of reasonable inferences are left to the trier of fact. Under [Fed. R. Civ. P. 56\(c\)](#), the moving party bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of, the record which it believes demonstrate the absence of a genuine issue of material fact. Once this burden is met, the burden shifts to the nonmoving party to establish the existence of a genuine issue for trial.

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

HN3 [down arrow] **Summary Judgment, Burdens of Proof**

Where the moving party has met its [Fed. R. Civ. P. 56\(c\)](#) burden, the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts. The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN4 [down arrow] **Sherman Act, Claims**

[Fed. R. Civ. P. 12](#) provides for the dismissal of claims upon which relief cannot be granted. Under the notice pleading requirements of the Federal Rules, however, a complaint need only set forth a short and plain statement of the claim, [Fed. R. Civ. P. 8\(a\), \(e\)\(1\)](#), and [\(f\)](#). Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required. All pleadings shall be so construed as to do substantial justice. Accordingly, motions to dismiss for failure to state a claim are disfavored in this circuit, and such a motion may not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state

861 F. Supp. 1366, *1366L^A1994 U.S. Dist. LEXIS 12644, **12644

of facts which could be proved in support of his claim. This rule applies with no less force to a Sherman Act, [15 U.S.C.S. § 1 et seq.](#), claim.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Denial of Allegations

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

[**HN5**](#) **Defenses, Demurrsers & Objections, Denial of Allegations**

A general denial, does not pass to plaintiff the burden of proving its entire case on summary judgment, especially when, the parties have not completed discovery.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

[**HN6**](#) **Monopolies & Monopolization, Actual Monopolization**

It is not necessary that monopoly power obtained should be exercised. Its existence is sufficient.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

[**HN7**](#) **Estoppel, Collateral Estoppel**

The doctrine of collateral estoppel precludes the relitigation of any ultimate issue of fact which was actually litigated and essential to the judgment in a prior suit, as long as the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior suit. In both Texas and federal courts, the doctrine applies even if the prior judgment is under appeal, except in those circumstances, where appeal consists of a trial de novo.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

[**HN8**](#) **Antitrust & Trade Law, Sherman Act**

It is, of course, possible to violate the antitrust laws through activities which, in the absence of anti-competitive intent, are entirely valid and legal.

861 F. Supp. 1366, *1366L^A1994 U.S. Dist. LEXIS 12644, **12644

Antitrust & Trade Law > Sherman Act > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN9 [down] Antitrust & Trade Law, Sherman Act

A party is generally immune from antitrust liability based on its having petitioned a court for redress. To pierce this immunity, plaintiff must first show that, as a matter of law, defendant's claims were objectively baseless, in the sense that no reasonable litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome.

Governments > Fiduciaries

Labor & Employment Law > Employment Relationships > Fiduciary Responsibilities

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN10 [down] Governments, Fiduciaries

It is well established in Texas that at least some employees owe their employers a duty not to disclose certain secrets.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN11 [down] Remedies, Damages

Section 4B of the Clayton Act bars any private cause of action for treble damages under the antitrust laws which is not commenced within four years after the cause of action accrued, [15 U.S.C.S. § 15b](#).

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

861 F. Supp. 1366, *1366L^A994 U.S. Dist. LEXIS 12644, **12644

Governments > Legislation > Statute of Limitations > Time Limitations

[HN12](#) [blue icon] Conspiracy, Elements

The "continuing violation" or "continuing conspiracy" exception to the four-year antitrust statute of limitations permits a cause of action to accrue whenever the defendant commits an overt act in furtherance of an antitrust conspiracy or, in the absence of an antitrust conspiracy, commits an act that by its very nature is a continuing antitrust violation.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > General Overview

[HN13](#) [blue icon] Antitrust & Trade Law, Sherman Act

A party does not continually violate the antitrust laws simply by virtue of its mere passive receipt of royalties from a monopoly which purchased its previously competing interests.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > General Overview

[HN14](#) [blue icon] Antitrust & Trade Law, Sherman Act

Continuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action. It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Clayton Act > General Overview

[HN15](#) [blue icon] Antitrust & Trade Law, Sherman Act

Antitrust action based on sham litigation accrues when prior lawsuit was filed, and continued prosecution of that action within the limitations period does not create a new action.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

861 F. Supp. 1366, *1366L^A1994 U.S. Dist. LEXIS 12644, **12644

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 > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > Sherman Act > General Overview

[HN16](#) [] Sherman Act, Scope

Horizontal price-fixing agreements are per se illegal under the Sherman Act, [15 U.S.C.S. § 1](#).

Business & Corporate Compliance > ... > Electric Power Industry > State Regulation > Rate Setting & Tariffs

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

[HN17](#) [] State Regulation, Rate Setting & Tariffs

As a matter of law that masochism on the part of a vertically-integrated consumer is not, by itself, a violation of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#)

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

[HN18](#) [] Remedies, Damages

To maintain an action for damages arising from violations of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), a plaintiff must show that he suffered an antitrust injury; that is, an injury which is of the type that the antitrust laws were intended to prevent, and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

861 F. Supp. 1366, *1366L^A1994 U.S. Dist. LEXIS 12644, **12644

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN19](#) [blue icon] Private Actions, Remedies

In the context of a price-fixing conspiracy among sellers in a given market, this means that competitors may not complain of conspiracies that set maximum prices above market levels, or that set minimum prices at any level because, absent predatory pricing, such conspiracies would either leave the competitor in the same position as would market forces or would actually benefit respondents by raising market prices.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN20](#) [blue icon] Price Discrimination, Defenses

Under the state action doctrine, restraints on trade are immune from antitrust liability if they have been clearly articulated and affirmatively expressed as state policy, and if this policy is actively supervised by the state itself.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Evidence > Burdens of Proof > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN21](#) [blue icon] Sherman Act, Jurisdiction

In Sherman Act, [15 U.S.C.S. § 1 et seq.](#), cases plaintiff need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction. A conspiracy would be covered by the Sherman Act, even though any actual impact on interstate commerce would be indirect or fortuitous.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Organizations

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

[HN22](#) [blue icon] Antitrust & Trade Law, Sherman Act

If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

Counsel: [**1] For TCA BUILDING COMPANY, Plaintiff: John V Singleton, Jr, Attorney at Law, Houston, TX. G Allen Price, Attorney at Law, Houston, TX.

For NORTHWESTERN RESOURCES COMPANY, A MONTANA CORPORATION, Defendant: David J Beck, Ronald D Secrest, Beck Redden & Secrest, Houston, TX. Don Henry Magee, McGinnis Lochridge & Kilgore, Austin, TX. For HOUSTON LIGHTING & POWER COMPANY, Defendant: Lee L Kaplan, Baker & Botts, Houston, TX.

Judges: KENT

Opinion by: SAMUEL B. KENT

Opinion

[*1371] ORDER ON MOTION FOR SUMMARY JUDGMENT

Plaintiff TCA Building Company ("TCA") brings this action against Defendants Northwestern Resources Company ("Northwestern"), Texas Utilities Electric Company ("TUE"), and Houston Lighting & Power Company ("HL&P"),¹ alleging that the Defendants conspired to keep it from mining lignite from its property, in violation of the Sherman Act, [15 U.S.C. §§ 1 & 2](#). This property, consisting of two contiguous tracts of land, is located within the area covered by the Jewett Mine, a near-surface lignite strip-mining operation run by Northwestern in Freestone and Leon Counties, Texas. Before the Court is the Defendant's consolidated motion for summary judgment or dismissal. For the reasons [**2] stated below, the motion is GRANTED IN PART and DENIED IN PART.

Background

The Jewett Mine

In 1972, the tracts now owned by TCA were purchased by W. Laird Lahrmann and his father, W. Lee Lahrmann, from the Texas Veteran's Land Board ("VBL"), under contracts for deed. These tracts, constituting approximately 107 acres, hold an estimated 2.8 million tons of recoverable lignite. The elder Lahrmann assigned the tracts to his son in 1976. In 1978, the son leased his mineral interests in the tracts to Defendant TUE, for a ten-year primary term.² Since the VBL still held an interest in the property, at that time this was the longest primary term permitted by statute. Simultaneously, however, W. Laird also [**3] executed documents purporting to grant TUE the option to lease the tracts for an additional 35 years. W. Laird died shortly thereafter, and his interest in the tracts passed back to his father.

In 1982, W. Lee Lahrmann and others sued TUE in the District Court of Freestone County, claiming that the 35-year options were void under the Texas statutes pertaining to mineral leases of VBL land. The state court dismissed the lawsuit in 1985 for want of prosecution.

Meanwhile, HL&P and Northwestern had also been acquiring lignite leases in this area.³ In 1979, HL&P and Northwestern entered a "Lignite Supply Agreement." This agreement established a lignite "Reserve Area" covering a large contiguous area in Limestone, Leon, and Freestone Counties, including the Lahrmann tracts. Under the

¹ The Plaintiff actually sued Utility Fuels, Inc., a sister company of HL&P. Since that time, however, Utility Fuels completely merged into HL&P, and HL&P was substituted as a Defendant herein. For the sake of simplicity, this opinion will refer to all activities of Utility Fuels as having been those of HL&P.

² TUE is an electric utility which operates several lignite-fueled generating stations in Texas.

³ HL&P is an electric utility, and Northwestern is a mining company.

agreement, HL&P sub-leased all of its lignite properties within the Reserve Area to Northwestern, agreed to build a lignite-burning generating [**4] plant in Limestone County, and agreed to purchase all of this plant's fuel requirements from Northwestern. In return, Northwestern agreed to attempt to acquire enough further reserves in the Reserve Area to supply the plant's expected 240,000,000 ton lignite requirements over its 30-year lifespan; to dedicate all of this reserve to HL&P; and to mine and deliver the lignite to the plant. Additionally, through this and subsequent agreements, HL&P agreed to purchase all of the permanent facilities necessary to mine the reserves, then lease this equipment to Northwestern for a nominal fee. This operation would become known as the Jewett Mine.

In 1986, TUE sold Northwestern a block of leases in the Reserve Area covering approximately 1300 acres, including the leases and options covering the Lahrman tracts, in exchange for an overriding royalty. Concerned about the possible invalidity of the options on Lahrman's land, Northwestern sent one of its landmen, [**5] Don McLaughlin, to obtain a ratification of these options. By this time, Lahrman owned the property in fee simple, and it was no longer under VLB [*1372] restrictions. Lahrman executed the ratifications in 1987.

Don McLaughlin left Northwestern in April, 1991, knowing that Northwestern planned to prepare Lahrman's land for mining that year. In September 1991, Lahrman sold his tracts, plus all claims and causes of action related to them, to Plaintiff TCA Building Company. TCA is owned by a trust created by Don McLaughlin's brother, Houston attorney Michael McLaughlin.

The Litigation

Two months after purchasing the tracts, TCA sued Northwestern in the District Court of Freestone County for a declaration that the leases were void,⁴ later adding TUE and HL&P as defendants. TCA claimed that the initial options were void under VLB regulations, and that the subsequent ratifications were void because they were procured through fraud. Northwestern maintained that its leases were valid, and continued preparing the TCA tracts for mining by stripping off the overburden and dewatering the subsurface. In November 1992, TCA informed Northwestern that it would seek more than \$ 50 million in damages [**6] if Northwestern mined the tracts under the disputed leases.

Northwestern responded in February 1993 that it would simply bypass the TCA tracts, and not mine the land at all, if TCA did not recognize its right to do so without reservation. Northwestern also informed TCA that:

In the progression of lignite production, once the production has passed the Lahrman tract, it will not be economically feasible to move back and produce lignite from the Lahrman tract. It is estimated that by May 1, 1993, the mining and reclamation operations will have bypassed the Lahrman tract to the point that it is not economically feasible to produce lignite from the Lahrman tract.

TCA balked, and Northwestern did, in fact, mine around the TCA [**7] tracts.

Despite its extant demand in the state court suit that Northwestern vacate its land, TCA then amended its petition to include the bypass decision as part of its allegation of fraud. TCA also filed this action, alleging that the actions of the Defendants violated federal antitrust laws.

In December 1993, Northwestern unilaterally released its interest in these tracts to TCA.

Trial on the state court action commenced on January 31, 1994. At trial, TCA complained that the release was inadequate; Northwestern then filed a supplemental release to meet these complaints. After three weeks of evidence, the jury returned a verdict against TCA. Although the court had previously ruled that the initial 35-year options had been void when executed, the jury found that Northwestern had not obtained the ratifications by fraud.

⁴ Typical of the character of the pleadings bandied about by both sides of this lawsuit, Mike McLaughlin contends that he did not learn of the questionable validity of the leases until after he purchased the land. Given the circumstances, this assertion strains the credulity of the Court.

The jury also found that TCA was estopped to assert its claims, and that Northwestern's decision to mine around the TCA Tracts did not diminish the value of the lignite on TCA's land. Accordingly, the state court entered a take-nothing judgment against TCA on March 11, 1994.

TCA's Antitrust Claims

In its recently amended Complaint, TCA asserts that the Defendants [\[**8\]](#) have violated [§§ 1](#) and [2](#) of the Sherman Act by a variety of means. First, TCA claims that the agreement of TUE to assign its lignite rights to Northwestern, and the supply agreements between Northwestern and HL&P, constituted a conspiracy to acquire monopoly power over the production and sale of lignite coal from the Jewett Mine. TCA also alleges that these agreements comprised an effort to fix the price of lignite in "the Jewett Mine market," and to monopolize the market for lignite to supply HL&P's Limestone County generating plant.

Next, TCA continues to assert that Northwestern fraudulently obtained the ratifications of the options on the TCA Tracts, "in furtherance of the conspiracy." TCA then vaguely asserts that the Defendants have "refused to deal" with the Plaintiff in the [\[*1373\]](#) sale of its lignite interest, and have "set out on a course of conduct that has and will hinder Plaintiff's ability to efficiently exploit its lignite interest." Plaintiff supports the refusal to deal claim with evidence that HL&P has refused to purchase TCA's lignite on reasonable terms, and that Northwestern has refused to allow TCA access to the "essential" equipment which it leases from HL&P. TCA also [\[**9\]](#) alleges that the Defendants have filed false statements with the Texas Railroad Commission in order to renew their license to mine the Jewett Mine, have slandered Plaintiff's title, and have engaged in "sham litigation" against the Plaintiff. TCA supports this latter allegation by pointing to the counterclaims and third-party claims filed against it and the McLaughlins in the prior state court action.

Standard of Review

General

HN1 [\[↑\]](#) Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56](#). A genuine issue of material fact exists if there is a genuine issue for trial that must be decided by the trier of fact. [Anderson v. Liberty Lobby, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). In other words, summary judgment should not be granted if the evidence indicates that a reasonable fact-finder could find in favor of the nonmoving party. *Id.* See also [Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#).

HN2 [\[↑\]](#) In ruling on a Motion for Summary Judgment, the Court must accept the evidence of the nonmoving party and draw all justifiable [\[**10\]](#) inferences in his favor. Credibility determinations, the weighing of the evidence, and the drawing of reasonable inferences are left to the trier of fact. [Anderson v. Liberty Lobby, 477 U.S. at 255](#).

Under [Fed. R. Civ. P. 56\(c\)](#), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." [Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 \(1986\)](#). Once this burden is met, the burden shifts to the nonmoving party to establish the existence of a genuine issue for trial. [Matsushita, supra, 475 U.S. at 585-87](#); [Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291, 294 \(5th Cir. 1987\)](#).

HN3 [\[↑\]](#) Where the moving party has met its [Rule 56\(c\)](#) burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . The nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.' Where the record taken as a whole could not lead [\[**11\]](#) a rational trier of fact to find for the nonmoving party, there is no *genuine issue for trial*." [Matsushita, supra, 475 U.S. at 586-87](#) (quoting [Fed. R. Civ. P. 56\(e\)](#)).

Dismissal

[HN4](#) Rule 12 of the Federal Rules of Civil Procedure provides for the dismissal of claims upon which relief cannot be granted. Under the notice pleading requirements of the Federal Rules, however, a complaint need only set forth "a short and plain statement of the claim." [Fed. R. Civ. P. 8\(a\)](#); see also [Fed. R. Civ. P. 8\(e\)\(1\)](#) ("Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required."), & 8(f) ("All pleadings shall be so construed as to do substantial justice."). Accordingly, motions to dismiss for failure to state a claim are disfavored in this circuit, and such a motion may not be granted unless "it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts which could be proved in support of his claim." [Cook & Nichol, Inc. v. Plimsoll Club, 451 F.2d 505, 506 \(5th Cir. 1971\)](#); [Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#); [**12](#) see [McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246, 62 L. Ed. 2d 441, 100 S. Ct. 502 \(1980\)](#) ("This rule applies with no less force to a Sherman Act claim").

[\[*1374\]](#) *The Defendants' Motion*

At several points in their brief, the Defendants raise issues in such broad terms that they cannot be reasonably read to meet their initial summary judgment burden of "informing the district court of the basis for [their] motion, and identifying those portions of [the record] which [they] believe[] demonstrate the absence of a genuine issue." For example, the brief introduces its section on the monopoly allegations by stating the elements of the claim and baldly asserting, without further support, that "TCA cannot establish either element." [HN5](#) A general denial, however, does not pass to Plaintiff the burden of proving its entire case on summary judgment, especially when, as here, the parties have not completed discovery.⁵ Accordingly, any arguments for summary judgment which the Defendants may have believed they raised and which are not addressed herein are summarily denied for lack of specificity.

[**13](#) Similarly, the Defendants' attack on TCA's complaint itself ignores the basic concept of the liberal notice pleading requirements in federal court, asking instead for a heightened pleading standard akin to that in civil rights cases. Moreover, the basis of the Defendants' criticism requires an assumption of illiteracy. For example, the Defendants deny that the complaint identifies the relevant product, geographic market, and parties, although these items are easily discerned from even a cursory review of the pleadings: the product is lignite, the geographic market is the Jewett Mine area, and the conspiring parties are the Defendants. Finally, the Court can only imagine that these alleged faults in the pleading form the basis of the Defendants' "motion to dismiss," presumably under [Rule 12\(b\)\(6\)](#), because their brief never actually specifies the relief requested from these phantom defects. Accordingly, except for the limited dismissal granted below, the Defendants' motion to dismiss is denied.

Analysis

State Law Claims

TCA's Amended Complaint makes vague references to causes of action arising under state law, such as a suit to quiet title, a request for an injunction against [**14](#) "sham litigation" in state court, and a request for judgment for "common law torts." In response to the Defendants' motion, Plaintiff conceded that the quiet title action is moot in light of Northwestern's release of all claims. As to any other claims TCA attempts to assert under state law relating to its dispute with the Defendants over its lignite rights, through due diligence TCA should have litigated these in the

⁵ The Defendants also complain, in their reply to Plaintiff's response, that TCA cannot show that they exercised monopoly power by setting either monopolistic or monopsonistic prices. TCA is not, of course, ever required to make such a showing. See [American Tobacco Co. v. United States, 328 U.S. 781, 811, 90 L. Ed. 1575, 66 S. Ct. 1125 \(1946\)](#) ([HN6](#)) It is not necessary that the power thus obtained should be exercised. Its existence is sufficient."); [United States v. American Airlines, Inc., 743 F.2d 1114, 1118 \(5th Cir. 1984\)](#) (quoting same), cert. dism'd, [474 U.S. 1001, 106 S. Ct. 420, 88 L. Ed. 2d 370 \(1985\)](#).

prior state court action. Accordingly, they are barred by res judicata. See [Barr v. Resolution Trust Corp., 837 S.W.2d 627, 628 \(Tex. 1992\)](#).

TCA also claims that the Defendants' alleged "sham litigation" was an act in furtherance of their alleged conspiracy to monopolize. In this context, the sham litigation claim will be discussed [infra](#).

Collateral Estoppel

HN7 [↑] The doctrine of collateral estoppel precludes the relitigation of any ultimate issue of fact which was actually litigated and essential to the judgment in a prior suit, as long as the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior suit. [Tarter v. Metropolitan Sav. & Loan Ass'n, 744 S.W.2d 926, 927 \(Tex. 1988\)](#). [**15] In both Texas and federal courts, the doctrine applies even if the prior judgment is under appeal, except in those circumstances (not relevant here) where appeal consists of a trial de novo. [Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 6 \(Tex. 1986\)](#); [Prager v. El Paso Nat'l Bank, 417 F.2d 1111, 1112 \(5th Cir. 1969\)](#).

In TCA's prior state court action against these Defendants, the primary issue [*1375] was whether the Defendants had obtained the 1987 Lahrmann ratifications of the options on the TCA tracts through fraud. The jury found that they had not, and the court entered a judgment on those findings declaring the leases to be valid and enforceable. Hence, whether or not the options were initially valid,⁶ the state court judgment establishes that TCA's predecessor-in-interest had granted Northwestern a valid right to mine the tracts long before TCA purchased them. Accordingly, TCA is collaterally estopped from denying in this forum that Northwestern's leases on the TCA Tracts were valid and enforceable after the 1987 ratifications, and any antitrust claims based on the Defendants' conduct in obtaining those ratifications are [**16] dismissed.

Likewise, TCA may not base any claim in this Court on a theory that actions of the Defendants which were permitted by these valid and enforceable leases were, in fact, pursuant to invalid leases. For example, the leases permitted Northwestern to dispossess TCA and Lahrmann of the surface estate, and to prepare the land for mining. These acts were not illegal, and cannot themselves form the basis of an antitrust claim. Moreover, TCA may not assert any "refusal to deal" claim arising from conduct occurring before December, 1993, because before that date TCA had no interest in lignite with which it could have dealt.

For a similar reason, Northwestern's decision to "mine around" the TCA Tracts cannot form the basis of any liability in this Court. Although far from clear, TCA's theory appears to be that this action furthered [**17] the conspiracy to monopolize the Jewett Mine and fix prices therein because "Northwestern, acting for all the monopolists, will either lease reserves at the price it sets, or will mine around lignite owners." As a general proposition, this statement is a truism: if a lignite owner refuses to lease to Northwestern at the price Northwestern is willing to pay, Northwestern will obviously have to mine around that deposit. With respect to TCA, however, the proposition is entirely irrelevant. As established in the state court action, when Northwestern mined around the TCA Tracts in 1993 it already owned the right to mine those tracts, and TCA owned no right to the lignite therein. The Court does suspect that under state law Northwestern actually owed TCA, as a royalty-owner, the commonlaw duty to mine those tracts when it mined the surrounding properties. TCA, however, denied Northwestern's right to do this, and threatened to claim as damages any profits which Northwestern might make on mining the tracts. Under these circumstances, no reasonable fact-finder could conclude that Northwestern should have mined the property anyway. Therefore, TCA cannot claim that Northwestern's decision to [**18] mine around its property was improper.

On the other hand, the Defendants incorrectly argue that collateral estoppel precludes entirely the issue of damages. In one of many blatant misrepresentations to the Court, the Defendants baldly claim that the state court findings "established that there was no diminution in value of TCA's surface and lignite estate." In fact, the jury only

⁶ Both parties also attempt to re-litigate here the question of the options' initial validity. The parties' attempt to reveal the relevance of this inquiry, however, has been unavailing.

found that Northwestern's *decision to mine around* the TCA Tracts did not diminish the value of the lignite therein. Moreover, even this finding does not enjoy the benefits of collateral estoppel, as the Defendants have not suggested -- and the Court has not culled from the record before it -- any reason that this finding was essential to the judgment entered by the state court. See Tarter, 744 S.W.2d at 927 (collateral estoppel applies only to finding essential to judgment in prior suit).

Also, contrary to the implications of the Defendants' motion, collateral estoppel does not govern every liability issue raised by TCA's Amended Complaint. HN8[↑] It is, of course, possible to violate the antitrust laws through activities which, in the absence of anti-competitive intent, are entirely **19 valid and legal. See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985) (holding that circumstances justified finding that defendant's *1376 refusal to continue joint ticket arrangement with smaller competitor violates Sherman Act). The question here, then, is whether TCA can show that the ostensibly valid actions of the Defendants had the effect or purpose of unlawfully suppressing competition.

Sham Litigation

TCA claims, among other things, that the Defendants interfered with its efforts to compete by pursuing "sham litigation" against it and the McLaughlins through their counter-and third-party claims in the state court suit. In that action, Defendant Northwestern claimed that TCA and the McLaughlins conspired to violate Don McLaughlin's alleged duty not to reveal Northwestern's concerns about the validity of the initial coal options on the TCA tracts. The Defendants move for summary judgment on this allegation, which the Court grants.

First, TCA's global claim of sham litigation is clearly meritless as to HL&P and TUE because these Defendants never joined the allegedly sham claims of Northwestern in the state court action. **20 TCA's refusal to acknowledge this could only be for the purpose of harassment, in violation of its duty to this Court.

Second, HN9[↑] a party is generally immune from antitrust liability based on its having petitioned a court for redress. California Motor Trans. Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972); Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961). To pierce this immunity, TCA must first show that, as a matter of law, Northwestern's claims were "objectively baseless, in the sense that no reasonable litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome." professional Real Estate Inv. v. Columbia Pictures Indus., 123 L. Ed. 2d 611, 624, 113 S. Ct. 1920 (1993). Even if the claims were objectively baseless, however, TCA must further show that Northwestern subjectively intended the prosecution of the claims to interfere directly with the business relationships of a competitor, through the use of the governmental process as opposed to the outcome of that process. Id.

TCA offers neither argument nor evidence supporting either prong of **21 this test. Furthermore, on an independent analysis, the Court finds that Northwestern's claims were not objectively baseless. HN10[↑] It is well established in Texas that at least some employees owe their employers a duty not to disclose certain secrets. See, e.g., Hunter v. Shell Oil Co., 198 F.2d 485, 487 (5th Cir. 1952) (geologist owes fiduciary duty to oil company employer with regard to company's confidential information about oil deposits). Northwestern's theory that this obligation included a duty by Don McLaughlin to not disclose the legal vulnerability of certain of his employer's contracts was, objectively, at least a good faith argument for the extension of existing law.⁷ 123 L. Ed. 2d at 627 (incorporating standard of Fed. R. Civ. P. 11). Even if not, however, TCA has failed to show even the possibility of subjective anticompetitive intent. Northwestern's "sham litigation" was a counterclaim to a suit brought by TCA. The jury, in turn, found TCA's suit to be lacking in proof. TCA has not shown how the efficient prosecution of Northwestern's "baseless" claims at the same time as TCA's pursuit of its "baseless" primary action could remotely interfere **22 with any of its "business relationships." Nor has TCA even identified any business relationships

⁷ Northwestern further argues that the fact that those claims were not baseless is established by the state court's refusal to direct a verdict on them." Of course, the state court's refusal to direct a verdict is probative of nothing, and this statement could not be sincerely made by anyone with even a passing familiarity with the mechanics of trial.

which existed at the time of filing and with which the litigation could have interfered. In fact, TCA has not even offered a description of Northwestern's actions from which this Court could determine that the process of defending against these claims burdened TCA at all. Accordingly, the claim must fail.

[*1377] **Limitations**

HN11[¹⁵] Section 4B of the Clayton Act bars any private cause of action for treble damages under the antitrust laws which is not commenced within four years after the cause of action accrued. [15 U.S.C. § 15b](#). TUE argues that, [*23] since it has not done anything in relation to the Jewett Mine or to any interest therein owned by TCA since 1986, and this action was not filed until 1993, any antitrust cause of action by TCA against TUE is clearly time-barred. HL&P and Northwestern also claim the benefit of the limitations statute, on the theory that they completed the alleged conspiracy and monopoly when they obtained the ratifications of the Lahrmann options in 1987.

In response, TCA simply makes the conclusory statement that it has pled "continuing antitrust violations," for which the limitations period is continuously renewed, citing [Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 502 n. 15, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 \(1968\)](#). Even assuming the truth of this conclusion, however, Defendant TUE's involvement with this "continuing violation" cannot be discerned.

HN12[¹⁶] The "continuing violation" or "continuing conspiracy" exception to the four-year antitrust statute of limitations "permits a cause of action to accrue whenever the defendant commits an overt act in furtherance of an antitrust conspiracy or, in the absence of an antitrust conspiracy, commits an act that by its very nature is a continuing antitrust [*24] violation." [Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards Inc., 677 F.2d 1045, 1051 \(5th Cir. 1982\)](#), cert. denied, 459 U.S. 1105, 74 L. Ed. 2d 953, 103 S. Ct. 729 (1983).⁸ The only act which the Plaintiff accuses TUE of which could be classified "by its very nature" as a "continuing antitrust violation" is TUE's alleged participation in a monopoly. However, TCA neither alleges nor presents evidence of anything TUE has done in relationship to the Jewett Mine since assigning its lignite leases to Northwestern in 1986, other than receive royalties from those leases. The undisputed evidence on file establishes that TUE retained no ownership interests in the Jewett Mine, the Limestone County generating plant, or the TCA Tracts, after 1986. Furthermore, TUE played no role in any decisions concerning the mining of the Jewett Mine or the operations of the generating plant.

[*25] This Court holds as a matter of law that **HN13**[¹⁷] a party does not continually violate the antitrust laws simply by virtue of its mere passive receipt of royalties from a monopoly which purchased its previously competing interests. Cf. [Greene County Mem. Park v. Behm Funeral Homes, 797 F. Supp. 1276, 1292 \(W.D. Pa. 1992\)](#)(mere existence of partnership or shareholder interest in a conspiring firm does not give rise to personal liability under the Sherman Act), aff'd 993 F.2d 876 (3rd Cir.), cert. denied, 126 L. Ed. 2d 146, 114 S. Ct. 187 (1993). Otherwise, the passive participant would be perpetually liable for the existence of a violation which it is powerless to end. Therefore, since there is no suggestion in the record that TUE has retained the ability to alter any unlawful monopoly in Jewett Mine area lignite since 1986, the existence of any such monopoly is not a "continuing violation" on the part of TUE.

The Plaintiff's remaining allegations against TUE -- that TUE conspired with the other Defendants to monopolize the Jewett Mine and fix the price of the lignite therein -- fail for the lack of any overt act in [*26] furtherance of the conspiracy since 1986. As the Fifth Circuit has explained, in the context of conspiracy claims:

HN14[¹⁸] Continuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action. It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action.

⁸ TCA does not claim the benefit of the speculative damages exception described in [Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 28 L. Ed. 2d 77, 91 S. Ct. 795 \(1971\)](#).

[*1378] *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975)(footnote omitted), cert. denied, 423 U.S. 1054, 46 L. Ed. 2d 643, 96 S. Ct. 784 (1976). TCA points to no "injurious act" done by TUE, or any active participation by TUE in any alleged conspiracy, within four years of this suit. Since any damages which TUE may have caused TCA have occurred solely because of the inertial consequences of TUE's pre-limitations actions, TCA's claims against TUE are barred. Compare *AI George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1275 (5th Cir. 1991)(antitrust HN15¹ action based on sham litigation accrues when [**27] prior lawsuit was filed, and continued prosecution of that action within the limitations period does not create a new action), and *Kaiser Aluminum*, 677 F.2d at 1052-55 (conspiring defendants' continuing receipt of benefits from illegal contract does not create new causes of action), with *Poster Exchange*, 517 F.2d at 129 (cause of action for refusal to deal is renewed with every specific act or word of refusal).

HL&P and Northwestern also assert the benefit of the limitations statute, on the theory that they had completed their exclusive dealing arrangement and monopoly of the Jewett Mine well before 1989. They are correct, of course, only to the extent that TCA claims damages specifically arising from pre-1989 events. Otherwise, the maintenance of monopolies and agreements in restraint of trade are the classic examples of "continuing violations" of the antitrust laws. See *Hanover Shoe v. United Shoe Mach. Corp.*, 377 F.2d 776, 794-95 (3d Cir. 1967)(cause of action renewed each time defendant enforced and renewed monopoly-creating leases), aff'd in relevant part, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968); [**28] *Poster Exchange, supra*. Therefore, if these Defendants' more recent refusals to deal with TCA were in furtherance of an unlawful agreement or monopoly, TCA's damages flowing therefrom are clearly not barred by limitations.

Price-Fixing: Failure of Claim and Lack of Standing

TCA claims that the lignite supply agreements between Northwestern and HL&P constitute a price-fixing conspiracy. Furthermore, TCA describes the conspiracy as horizontal as well as vertical; that is, TCA claims that the agreement is not simply an agreement between HL&P and Northwestern as buyer and seller, but is also an agreement between sellers of Jewett Mine lignite because HL&P owns Jewett Mine lignite leases which it has subleased to Northwestern.

Of course, as between an individual buyer and an individual seller a vertical "price-fixing agreement" is not only lawful, but expected. If buyer and seller could not fix a price, nothing would ever get sold. This explains TCA's creative attempt to classify both Defendants as sellers, since HN16¹ horizontal price-fixing agreements are *per se* illegal under § 1 of the Sherman Act. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927). [**29]

In this posture, however, the claim must be dismissed for failure to make sense. Price-fixing agreements are illegal because they restrain competition based on consumers' preferences, such as the price, service, or quality associated with a given product. *Albrecht v. The Herald Co.*, 390 U.S. 145, 152-54, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968). The party most directly harmed by such agreements is the consumer of the subject product. Cf. *ARCO v. USA Petroleum*, 495 U.S. 328, 336, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990). Yet TCA asserts that HL&P, as one of two dominant owners of Jewett Mine lignite, conspired with the other owner to fix the price of said lignite, even though the party most obviously injured by such a conspiracy would be the sole consumer of this ore: HL&P. Given the lack of reason to this theory, the Court holds HN17¹ as a matter of law that masochism on the part of a vertically-integrated consumer is not, by itself, a violation of the Sherman Act.⁹

⁹ In theory, the Court could imagine one reason that HL&P would actually agree to pay inflated prices for its own coal: given that HL&P is a state-regulated utility holding monopolies in various markets for electricity, the payments to Northwestern would appear as legitimate third-party expenses in HL&P's rate applications. Therefore, the regulating agency might set rates for HL&P which appear to be reasonable but which would, in fact, allow HL&P to gain monopoly profits through the monopoly prices it pays to itself for coal supplies.

TCA, however, has neither pled nor argued such a motive. Rather, Plaintiff states in its Amended Complaint that HL&P's motive for entering the lignite supply agreements was perfectly legitimate:

[**30] [*1379] Put simply, TCA's complaint describes only a situation in which one coal-owning party -- HL&P -- agreed to purchase a package of mining services and additional coal from another -- Northwestern. Northwestern and HL&P could not have been competing for the sale of HL&P's coal to HL&P, because HL&P already owned it. Likewise, Northwestern did not compete with HL&P for the provision of mining services, because HL&P has no such operations. Therefore, the complaint describes no agreement between competitors and hence no horizontal price fixing agreement.

Moreover, even if Northwestern and the "coal-owning" branch of HL&P could be said to have fixed lignite prices in violation of [§ 1](#), TCA would not have standing to complain. As a potential seller of lignite, TCA is a competitor of these alleged conspirators. [HN18](#)¹⁰ To maintain an action for damages arising from violations of the Sherman Act, a plaintiff must show that he suffered an "antitrust injury"; that is, an injury which is "of the type that the antitrust laws were intended to prevent, and that 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 (1977). [**31] [HN19](#)¹¹ In the context of a price-fixing conspiracy among sellers in a given market, this means that competitors "may not complain of conspiracies that . . . set maximum prices above market levels, or that set minimum prices at any level" because, absent predatory pricing, such conspiracies "would either leave [the competitor] in the same position as would market forces or would actually benefit respondents by raising market prices." [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 584 n.8, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). As a potential competitor of the Defendants in the market for Jewett Mine lignite, therefore, TCA has no cause of action based on the Defendants' alleged conspiracy to fix the price of that commodity.

TCA's inability to allege such an antitrust injury is further established by the TCA's claimed damages. TCA does not allege that the supposedly "fixed" price has harmed it; in fact, it claims a willingness to sell its coal at a substantially lower price than that paid to Northwestern.¹⁰ Instead, TCA simply claims that the harm it has suffered is an inability to sell its lignite at all. While that may be the result of antitrust violations, it has [**32] nothing to do with "price-fixing." Accordingly, any claims for "price-fixing" are dismissed.

Therefore, at this point the only remaining viable claims of TCA are:

- 1) That Northwestern and HL&P have, through otherwise legitimate means, unlawfully monopolized or attempted to monopolize the market for lignite in the Jewett Mine area, in violation of [§ 2](#) of the Sherman Act; and
- 2) That the requirements/exclusive dealing contract between Northwestern and HL&P constitutes an unlawful agreement in restraint of trade, in violation of [§ 1](#) of the Sherman Act.

The only cognizable antitrust injury TCA alleges is that, in furtherance of these two [*1380] violations, HL&P has effectively refused to purchase TCA's coal, and Northwestern has refused to provide TCA access to its "essential facilities" for marketing that coal to HL&P.¹¹

In order to operate efficiently, and profitably, that is to say to benefit both ratepayers and investors, electric utilities relying on fossil fuels as an energy source must have secure fuel supplies and supply sources to insure continuous production capacity. The more efficient a production unit (such as Limestone County Nos. 1 and 2) is, the more profitable the power company can be because efficient production insures sales of over-capacity to less efficient producers on the power grid. . . . The more secure the fossil fuel supply -- the more efficient the generating station.

Plaintiff's Amended Complaint P 10. Furthermore, this admission by TCA goes far to negate the theory that the Defendants' requirements contract unlawfully restrains trade. The Defendants, however, have not argued this admission as a basis for summary judgment.

¹⁰ Hence the "predatory pricing" exception of [Matsushita](#) is inapplicable.

¹¹ The Defendants argue for summary judgment on the grounds that they have not, in fact, refused to deal with TCA. To this end, HL&P claims to have accepted TCA's offer of sale, and Northwestern claims to have "discussed with TCA the possibility of contract mining." TCA's evidence, however, strongly indicates that these statements are not true and that, in fact, the

[**33] Other Standing Issues

The Defendants also claim that TCA lacks antitrust standing for these remaining claims. The argument is largely a collection of indecipherable, jumbling, and unconnected pieces of antitrust headnotes, with no description of their relevance to the case at hand or their discernible relationship to the question of standing. The Defendants do cite the seminal case on the issue, [Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 \(1983\)](#). They do so in an utterly conclusory manner, however, with no mention whatsoever of the detailed list of factors the Supreme Court offered therein for the proper analysis of the issue. The thrust of the Defendant's argument, to the extent one can be discovered, appears to be encapsulated in the heading of that section: TCA lacks standing because it is "neither a damaged consumer nor a competitor" of the Defendants. Without more, however, this major premise is derived from an overly broad and simplistic reading of controlling antitrust jurisprudence. [See, e.g., Blue Shield v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 \(1982\)](#)(patient of psychologist has [**34] standing to complain of conspiracy by insurance companies and psychiatrists against psychologists).

Furthermore, Northwestern's premise that TCA is not its competitor is unsupported factually. Since December 1993, when the Defendants unilaterally released their rights to mine the TCA tracts, TCA has been an owner of lignite in the Jewett Mine market. TCA has entered negotiations with companies interested in mining these tracts for TCA, and has attempted to negotiate a the sale of its lignite to HL&P. Nonetheless, the Defendants argue that TCA is not a viable competitor in this market because it has no mining permit, mining equipment, or experienced mining personnel. Reason, however, does not support the notion that a seller of minerals does not "compete" in the market for those minerals simply because it intends to contract the operation of its mine to others.

As a competitor for sales of lignite in a market which the Defendants have allegedly monopolized, which has allegedly lost sales due to the Defendants' allegedly unlawful agreement to exclude competitors, no party is in a better position to vindicate the purposes of the antitrust laws than TCA. Cf. [R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 158 \(9th Cir. 1989\)](#) [**35] (Norris, J., dissenting)(noting that a utility, as a regulated monopoly which can pass most of its costs on to consumers, has little motivation to sue its fuel suppliers for antitrust violations).¹² Accordingly, based on the extant pleadings and evidence in the record, and the lack of reasoned argument to the contrary, the Court finds that TCA is the proper party to bring this suit.

[**36] Market Allegations

The Defendants assert that TCA's complaint should be dismissed for failure to [*1381] allege a "legally relevant market," claiming that "to the extent that TCA is claiming that the Jewett Mine area is a legally relevant market, it is wrong as a matter of law." In support of this proposition, they cite a case in which a plaintiff defined the relevant market as the market for disseminating one particular trademarked health education program called "Growing Healthy." [Re-Alco Indus., Inc. v. National Center for Health Educ., Inc., 812 F. Supp. 387 \(S.D. N.Y. 1993\)](#). There, the court properly held that a single copyrighted or trademarked brand of a seller cannot comprise its own "market" for the purposes of antitrust law. [Id. at 391](#). This conclusion should be obvious; the trademark laws grant the seller

Defendants have only "discussed" dealing with TCA on the basis of clearly onerous terms. For example, HL&P has "agreed" to purchase TCA's lignite at the bargain price offered, but only if TCA meets conditions such as posting a \$ 6.75 million bond against unspecified possible losses. Such a dichotomy of possible fact findings is a textbook example of a "genuine issue" for trial.

¹² The Defendants cite Thermogenics for the bald proposition that "[a] disgruntled landlord or lessor lacks standing to bring a Section 2 case because a lessor's injuries are not the kind of injuries to competition that the antitrust laws are meant to prevent." This statement calls for two comments. First, the breadth of this proposition is facially preposterous and, of course, unsupported by the cited authority. Second, to the extent that the case otherwise supports the Defendants' motion, the Court would note that, for the most part, the dissenting opinion to that 6-5 en banc decision demonstrates a much more learned appreciation of the current state of antitrust law.

of a trademarked brand a monopoly in that brand of a product, and the relevant market for antitrust purposes consists of that brand's reasonable substitutes. Id.

Amazingly, however, the Defendants then simply state: "So it is here." To support this conclusion, they first add "or product" in their version **[**37]** of the Re-Alco holding, without mentioning the qualifying language "copyrighted or trademarked." Defendant's brief at P 28. Then they argue that the coal mined by Northwestern is Northwestern's own "product," in which it has a natural monopoly. The Court can assure the Defendants, however, that no other erstwhile rational being would dare to credit this assertion with any appellation more generous than ludicrous, or downright silly. The plaintiff has not complained of a monopoly in "Northwestern lignite;" it complained of the Defendants' monopoly in lignite from the Jewett Mine area. This lignite is "naturally" capable of being produced by any party who purchases the right to do so from the various landowners in that area. Northwestern did not create this product, and in fact the rights to the product used to be leased by at least three separate and distinct entities. The prevention of monopolies and restraints on trade in such a "product" with cross-elasticity of demand between various potential sources is, of course, the very essence of the Sherman Act. If the Defendants consolidated significant market power over this product through anticompetitive means, clearly they have created **[**38]** an unlawful monopoly, and their argument to the contrary is disingenuity approaching the obscene.

As if to underscore the frivolity of this argument and the inability to follow the conclusion with any reason, the Defendants again in this section digress to utterly irrelevant statements made, apparently, for the sole purpose of filling paper. After stating that as a matter of law the Jewett Mine market is a natural monopoly, they (in the same paragraph) segue into the statement that their monopoly is not illegal because it was gained by conduct that was honestly industrial. While this may certainly be true, and might vindicate the Defendants if proven, it has nothing whatsoever to do with the question of whether the allegation of a monopoly in Jewett Mine area lignite gained through unindustrial and *anticompetitive* conduct states a claim for which relief may be granted. Since the answer to that question is clearly that it does, the Defendants' motion to dismiss on this basis defies sense.

State Action Doctrine

The Defendants' journey through Wonderland continues with a claim that the "state action doctrine" precludes TCA's complaint. HN20  Under this doctrine, restraints on trade **[**39]** are immune from antitrust liability if they have been clearly articulated and affirmatively expressed as state policy, and if this policy is actively supervised by the state itself. FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2176, 119 L. Ed. 2d 410, 422 (1992). The Defendants' sole argument based on this doctrine is that, since the State of Texas regulates strip mining from cradle to grave and has licensed only Northwestern to mine the Jewett Mine, the Ticor test is satisfied.

Again, the Defendants provide absolutely no support for this conclusion. They point to no policy wherein the State of Texas even suggests a preference for having only one company mine a given area of lignite deposits, much less clearly articulates such. They do not argue that TCA or its contractors could not obtain a permit to mine in the Jewett Mine area. They enlighten the Court of no state policy favoring exclusive dealing arrangements between mining companies **[*1382]** and utilities. In short, they present no state policy which necessarily conflicts with federal requirements that they compete for mineral reserves in the Jewett Mine area in accordance with **[**40]** the Sherman Act.

Instead, the Defendants offer only this statutory language:

The State of Texas wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations with the State. . . . It is therefore declared to be the purpose of this Act: to prevent the adverse effects to society and the environment resulting from unregulated surface coal mining operations as defined by this Act. Tex. Rev. Civ. Stat. Ann. art. 5920-11, §2, P 5(a) (Vernon's Supp. 1994).

This statement is, of course, utterly devoid of probative value under the Ticor test. Compare Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)(state approval of illegal tying arrangement by public utility does not give rise to immunity, because approval does not express adoption or supervision of policy).

Like a mine with its reserves depleted and its framework removed, the Defendants' argument once more is wholly without value or support.

Interstate Commerce

Finally, in an argument not given serious consideration since the *Lochner* era,¹³ the Defendants propose that this Court lacks jurisdiction over TCA's claims because their activities **[**41]** do not affect interstate commerce, pointing to the Sherman Act's proscription only of those monopolies in, and those restraints of, trade or commerce "among the several states." [15 U.S.C. §§ 1 & 2](#). In the absence of any basic education on the issue, the argument might be persuasive: the Jewett Mine is located entirely within Texas, the entire output of the mine feeds a Texas generating plant, and the entire electrical output of that plant is sold within Texas. Consideration of the facts of this case in light of the broad and well-established judicial interpretations of the Act's interstate commerce requirement, however, cannot lead to the Defendants' conclusion without a wholesale misrepresentation or concealment of that jurisprudence. As before, unfortunately, deception is the Defendants' battle cry. For example, they cite a 1980 Tenth Circuit opinion -- [*Crane v. Intermountain Health Care, Inc., 637 F.2d 715 \(10th Cir. 1980\)*](#) -- for the propositions that "for jurisdictional purposes, plaintiff must point to relevant channels of interstate commerce logically affected by defendants' allegedly unlawful conduct," and that **[**42]** "it is insufficient that defendants' overall business may impact interstate commerce if the challenged activity is . . . unrelated to interstate commerce." Both suggestions, however, have since been plainly rejected by the Supreme Court. Rather, [HN21](#)[] in Sherman Act cases "[plaintiff] need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction." [*Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 114 L. Ed. 2d 366, 376, 111 S. Ct. 1842 \(1991\)*](#). "A conspiracy . . . would be covered by the Sherman Act, even though any actual impact on interstate commerce would be indirect or fortuitous." [*Id. at 375*](#).

[43]** Indeed, [*Crane*](#) is cited by the *dissent* in [*Summit Health*](#) as being contrary to the holding of the Court. 114 L. Ed. 2d at 379 (Scalia, J., dissenting). The *majority* opinion observed that it is "well established" that the Sherman Act reaches all activities which Congress has the constitutional power to regulate under the [*Commerce Clause*](#). [*Id. at 374 n.10; Chatham Condominium Ass'n v. Century Village, Inc., 597 F.2d 1002, 1006 \(5th Cir. 1979\)*](#). Congress, in turn, enjoys the constitutional power under the [*Commerce Clause*](#) to regulate any activity which may be *rationally* found to affect interstate commerce. [*Heart of Atlanta Motel, \[*1383\] Inc. v. United States, 379 U.S. 241, 258, 13 L. Ed. 2d 258, 85 S. Ct. 348 \(1964\)*](#). The question, then, is clearly *not* whether Jewett Mine lignite or HL&P electricity is in interstate commerce, but simply whether it would be rational to conclude that restraints on trade in lignite from the Jewett Mine area could affect interstate commerce. The only serious answer to this inquiry is "yes."

Defendant Northwestern is a Montana corporation; HL&P, a Texas company. The engineers and managers employed at the Jewett Mine **[**44]** undoubtably hail from across the country. The mine necessarily requires the use of numerous pieces of heavy equipment, many of which are manufactured in other states. Electricity is generated at the Limestone County plant by generators built out-of-state, and it is used in the furtherance of interstate commerce passing through highways, airports, and shipping ports. HL&P expects Northwestern to supply its Limestone County generating plant with 240,000,000 tons of lignite over the plant's 30-year lifespan, displacing HL&P's reliance on other fuel supplies which might be purchased in interstate commerce. Clearly, therefore, the conclusion that the Defendants' operation of the Jewett Mine affects interstate commerce is not only rationally permitted, but rationally commanded. Compare [*Hodel v. Virginia Surface Mining & Reclam. Ass'n, 452 U.S. 264, 281-83, 69 L. Ed. 2d 1, 101 S. Ct. 2352 \(1981\)*](#)(the *commerce clause* permits Congress to regulate wholly local surface mining operations done by wholly local companies, where Congress rationally found that these operations generally could affect the environment in other states).

¹³ This is only a slight exaggeration; the argument may have had some merit in this Circuit twenty years ago. See [*Rosemount Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416*](#) (5th Cir. 1972)(finding no Sherman Act jurisdiction in dispute between local gravel companies where defendant's products were mined and sold only intrastate, despite out-of-state character of plaintiff, its potential purchaser, and defendant's suppliers, and defendant's use of Mississippi River and interstate highways).

Moreover, even under the Defendants' test requiring a logical connection [**45] between the effects of the challenged activity and interstate commerce, the Sherman Act plainly reaches the allegations of TCA's complaint and the evidence in support thereof. TCA's complaint alleges that two parties from different states have unlawfully monopolized the production of lignite in the Jewett Mine area, and have unlawfully agreed to restrain trade in that lignite. The evidence supports a finding that, in the absence of such restraints, mining companies located in other states would attempt to compete for the right to produce lignite from that area. These companies might obtain financing from interstate loans or shareholders. Therefore, if the violations alleged are true, the Defendants' conduct has clearly poses a threat to interstate commerce. "[HN22](#)[¹⁴] 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 Ass'n, 336 U.S. 460, 464, 93 L. Ed. 805, 69 S. Ct. 714 \(1948\)](#). The Defendants' argument to the contrary is, once more, wholly without foundation in law or fact. Compare [Summit Health, supra](#) (local doctor's allegations of conspiracy by local [**46] peer review committee at local hospital satisfies Sherman Act jurisdictional requirements, where hospital's overall activities affect interstate commerce); [Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 48 L. Ed. 2d 338, 96 S. Ct. 1848 \(1976\)](#)(local hospital may bring Sherman Act suit against another local hospital and its local officials for conspiracy to restrain plaintiff hospital's expansion, where failure to expand would restrict interstate medicine sales and financing); [Goldfarb v. Virginia State Bar, 421 U.S. 773, 783-85, 44 L. Ed. 2d 572, 95 S. Ct. 2004 \(1975\)](#)(local conspiracy to set fees of local attorneys performing local residential title services is within purview of Sherman Act, where many home purchases are financed with interstate and federal loans); [Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1063 \(5th Cir. 1985\)](#)(El Paso real estate broker's complaint of boycott by other El Paso brokers implicated Sherman Act, where actions of brokers generally affect demand for interstate financing, title insurance, and advertising), [cert. denied, 474 U.S. 1102, 88 L. Ed. 2d 919, 106 S. Ct. 884 \(1986\)](#).

Conclusion

From the 40 pages of dross argued [**47] by the Defendants, the Court has found very few jewels, and most of these are only semiprecious. Based on these, it is ORDERED that (1) all state law claims are DISMISSED as barred by *res judicata*; (2) under the doctrine of collateral estoppel, the 1987 ratifications of the options on the Lahrmann [*1384] tracts are DEEMED VALID AND ENFORCEABLE; (3) all sham litigation claims are DISMISSED; (4) all claims against Defendant TUE are DISMISSED as time-barred; and (5) all price-fixing claims are DISMISSED for failure to state a claim upon which relief can be granted.

Otherwise, all other requests for relief claimed by the Defendants are DENIED. The rest of the Defendants' motion is characterized by misrepresentation of both law and fact, and argument too illogical and disingenuous to even warrant the distinction of chicanery.¹⁴ The Court is both alarmed and disturbed to note that the motion was presented over the names of some of the most distinguished attorneys in the state. Clearly, the ethical level of advocacy presented therein is far below the standards normally associated with either those individuals or their respective law firms. The Court assumes that this aberration arose [**48] simply from a temporary inability to dedicate appropriate resources to this case at the time they were needed. The Court knows, however, that through this motion the Defendants have stolen countless hours of the Court's time, and hence deprived countless other litigants of a more timely resolution of their needs.

This will not happen again in this case. Further pleadings of this character will not be considered by the Court prior to trial. Moreover, the parties will be given only one more opportunity to file dispositive motions. To this end, the pretrial Order of March 2, 1994, is AMENDED to allow the filing of one dispositive motion by each party on or before October 28, 1994. The responses to these motions, if any, will be due November 18, 1994, and no such motions will be considered before that date. [**49] Replies to responses will be neither required nor permitted.

Given the February trial setting of this case, the docket of this Court, and the holidays intervening between these deadlines and trial, the Court strongly suggests that the issues raised by any such motions be limited in number and

¹⁴ This critique is not intended as praise by omission for the Plaintiff's advocacy. Against a well-reasoned and factually-supported motion, TCA's cursory and conclusory responses would have been woefully insufficient.

based on clearly established grounds. To this end, the parties are advised that, if the Court is unable to carefully consider the motions before trial, it will simply require their re-briefing afterwards in the form of post-trial motions.

Although the Court is loathe to research the law for its litigants, it is also loathe to grant trials on meritless cases. Therefore, the Court suggests that the parties direct at least part of their further attention to Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961). If the original agreement by Northwestern and HL&P to excluded dealings with other parties was permissible, it is immaterial that these Defendants are now refusing to deal with TCA, whether pursuant to that contract or otherwise. This, in turn, was the exact issue considered by the Supreme Court in Tampa Electric: the antitrust legality of a public **[**50]** utility's contract with a local mining concern for all of its coal requirements at a local generating plant. Like the Court suspects will be a principle issue in the case at bar, the Tampa Electric court considered the proper standards to be applied in determining the size of the geographic market in which a contract allegedly restrains trade. Although the Supreme Court decided that case under § 3 of the Clayton Act, if the Defendants' arrangement passes muster by that standard it is necessarily valid under the narrower strictures of the Sherman Act. Id. at 335.

Finally, the parties are further ORDERED to file no further pleadings on any of the issues finally disposed of by this Order in this Court, including motions to reconsider and the like, with one exception. If the parties can present to the Court compelling and relevant new evidence or legal authority affecting an issue, which they could not through the exercise of due diligence have presented on original submission of this motion, the parties are invited to bring these to the Court's attention at the time designated above. Otherwise, the parties are instructed to seek any further relief to **[**51]** which they feel themselves entitled in the United States **[*1385]** Court of Appeals for the Fifth Circuit, as may be appropriate in due course.

IT IS SO ORDERED.

Done this 31st day of August, 1994, at Galveston, Texas.

SAMUEL B. KENT

UNITED STATES DISTRICT JUDGE

End of Document



Aa All Star Enters.

United States Bankruptcy Court for the Northern District of Ohio, Western Division

September 7, 1994, Decided ; September 7, 1994, Filed

Case No. 94-3136 (Related Case: 94-31962)

Reporter

173 B.R. 343 *; 1994 Bankr. LEXIS 1446 **

In Re: AA All Star Enterprises, Inc., Debtor; AA All Star Enterprises, Inc., Plaintiff v. Ameritech Publishing, Inc., Defendant

Core Terms

advertisement, preliminary injunction, antitrust, monopoly, yellow pages, injunction, appliance, lawsuit, repair, publish

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN1[] Injunctions, Preliminary & Temporary Injunctions

As stated by the United States Court of Appeals for the Sixth Circuit, there are four factors particularly important in determining whether a preliminary injunction is proper: (1) the likelihood of success on the merits; (2) whether injunction will save the plaintiff from irreparable injury; (3) whether the injunction would harm others; and (4) whether the public interest would be served by the injunction.

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

HN2[] Monopolies & Monopolization, Attempts to Monopolize

Illegal monopolization under § 2 of the Sherman Act has two distinct elements: (1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > 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

HN3 Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

For purposes of the "refusal to deal" area of **antitrust law** under § 2 of the Sherman Act, there exist two conceptually similar lines of cases which impose a duty to deal upon a monopolist. The first is a straightforward "intent" test, which states that a business is free to deal with whomever it pleases so long as it has no purpose to create or maintain a monopoly. There also exists a second, related line of cases which has been styled as promulgating the "bottleneck" theory of **antitrust law**. Under this approach, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it. In theory, the distinction between the intent theory and the bottleneck theory is that the former focuses on the monopolist's state of mind while the latter examines the detrimental effect on competitors.

Judges: **[**1]** Speer

Opinion by: RICHARD L. SPEER

Opinion

[*343] MEMORANDUM OPINION AND DECISION

This cause comes before the Court upon Plaintiffs Verified Complaint For Temporary And Permanent Mandatory Injunction, Motion For Preliminary (Affirmative) Injunction, Motion For Emergency Hearing, Supplemental Brief In Support of Plaintiffs Motion For Preliminary Injunction, and Reply Brief; and Defendant's Memorandum in Opposition to Plaintiffs Motion for Preliminary Injunction, Supplemental Memorandum, and Second Supplemental Memorandum. At the Hearing, the parties were afforded the opportunity to present evidence and arguments they wished the Court to consider in reaching its decision. This Court has reviewed the arguments of counsel, exhibits presented as well as the entire record in the case. Based upon that review, and for the following reasons, the Court finds that the Plaintiffs Motion for Preliminary Injunction should be Denied.

FACTS

Plaintiff/Debtor AA All Star Enterprises, Inc. (hereafter "All Star") is an Ohio corporation engaged in the business of, among other things, appliance repair. On August 10, 1994, Plaintiff filed a voluntary Chapter 11 petition with this Court. On August 18, 1994, Plaintiff filed a **[**2]** Verified Complaint For Temporary and Permanent Injunction, initiating the present case. On that same day, Plaintiff filed a Motion For Emergency **[*344]** Hearing, along with a Motion For Preliminary Injunction, asking this Court to direct Defendant Ameritech Publishing Inc. (hereafter "Ameritech") to publish All Star's advertisement in its commercial telephone advertising directory, commonly known

as the "Yellow Pages". The basis for Plaintiffs claim is that Ameritech's refusal to publish its advertisement will cause irreparable harm to All Star, which obtains almost all of its business from yellow pages advertising, according to the affidavit of Patrick Mayberry, the President of All Star.

An Emergency Hearing was held on August 19, 1994. At that Hearing it was revealed by Ameritech that the basis for its refusal to publish All Star's advertisement is that All Star has not paid approximately One Hundred Seventy-seven Thousand Nine Hundred Thirty-three Dollars (\$ 177,933.00) for previous Yellow Page advertisements. Of this amount, approximately Eighty-three Thousand Four Hundred Sixty-seven Dollars (\$ 83,467.00) related to advertisements displayed in the 1992-93 Yellow Pages editions for Toledo, **[**3]** Akron, and Indianapolis. The amounts relating to the 1992-93 can be broken down further, into approximately Forty-nine Thousand Three Hundred Ninety-two Dollars (\$ 49,392.00) for the Toledo advertisement, Eighteen Thousand Five Hundred Eighty-five Dollars (\$ 18,585.00) for Akron, and Fifteen Thousand Four Hundred Ninety Dollars (\$ 15,490.00) for Indianapolis. The 1993-94 unpaid advertisements which were run in Toledo and Indianapolis only, totaled approximately Ninety-four Thousand Four Hundred Sixty-six Dollars (\$ 94,466.00). These figures were not disputed by All Star.

All Star's justification for not paying these claims relates back to two lawsuits presently pending in state court between itself and Ameritech. The first action appears to be for breach of contract. It appears that All Star expected Ameritech to display its ad first in the 1992-93 Toledo Yellow Pages titled listing. Instead they were placed second. This was the only advertisement alleged to be misplaced. All Star's only explanation for not paying for any of the other ads is that they expect a judgment against Ameritech from these lawsuits, and the moneys owed could simply be subtracted from the judgments.

The second **[**4]** action is an antitrust lawsuit against Ameritech under Section 2 of the Sherman Act for Ameritech's refusal to publish any further advertisements without payment on the previous ones. In that action, All Star alleges that the operation of the Yellow Pages was in effect a monopoly for Ameritech, and as such Ameritech must provide equal access to services for all. It is on the basis of this suit that All Star seeks a Preliminary Injunction.

DISCUSSION

The issue presented in this case is whether this Court should grant a Preliminary Injunction as requested by All Star on the basis of All Star's pending Antitrust action. For the reasons discussed below, the Court will deny All Star's request for Preliminary Injunction.

HN1 As stated by the 6th Circuit Court of Appeals, there are four factors particularly important in determining whether a preliminary injunction is proper:

- (1) the likelihood of success on the merits,
- (2) whether injunction will save the plaintiff from irreparable injury,
- (3) whether the injunction would harm others; and
- (4) whether the public interest would be served by the injunction.

In re: [De Lorean Motor Company, 755 F.2d 1223 \(1985\)](#). **[**5]**

For the reasons discussed below, this Court finds that All Star has failed to show a likelihood of success on the merits, and will thus deny its Motion. The other factors listed above need not be discussed in detail. However, it should be noted that Plaintiff has also made no showing that the injunction would harm others or society, other than the bare allegation that All Star may be forced out of business, and the result would harm competition in the

appliance repair market. There has been no showing that this market would be non-competitive without the presence of All Star, or that any type of monopoly would result.

[*345] The law in the area of antitrust under Sherman Act has been summarized by the United States Supreme Court in [United States v. Grinnell Corp.](#) [384 U.S. 563, 570, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 \(1966\)](#). In that case the Supreme Court noted that [HN2](#) illegal monopolization under Section 2 of the Sherman Act has two distinct elements: 1) 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 [**6] a superior product, business acumen, or historical accident." [384 U.S. at 570-71](#).

In the case at bar, All Star must make a reasonable showing that Ameritech's control of the Yellow Pages is a monopoly in the "relevant market" in order to prevail in its antitrust action. Though this Court does not hereby hold that All Star has made this showing, there are several cases wherein the Yellow Pages has been inferred to possess monopoly power in certain instances. See [Directory Sales Management v. Ohio Bell Telephone Company](#), [833 F.2d 606 \(1987\)](#); v. [GTE Directories Corporation Ad-Vantage Telephone Directory Consultants, Inc.](#), [849 F.2d 1336 \(1987\)](#); [Yellow Pages Consultants Inc. v. GTE Directories Corporation](#), [951 F.2d 1158 \(1991\)](#). The Court will assume, arguendo, that monopoly power exists as a basis for the analysis of the value of All Star's claim.

[HN3](#) The "refusal to deal" area of [antitrust law](#) under Section 2 of the Sherman Act, has been succinctly stated by the 6th Circuit in [Byars v. Bluff City News Company](#), [609 F.2d 843 \(1979\)](#). [**7] In [Byers](#), the Court explained:

There exist two conceptually similar lines of cases which impose a duty to deal upon a monopolist. The first is a straightforward 'intent' test which originated from Dicta in [United States v. Colgate & Co.](#), [supra](#), 250 U.S. at 307, 39 S.Ct. at 468 where the Court stated that a business is free to deal with whomever it pleases so long as it has no purpose to create or maintain a monopoly'.

There also exists a second, related line of cases which has been styled as promulgating the 'bottleneck theory of [antitrust law](#).' Under this approach, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it.

In theory, the distinction between the 'intent' theory and the 'bottleneck' theory is that the former focuses on the monopolist's state of mind while the latter examines the detrimental effect on competitors. [Id. at 855-856](#).

In the case at bar, neither the "intent" theory nor the "bottleneck theory" apply to Ameritech's refusal to deal. For the intent theory to apply, All Star would need to show Ameritech's intent was to capture or maintain [**8] a monopoly. All Star only alleges that the actions of Ameritech would harm competition in the appliance repair market because they will be forced out of business. Ameritech does not compete, nor to this Court's knowledge seek to compete, in the Appliance repair market. Thus, their goal, or "intent", is not to monopolize. Rather, they appear only to wish to refrain from doing business with a client who has not paid its bills. This constitutes a valid business justification.

All Star also claims that Ameritech's purposes for their refusal to deal are improper. All Star argues that Ameritech is simply refusing to deal with a client that has instituted a lawsuit against them, and who has not paid them on the basis of the disputed claim. While this argument could have merit to the extent of the disputed claim of the first lawsuit concerning the amount owed for an allegedly misplaced ad in Toledo in 1992-93, it does not have merit concerning the other late payments. The disputed claim amounts to only Forty-nine Thousand Three Hundred Ninety-two Dollars (\$ 49,392.00) of the total One Hundred Seventy-seven Thousand Nine Hundred Thirty-three Dollars (\$ 177,933.00) which is currently due. Further, [**9] Ameritech has not flatly refused to deal. They have offered to publish All Star's add if One Hundred Thousand Dollars (\$ 100,000.00) of the total past due amount were paid, and the current advertisement were paid for in advance. [*346] All Star's only counter argument is that it intends to offset any balances due from the judgment it will receive from its two lawsuits. From these facts, this Court determines that All Star has not demonstrated that Ameritech could have an intent to monopolize.

A similar result is reached under the "bottleneck" theory, where the emphasis is upon the detrimental effect on competition. Again, there is no basis to believe that the appliance repair market will in any way suffer absent All Star. Further, because Ameritech has not been shown to engage in the appliance repair market, or stand to gain in any other way from All Star's failing, there is no basis to show any abuse of monopoly power. Thus, All Star has failed to show that it has a significant likelihood of success on the merits of its antitrust claim against Ameritech.

A similar holding was reached by the court in [Langenderfer, et al. v. S.E. Johnson Co., et al.](#), 917 F.2d 1413 (1990). **[**10]** Of the many issues presented in that case, one dealt with a small paving and excavating business that claimed the defendants, who were large road construction companies, violated antitrust laws for refusing to sell them stone, sand and asphalt which they depended upon in certain locations. [Id. at 1423](#). The plaintiffs claimed that the reason they were cut off was for assisting another party in another antitrust action against the defendant. [Id. at 1424](#). This is similar to the case herein, where the Plaintiff claims that Ameritech's refusal to deal is motivated by other litigation. Also similar to the case at bar, the plaintiff in [Langenderfer](#) was "consistently overdue" in payments, and had shown credit difficulties. [Id. at 1425](#). The court held, "Essentially, it seems clear that defendants and [plaintiff] were engaged in a series of commercial disputes . . . The claim for refusal to deal is inextricably bound with the commercial and contract disputes between the parties, and was not proven to be a practice related to antitrust conduct." [Id. at 1426](#).

For the reasons **[**11]** stated above, this Court likewise holds that All Star's antitrust claim is inextricably bound with commercial disputes and does not have sufficient likelihood of success to enable or persuade this Court to grant its preliminary injunction and force Ameritech to deal with a client that has consistently not paid for the services it was rendered. Such a holding would allow clients of monopolies the right to subvert their payments by simply bringing tenuous claims against the monopoly, and demanding injunctions to force the continuation of services pending lengthy litigation. Such a holding would be contrary to public policy and belie common sense.

For all the foregoing reasons the Court decides to deny the All Star's Motion for Preliminary Injunction. In reaching the conclusion found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this opinion.

Accordingly, it is

ORDERED that the Plaintiffs Motion for Preliminary Injunction be, and is hereby, DENIED.

Dated: September 7, 1994

Richard L. Speer, United States Bankruptcy Judge



Armbruster Prods. v. Wilson

United States Court of Appeals for the Fourth Circuit

June 6, 1994, Argued ; September 12, 1994, Decided

No. 93-2427, No. 93-2428, No. 93-2429

Reporter

1994 U.S. App. LEXIS 24796 *; 1994-2 Trade Cas. (CCH) P70,721

ARMBRUSTER PRODUCTS, INCORPORATED, Plaintiff-Appellant, and JOSEPH M. ARMBRUSTER; JOSEPH G. KUMP, Plaintiffs, v. DAVID G. WILSON, Defendant-Appellee. JOSEPH M. ARMBRUSTER, Plaintiff-Appellant, and ARMBRUSTER PRODUCTS, INCORPORATED; JOSEPH G. KUMP, Plaintiffs, v. DAVID G. WILSON, Defendant-Appellee. JOSEPH G. KUMP, Plaintiff-Appellant, and ARMBRUSTER PRODUCTS, INCORPORATED; JOSEPH M. ARMBRUSTER, Plaintiffs, v. DAVID G. WILSON, Defendant-Appellee.

Notice: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Reported in Table Case Format at: 35 F.3d 555, 1994 U.S. App. LEXIS 32195.

Prior History: Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge. (CA-92-743-5-BR).

Disposition: AFFIRMED

Core Terms

pleadings, district court, estoppel, election, cases, servant, notice, affirmative defense, unfair, tortious interference, motion for judgment

LexisNexis® Headnotes

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Evidence > Judicial Notice > General Overview

Evidence > Judicial Notice > Adjudicative Facts > General Overview

Evidence > Judicial Notice > Adjudicative Facts > Public Records

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

[**HN1**](#) [down arrow] Adjudicative Facts, Judicial Records

When ruling on a motion for judgment on the pleadings, the district court is not limited to the pleadings themselves, but may take judicial notice of additional facts where appropriate. The judicially noticed fact, pursuant to [Fed. R. Evid. 201](#), must be (1) not subject to reasonable dispute and (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The court may take judicial notice of matters of public record, including notice of other state court pleadings. The consideration of judicially noticed facts does not transform a motion for judgment on the pleadings into a motion for summary judgment.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > Judgments > Pretrial Judgments > General Overview

[**HN2**](#) [down arrow] Pretrial Judgments, Judgment on Pleadings

To sustain a grant of judgment on the pleadings, the non-moving party must not be able to plead any facts that would support her claim.

Evidence > Authentication > General Overview

Evidence > Judicial Notice > General Overview

Evidence > Judicial Notice > Adjudicative Facts > General Overview

Evidence > Judicial Notice > Adjudicative Facts > Public Records

[**HN3**](#) [down arrow] Evidence, Authentication

The district court is permitted to take judicial notice of the pleadings in another state's action, a matter of public record. Although the complaint was not a certified copy of the original document, that technical failure of authentication is not fatal.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Waiver & Preservation of Defenses

[**HN4**](#) [down arrow] Defenses, Demurrs & Objections, Affirmative Defenses

[Fed. R. Civ. P. 8\(c\)](#) requires affirmative defenses to be raised in the pleadings; a failure to comply generally results in waiver. Where the matter is raised in the trial court in a manner that does not result in unfair surprise, however, technical failure to comply precisely with [Rule 8\(c\)](#) is not fatal. Waiver does not automatically follow from the failure of a defendant to raise an affirmative defense in the answer. The requirement of pleading an affirmative defense may be waived if evidence of the defense is admitted into the record without objection.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Torts > Vicarious Liability > Employers

HN5 [down] **Estoppel, Collateral Estoppel**

Florida has an established rule that a claimant having elected to sue the master and having obtained a collectible judgment against it cannot subsequently sue the servant for the same conduct. Since the master was only vicariously liable for the servant's conduct under the doctrine of respondeat superior, the plaintiff could not sue the servant after having elected to sue and having obtained a collectible judgment against the master. Florida courts have made clear that under this "election of actions theory" "the plaintiff may elect to treat the employee's act as that of the employer, or that of the employee himself, but not both.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN6 [down] **Estoppel, Collateral Estoppel**

Satisfaction of the prior judgment is not a requirement for estoppel under Florida law.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN7 [down] **Estoppel, Collateral Estoppel**

A litigant cannot revisit the same transaction or occurrence, already adjudicated between the same parties, by resort to a new legal theory in a separate lawsuit. To do so is an impermissible splitting of causes of action.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN8 [down] **Estoppel, Collateral Estoppel**

When the plaintiffs initially sued those defendants, it was incumbent upon them then to raise all available claims or demands for relief arising out of the alleged breach. Their failure to do so precludes subjecting those defendants to another successive action based on the same conduct.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

HN9 [down] **Trade Practices & Unfair Competition, Federal Trade Commission Act**

It is an accepted tenet of basic antitrust law that § 5 of the Federal Trade Commission Act, 15 U.S.C.S. § 45(a)(1), sweeps within its prohibitory scope conduct also condemned by § 1 of the Sherman Act. Proof of conduct violative of the Sherman Act is proof sufficient to establish a violation of the North Carolina Unfair Trade Practices Act.

Counsel: Argued: Roy Wilson Day, Jr., DAY & WHITE, P.A., Raleigh, North Carolina, for Appellants.

Argued: David A. Harlow, MOORE & VAN ALLEN, Durham, North Carolina, for Appellee.

On Brief: Joseph H. Nanney, Jr., MOORE & VAN ALLEN, Durham, North Carolina; Anthony M. Lorusso, Philip X. Murray, LORUSSO & LOUD, Boston, Massachusetts, for Appellee.

Judges: Before ERVIN, Chief Judge, WIDENER, Circuit Judge, and JACKSON, United States District Judge for the Eastern District of Virginia, sitting by designation. Judge Ervin wrote the opinion, in which Judge Widener and Judge Jackson joined.

Opinion by: ERVIN

Opinion

OPINION

ERVIN, Chief Judge:

Armbruster Products, Inc., Joseph M. Armbruster, and Joseph G. Kump (collectively, "Armbruster") brought this action in diversity against David G. Wilson in the United States District Court for the Eastern District of North Carolina on November 8, 1992, alleging [*2] tortious interference with contract, tortious interference with business relationship, wrongful interference with prospective advantage, and unfair trade practices under N.C.G.S. §§ 75-1.1 et seq. Wilson filed his Answer on January 4, 1993. Wilson later filed a Motion for Judgment on the Pleadings on August 20, 1993, seeking dismissal of the suit. District Judge Earl Britt granted Wilson's motion on October 4, 1993.

The district court found that a prior suit brought in Florida state court by Armbruster against Wilson and Wilson's employer, Fasco Industries, Inc., precluded the present suit. In the Florida suit, Wilson was dismissed for lack of personal jurisdiction. A final judgment was entered against Fasco in the amount of \$ 1.3 million in favor of Armbruster Products, Inc. and in the amount of \$ 200,000 in favor of Joseph M. Armbruster. That judgment is currently on appeal in the Florida courts. Armbruster appeals the district court's grant to Wilson of judgment on the pleadings. For the reasons set forth below, we affirm the district court's decision.

I.

Armbruster Products, Inc. is a Florida corporation. In 1980, Armbruster entered a license agreement with Fasco, a Delaware corporation [*3] with its principal place of business in North Carolina, permitting Fasco to manufacture and sell a power blower known as the "Power Cat" on which Armbruster held a patent. Wilson is president of Fasco's Consumer Products Division.

In 1990, Armbruster developed a portable air circulation device known as the "Blue Blower." Armbruster entered into a contract with Black & Decker in early 1991 whereby Black & Decker would manufacture, market, and sell the device. Under the terms of the contract, Armbruster would receive \$ 1.3 million initially and up to \$ 10 million in royalties.

In March 1991, Wilson told representatives of Black & Decker that Armbruster had no right to sell a license for the Blue Blower because the device was covered by the agreement between Armbruster and Fasco regarding the Power Cat. Wilson made further representations that Armbruster and its agents were untrustworthy. As a result of these events, Black & Decker terminated its arrangement with Armbruster for the manufacture and sale of the Blue Blower.

Armbruster alleges that Wilson made these representations knowing that they were false with the intent to interfere with the business relationship between Armbruster [*4] and Black & Decker. It filed suit in Florida state court against Fasco and Wilson in the spring of 1991, alleging tortious interference with contract, intentional interference with business relationship, libel and slander, and antitrust violations. The basis of Fasco's liability was alleged to be "that the acts of the division president of the Defendant corporation are such that they are imputed to the corporation and are, in fact, acts of the corporation" J.A. 14. Wilson was dismissed from the Florida suit for lack of personal jurisdiction. Armbruster obtained a judgment against Fasco for over \$ 1.3 million dollars. Fasco has posted a bond with the Florida court for \$ 2,108,558.75, which will be used to satisfy any judgment against it following appeal.

Armbruster then brought the instant action against Wilson in the Eastern District of North Carolina alleging tortious interference with contract, tortious interference with business relationship, wrongful interference with prospective advantage, and unfair trade practices. Upon motion by Wilson, the district court found that the Florida action precluded this suit.

II.

Armbruster alleges that the district court improperly considered [*5] facts outside the pleadings when ruling on Wilson's motion for judgment on the pleadings; by doing so, the court impermissibly transformed the motion into one for summary judgment without giving the parties notice and an opportunity to respond. Armbruster further argues that because the motion was in fact treated as a motion for summary judgment, the Florida complaint upon which the court relied was not appropriately authenticated and therefore should not have been considered.

HN1[] When ruling on a motion for judgment on the pleadings, the district court is not limited to the pleadings themselves, but may take judicial notice of additional facts where appropriate. *Southmark Prime Plus, L.P. v. Falzone*, 776 F. Supp. 888, 892 (D. Del. 1991); *J.M. Blythe Motor Lines Corp. v. Blalock*, 310 F.2d 77, 78-9 (5th Cir. 1962). The judicially noticed fact, pursuant to *Fed. R. Evid. 201*, must be (1) not subject to reasonable dispute and (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *Falzone*, 776 F. Supp. at 892. The court may take judicial [*6] notice of matters of public record, *United States v. Wood*, 925 F.2d 1580 (7th Cir. 1991), including notice of other state court pleadings, *In re Phillips*, 593 F.2d 356, 357 (8th Cir. 1979). The consideration of judicially noticed facts does not transform a motion for judgment on the pleadings into a motion for summary judgment. *Falzone*, 776 F. Supp. at 892. **HN2**[] To sustain a grant of judgment on the pleadings, the non-moving party must not be able to plead any facts that would support her claim. *Wood*, 925 F.2d at 1581; *Blalock*, 310 F.2d at 78-79; *Falzone*, 776 F. Supp. at 891.

The district court below granted judgment on the pleadings on the basis of the pleadings themselves, the briefs submitted by counsel relating to the motion, and a copy of the Complaint filed in the Florida action that was attached to Wilson's motion. Armbruster complains that the court should not have considered the Complaint. We find that **HN3**[] the district court was permitted to take judicial notice of the pleadings in the Florida action, [*7] a matter of public record. Wilson's motion was not thereby transformed into a motion for summary judgment. Although the Complaint was not a certified copy of the original document, that technical failure of authentication is not fatal. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1551 (9th Cir. 1989). Armbruster does not challenge its accuracy. The district court considered no improper evidence in ruling on Wilson's motion.

III.

Armbruster claims that because Wilson did not raise the affirmative defense of estoppel by election in his Answer, he waived the defense.

Florida law contains some authority for the position that if the affirmative defense of estoppel by election is not raised in the pleadings, it is waived. *Law Offices of Harold Silver, P.A. v. Farmers Bank & Trust Co.*, 498 So. 2d 984, 986 (Fla. Dist. Ct. App. 1st Dist. 1986). See also, *Aufseher v. Aufseher*, 217 So. 2d 868, 869 (Fla. Dist. Ct. App. 3d Dist. 1969). However, "although state law defines the nature of defenses, . . . the Federal Rules of Civil Procedure provide the manner and time in which defenses [*8] are raised and when waiver occurs." *Lucas v. United States*, 807 F.2d 414, 417 (5th Cir. 1986).

HN4 [↑] [Federal Rule of Civil Procedure 8\(c\)](#) requires affirmative defenses to be raised in the pleadings; a failure to comply generally results in waiver. *Id.* "Where the matter is raised in the trial court in a manner that does not result in unfair surprise, however, technical failure to comply precisely with [Rule 8\(c\)](#) is not fatal." *Id.* "It is well established that waiver does not automatically follow from the failure of a defendant to raise an affirmative defense in the answer." *Wilkinson v. United States*, No. 91-1795, 1992 WL 188144, at * 3 (4th Cir. Aug. 7, 1992) (unpublished opinion). This court has found that the requirement of pleading an affirmative defense may be waived if evidence of the defense is admitted into the record without objection. *Caterpillar Overseas, S.A. v. Marine Transport Inc.*, 900 F.2d 714, 725 (4th Cir. 1990).

Here, Wilson raised the issue of estoppel by election in his motion for judgment on the pleadings. The motion urged "dismissing this action on the grounds that this action was previously tried [*9] by Plaintiffs in an action brought in Florida state court against Defendant's employer and, under Florida law, the previous action bars Plaintiffs from bringing this action." J.A. 102. The Florida complaint filed by Armbruster was attached to the motion. Wilson submitted a brief in support of that motion and Armbruster submitted a reply. Neither the brief nor the reply are part of the record before this court. Wilson contends, and Armbruster does not deny, that Armbruster responded to the motion on the merits without objecting to the submission of the complaint.

Under these circumstances, Armbruster cannot reasonably contend that it was unfairly surprised by the estoppel issue. Because there was no unfair surprise and because evidence of the defense was introduced without objection from Armbruster, Wilson did not waive the affirmative defense of estoppel by election.

IV.

Armbruster argues that the district court misapplied Florida law in determining that the prior suit precluded this action. Two theories Armbruster sets forth are (1)that the prior suit has no preclusive effect because the judgment has not been satisfied, and (2)that a recent Florida court of appeals case requires [*10] the abandonment of traditional Florida law on this issue.

HN5 [↑] Florida has an established rule that a claimant having elected to sue the master and having obtained a collectible judgment against it cannot subsequently sue the servant for the same conduct. [Phillips v. Hall](#), 297 So. 2d 136, 139 (Fla. Dist. Ct. App. 1st Dist. 1974). As a subsequent opinion explained, "since the master was only vicariously liable for the servant's [conduct] under the doctrine of respondeat superior, the plaintiff could not sue the servant after having elected to sue and having obtained a collectible judgment against the master." [Hinton v. Iowa Nat'l Mut. Ins. Co.](#), 317 So. 2d 832, 836 (Fla. Dist. Ct. App. 2d Dist. 1975), cert. denied, 328 So. 2d 842 (Fla. 1976). After reviewing approaches by other states to the issue, the *Hinton* court concluded that "the weight of authority is on the side of barring a plaintiff from relitigating his claim against the servant when a judgment has been entered in a prior suit brought against the master involving the same issues." *Id. at 837*. Florida courts [*11] have made clear that under this "election of actions theory" "the plaintiff may elect to treat the employee's act as that of the employer, or that of the employee himself, but not both." [Atlantic Cylinder Corp. v. Hetner](#), 438 So. 2d 922, 923 (Fla. Dist. Ct. App. 1st Dist. 1983), review denied, 447 So. 2d 885 (Fla. 1984).

A.

Armbruster claims that because in *Phillips*, *Hinton*, and *Hetner* the judgment against the master had been satisfied or tendered, that satisfaction is a requirement before estoppel will apply. Armbruster finds further support for his position in *Mitchell v. Edge*, 598 So. 2d 125 (Fla. Dist. Ct. App. 2d Dist. 1992). In that case, the court found that the *Phillips* line of cases did not apply because the master had refused to satisfy the judgment, which finding Armbruster interprets to indicate that satisfaction is required before estoppel applies.

In fact, the cases require only that a "collectible" judgment be entered against the master. [Phillips](#), 297 So. 2d at 139; [Hinton](#), 317 So. 2d at 836. The [*12] *Phillips* court clearly stated that

the true foundation for the nonliability of the present defendant is not found in the doctrine of estoppel by judgment, nor in that of satisfaction obtained by the plaintiff from some other party. The plaintiff is debarred from maintaining the present suit because he had and has exercised an election. There was a single wrongful act, and it was the plaintiff's privilege to treat it as that of the actor or as that of the master.

297 So. 2d at 138 (quoting *McNamara v. Chapman*, 81 N.H. 169, 123 A. 229, 31 A.L.R. 188 (1923)). As the *Hinton* court clarified, "if the first judgment were not *collectible*, the plaintiff could sue the [servant] for a sum not to exceed the amount of the first judgment." 317 So. 2d at 838 n.2 (emphasis added). HN6[ Satisfaction of the prior judgment is not a requirement for estoppel under Florida law.

Here, there has been no contention that the judgment against Fasco is uncollectible. In fact, Fasco has posted bond in the amount of \$ 2,108,558.75 with the Florida court, and if Armbruster prevails on [*13] appeal in the Florida action, the bond will be used to satisfy the judgment. The district court correctly found that estoppel is appropriate under these circumstances.

B.

Armbruster next argues that the recent *Mitchell* case requires the abandonment of the *Phillips* line of cases. *Mitchell* does cast doubt on the traditional master-servant estoppel cases. The Florida appellate court, however, stopped short of deciding that those cases were no longer good law.

In *Mitchell*, the master refused to satisfy the judgment against it. The judgment was uncollectible. Therefore, under the *Phillips* cases, plaintiff was not estopped from pursuing the servant. The *Mitchell* court noted that had the judgment been satisfied, the servant "perhaps would have a viable defense based on the cases" in the *Phillips* line. *Mitchell*, 598 So. 2d at 127. The court went on however, to state that the more modern version of the Restatement (Second) of Judgments § 49 (1982) provides that where a person suffers injury as a result of acts of two or more persons, he has a claim against each of them. *Id.* at 128. The court indicated [*14] that the new provisions in the revised Restatement may make the traditional rules obsolete. The court concluded, however, that

because *Hinton* is support for our holding under the circumstances of this case, we are not now required to decide whether the more modern version of the rule as stated in the Restatement (Second) of Judgments is now the "weight of authority" and should cause us to recede from the other holdings in *Hinton* that appear contrary to the Restatement rule.

Id. *Mitchell* did not decline to follow the *Phillips* cases. Furthermore, *Mitchell* is not a decision from the Florida Supreme Court. The Florida Supreme Court denied review of both *Hinton* and *Hetner*. There is no indication that it would choose this case to overrule the well established Florida rule. Because *Phillips* is controlling, the district court correctly determined that Armbruster is estopped from bringing suit against Wilson.

V.

Armbruster's final argument is that even if estoppel prevents relitigation of the claims brought in the Florida suit, Armbruster should be permitted to try its claim under the North Carolina Unfair Trade Practices Act because that claim was not [*15] brought in the Florida action. HN7[ A litigant, however, "cannot revisit the same transaction or occurrence, already adjudicated between the same parties, by resort to a new legal theory in a separate lawsuit. To do so is an impermissible splitting of causes of action." *Florida Patient's Compensation Fund v. St. Paul Fire & Marine Ins. Co.*, 535 So. 2d 335, 338 (Fla. Dist. Ct. App. 4th Dist. 1988).

HN8[ When the plaintiffs initially sued those defendants, it was incumbent upon them then to raise all available claims or demands for relief arising out of the alleged breach. Their failure to do so precludes subjecting those defendants to another successive action based on the same conduct.

Greenstein v. Greenbrook, Ltd., 443 So. 2d 296, 297 (Fla. Dist. Ct. App. 3d Dist. 1983). Because Armbruster's claim under the North Carolina statute arises from the same conduct charged in Armbruster's first suit, Armbruster cannot now relitigate the same occurrence under a new legal theory.

Claims under the North Carolina statute sound in antitrust. In fact,

provisions of the North Carolina act are reproduced verbatim from § 5 of the Federal [¶16] Trade Commission Act, [15 U.S.C. § 45\(a\)\(1\)](#), and . . . [HN9](#)[↑] it is an accepted tenet of basic **antitrust law** that § 5 of the Federal Trade Commission Act sweeps within its prohibitory scope conduct also condemned by § 1 of the Sherman Act. . . . We thus hold that proof of conduct violative of the Sherman Act is proof sufficient to establish a violation of the North Carolina Unfair Trade Practices Act.

Itco Corp. v. Michelin Tire Corp., Com. Div., 722 F.2d 42, 48 (4th Cir. 1983). Armbruster's North Carolina claim is clearly one for anti-trust violations, similar to those brought in the Florida action. Armbruster could have brought the North Carolina claim in the Florida suit, but did not do so. The North Carolina statute does not provide Armbruster a new forum to litigate the same events. The decision of the district court is affirmed.

AFFIRMED

End of Document



Stelwagon Mfg. Co. v. Tarmac Roofing Sys.

United States District Court for the Eastern District of Pennsylvania

September 12, 1994, Decided ; September 12, 1994, Filed; September 13, 1994, Entered

CIVIL ACTION No. 92-1073

Reporter

862 F. Supp. 1361 *; 1994 U.S. Dist. LEXIS 12812 **; 1994-2 Trade Cas. (CCH) P70,715

STELWAGON MANUFACTURING COMPANY, Plaintiff, v. TARMAC ROOFING SYSTEMS, INC., Defendant.

Core Terms

sales, damages, new trial, distributorship, roofing, matter of law, remittitur, witnesses, argues, statute of frauds, terms, price discrimination, defense motion, good faith, calculated, antitrust, parties, custom

Counsel: **[**1]** For STELWAGON MANUFACTURING COMPANY, Plaintiff: DAVID A. GRADWOHL, PELINO & LENTZ, PHILA, PA. PATRICK J. DORAN, PELINO & LENTZ, PHILA, PA.

For TARMAC ROOFING SYSTEMS, INC., Defendant: SCOTT R. SHEPHERD, DILWORTH, PAXSON, KALISH & KAUFFMAN, PHILA, PA.

Judges: ROBRENO

Opinion by: EDUARDO C. ROBRENO

Opinion

[*1363] MEMORANDUM

EDUARDO C. ROBRENO, J.

SEPTEMBER 12, 1994

This antitrust and breach of contract action was tried to a jury, which rendered a verdict in plaintiff's favor. Post-trial motions were subsequently filed, with defendant claiming various points of legal and trial error. For the reasons herein stated, the defendant's motion for judgment as a matter of law and for a new trial will be denied, but its motion for remittitur will be granted. ¹

I. BACKGROUND

Stelwagon Manufacturing Company ("Stelwagon") is a wholesale distributor of roofing and related materials.² In early 1988, Stelwagon entered **[**2]** into an oral, semi-exclusive distributorship agreement with Tarmac Roofing

¹ Given the remittitur, the Court will continue its consideration of Stelwagon's motion for attorney's fees pending final resolution of this matter.

² Notwithstanding the company's name, Stelwagon is not a manufacturer. See Tr. of 12/14/93, at 52 (testimony of John R. Keenan).

Systems, Inc. ("Tarmac"), for the distribution of Tarmac's modified asphalt products ("MAPs") in the Philadelphia area. MAPs are rolled roofing products used to cover flat roofs, and are sold to roofing contractors. See Tr. of 12/14/93, at 56-57 (Keenan). Stelwagon sold Tarmac-brand MAPs in 1988 and 1989 without incident in the relationship and with steadily improving results. In early 1989, Stelwagon became aware of sales made to its competitors in violation of the agreement. Some of these sales were also made at preferential prices. Stelwagon complained to Tarmac, and eventually brought the instant action, alleging breach of contract as well as price discrimination in violation of federal **antitrust law**. See [15 U.S.C. §§ 13\(a\)](#), [15](#).

[*1364] Defendant moved at the close of plaintiff's [**3] case, and again at the close of all the evidence, for judgment as a matter of law pursuant to [Federal Rule of Civil Procedure 50\(a\)\(1\)](#)³ [**4] on all counts of plaintiff's complaint. Both of these motions were denied and the case was submitted to the jury, which rendered a verdict in plaintiff's favor on the breach of contract and price discrimination claims, awarding plaintiff \$ 1,500,000 and \$ 772,000 respectively. The Court trebled the antitrust damages, see [15 U.S.C. § 15](#), and entered judgment in plaintiff's favor in the amount of \$ 3,816,000. Defendant now renews its motion, and, in the alternative, requests a new trial or remittitur. See [Fed. R. Civ. P. 50\(b\)](#), [59\(a\)](#).⁴

II. DISCUSSION

A. Legal Standards

The discarding of a jury verdict and entry of judgment as a matter of law in favor of the party who failed to prevail at trial is not lightly done. The evidence in the case must be viewed in the light most favorable to the successful party, and every reasonable inference therefrom must be drawn in that [**5] party's favor. See *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 190 (3d Cir. 1992), cert. denied, 122 L. Ed. 2d 677, U.S. , 113 S. Ct. 1285 (1993); *Fireman's Fund Ins. Co. v. Videofreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976) ("The trial judge, in his review of the evidence, . . . must expose the evidence to the strongest light favorable to the party against whom the motion is made and give him the advantage of every fair and reasonable inference."), cert. denied, 429 U.S. 1053, 50 L. Ed. 2d 770, 97 S. Ct. 767 (1977). It is impermissible to question the credibility of witnesses, or to weigh conflicting evidence as would a fact-finder. See *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691 (3d Cir. 1993). Applying these precepts, a jury verdict can be displaced by judgment as a matter of law only if "the record is 'critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief.'" *Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3d Cir. 1980) [**6] (quoting *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969)), cert. denied, 450 U.S. 959 (1981).

Similar concerns restrict the Court's discretion in ordering a new trial pursuant to [Federal Rule of Civil Procedure 59](#). "Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge

³ [Federal Rule of Civil Procedure 50\(a\)\(1\)](#) provides that:

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

⁴ [Rule 50\(b\)](#) reads, in relevant part, as follows:

Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. . . .

[Rule 59\(a\)](#) reads, in relevant part, as follows:

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States

862 F. Supp. 1361, *1364 (U.S. Dist. LEXIS 12812, **6

takes over, if he does not usurp, the prime function of the jury as the trier of the facts." [Lind v. Schenley Indus., Inc., 278 F.2d 79, 90](#) (3d Cir.) (in banc), cert. denied, 364 U.S. 835, 5 L. Ed. 2d 60, 81 S. Ct. 58 (1960). A new trial on the basis that the verdict is against the weight of the evidence can be granted "only where a miscarriage of justice would result if the verdict were to stand." [Klein v. Hollings, 992 F.2d 1285, 1290 \(3d Cir. 1993\)](#). Where the proffered basis is trial error, "the court's inquiry . . . is twofold. It must first determine whether an error was made in the course of the trial, and then must determine whether that error was so prejudicial that [**7] refusal to grant a new trial would be inconsistent with substantial justice." [Farra v. Stanley-Bostitch, Inc., 838 F. Supp. 1021, 1026 \(E.D. Pa. 1993\)](#) (quotation [*1365] marks omitted), aff'd without op., 992 F.2d 1285, 1290 (3d Cir. July 22, 1994); see [Fed. R. Civ. P. 61](#). An error in jury instructions must be so substantial that, viewed in light of the evidence in the case and the charge as a whole, "the instruction was capable of confusing and thereby misleading the jury." [Link v. Mercedes-Benz of N. Am., Inc., 788 F.2d 918, 922 \(3d Cir. 1986\)](#) (quoting [United States v. Fischbach & Moore, Inc., 750 F.2d 1183, 1195 \(3d Cir. 1984\)](#)).

B. Breach of Contract Claim

1. Failure to establish the terms of the contract by clear and precise evidence

The parties agree that, under Pennsylvania law,⁵ the terms of an oral contract must be established by clear and precise evidence in order to be enforceable.⁶ [**10] [Richardson v. John F. Kennedy Memorial Hosp., 838 F. Supp. 979, 987-88 \(E.D. Pa. 1993\)](#); [Gorwara v. AEL Indus., Inc., 784 F. Supp. 239, 242 \(E.D. Pa. 1992\)](#). [**8] The clear and precise standard, however, does not require that there be undisputed evidence in the record. Rather, "once it is determined that the parties intended to form a binding agreement, certainty of terms is important only as a 'basis for determining the existence of a breach and for giving an appropriate remedy.'" [Browne v. Maxfield, 663 F. Supp. 1193, 1198 \(E.D. Pa. 1987\)](#) (quoting *Restatement (Second) of Contracts* § 33). "Exact precision" is not required. [Richardson, 838 F. Supp. at 988](#). The jury is to determine the terms and the parties' understanding thereof, viewed in light of all the surrounding circumstances. See [Lucacher v. Kerson, 355 Pa. 79, 48 A.2d 857, 857-58 \(Pa. 1946\)](#); [McCormack v. Jermyn, 351 Pa. 161, 40 A.2d 477, 479-80 \(Pa. 1945\)](#); [Kirk v. Brentwood Manor Homes, Inc., 191 Pa. Super. 488, 159 A.2d 48, 51 \(Pa. Super. 1960\)](#). At trial, testimony concerning the distributorship agreement was offered by numerous witnesses, including John Keenan, plaintiff's vice-president [**9] and general manager, and Gordon Amhaus, former vice-president of sales and marketing at Tarmac.⁷ That there were conflicts or

⁵ In resolving Stelwagon's breach of contract claim, state law applies. See [Erie R.R. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 \(1938\)](#). Neither party contests that Pennsylvania law applies.

⁶ Although plaintiff has agreed that this is the evidentiary standard it must meet, the Court's review of the case law does not support this conclusion. Although a number of cases decided by the federal courts sitting in Pennsylvania have adopted this characterization of Pennsylvania law, see, e.g., [Richardson v. John F. Kennedy Memorial Hosp., 838 F. Supp. 979, 987-88 \(E.D. Pa. 1993\)](#); [Kassab v. Ragnar Benson, Inc., 254 F. Supp. 830, 832 \(W.D. Pa. 1966\)](#), it appears that the case upon which this line of precedent is based, [Miller v. Wise, 33 Pa. Super. 589, 593 \(1907\)](#), dealt not with a garden-variety oral contract, but with an oral contract that allegedly modified a written agreement. See [Pellegrine v. Luther, 403 Pa. 212, 169 A.2d 298, 299 \(Pa. 1961\)](#) ("The law is well settled that a written agreement can be modified by a subsequent oral agreement provided the latter is based upon a valid consideration and is proved by evidence which is clear, precise and convincing."). The clear and precise standard has also been applied when fraud is claimed in the formation of a contract, see [Krause v. Great Lakes Holdings, Inc., 387 Pa. Super. 56, 563 A.2d 1182, 1187 \(Pa. Super. 1989\)](#), appeal denied, [574 A.2d 70 \(Pa. 1990\)](#), or when an oral contract creating or modifying a will is sought to be enforced, see [Kelly v. Sheehan, 378 Pa. 33, 105 A.2d 706, 707 \(Pa. 1954\)](#); [Hatbob v. Brown, 394 Pa. Super. 234, 575 A.2d 607, 612 \(Pa. Super. 1990\)](#). Also significant is the omission of this standard in the Pennsylvania Suggested Standard Civil Jury Instructions, which highlight that oral contracts are just as enforceable as written ones, see Pa. SSJI (Civil) § 15.01, but fail to mention the clear and precise standard. Thus, the heightened standard of clear and precise evidence would appear to be applicable to situations where a party seeks to modify a written document with a subsequent oral contract, not for generally establishing an oral contract.

Since both parties have argued that the clear and precise standard applies, and since plaintiff's proof was sufficient to go to the jury based on the higher standard, the Court will apply the clear and precise standard in this case.

contradictions in the testimony is of no moment, since resolution of such inconsistencies is peculiarly the province of the jury. The testimony offered supports Stelwagon's version of the contract between the parties: an exclusive distributorship within Philadelphia, with the exception of Roofer's Mart, a pre-existing distributor. [*1366] There is no basis for entry of judgment as a matter of law in favor of defendant.

2. Failure to establish damages

Tarmac argues that Stelwagon also failed to introduce evidence of damages resulting from the breach of contract. Stelwagon argues that it introduced sufficient evidence to allow the jury to calculate its lost profits due to the breach of the distributorship agreement. Stelwagon may recover lost profits "if there is (1) evidence to establish the damages with reasonable certainty; (2) they were the proximate consequence of the wrong; [and] (3) they were reasonably foreseeable." [Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 680 \(3d Cir. 1991\)](#) (citing [Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 464 A.2d 1243, 1258 \(Pa. Super. 1983\)](#)). Stelwagon offered at trial the expert testimony of Dr. Martin Perry, who opined on Tarmac's sales of MAPs to one [*11] of Stelwagon's competitors, Allied Roofing, as well as on Stelwagon's average profit margin. See Tr. of 12/16/93, at 77-79 (testimony of Dr. Martin Perry). Sales within Philadelphia in violation of the distributorship agreement represented lost volume to Stelwagon. This was sufficient evidence from which the jury could conclude that, to the extent Allied sold Tarmac-brand MAPs in Philadelphia, Stelwagon suffered a loss of profits.⁸

3. Contract was barred by the Statute of Frauds

Neither party contests [*12] the applicability of Article Two of the Uniform Commercial Code, governing the sale of goods, to the distributorship agreement. See [13 Pa. Cons. Stat. Ann. §§ 2101-2725](#) (1984 & Supp. 1994); [Weilersbacher v. Pittsburgh Brewing Co., 421 Pa. 118, 218 A.2d 806, 807-08 \(Pa. 1966\)](#). Tarmac argues that the distributorship agreement alleged by Stelwagon violates the statute of frauds because there is no writing and the contract does not come within any of the statute's exceptions. See [13 Pa. Cons. Stat. Ann. § 2201](#). Specifically, Tarmac argues that judgment as a matter of law must be entered because waiver of the statute cannot be established by custom in the industry, there was no evidence of a prior course of dealing between the parties, and there was insufficient evidence of part performance. These contentions are without merit. As the Pennsylvania Superior Court held in [H.B. Alexander & Son, Inc. v. Miracle Recreation Equipment Co., 314 Pa. Super. 1, 460 A.2d 343 \(Pa. Super. 1983\)](#), custom and usage of trade can indicate that there has been a waiver of the statute of frauds' protection, [*13] see *id. at 345*. See also [Atlantic Paper Box Co. v. Whitman's Chocolates, 844 F. Supp. 1038, 1044-45 \(E.D. Pa. 1994\)](#). That there was no prior course of dealing between Stelwagon and Tarmac is irrelevant, since there was evidence in the record to support a conclusion that Tarmac waived the statute of frauds in line with the established industry course of dealing. See Tr. of 12/14/93, at 77-78 (Keenan); Tr. of 12/15/93, at 116-21 (Amhaus).

Likewise, the jury was correctly instructed on the performance exception to the statute of frauds. See [13 Pa. Cons. Stat. Ann. § 2201\(c\)\(3\)](#). Amhaus acknowledged that, as a Tarmac vice-president, he enforced the exclusivity provisions of the distributorship agreement. See Tr. of 12/15/93, at 124 (Amhaus); Tr. of 12/14/93, at 84-86 (Keenan). The argument that the performance exception only excepts the contract to the extent of actual performance is not apposite in the context of a distributorship agreement, where the parties are pledging to use their best efforts. Unlike the sale of discrete goods, upon which Article Two is originally grounded, a distributorship

⁷ At the time of the trial, Mr. Amhaus was employed by GS Roofing Products, Inc., a company that had purchased Tarmac's assets while the litigation was pending. See Tr. of 12/15/1993, at 97-98 (testimony of Gordon Amhaus).

⁸ In the alternative, Tarmac requests a new trial because Dr. Perry's opinion was improperly admitted and because the verdict was against the weight of the evidence. The former issue is taken up *infra*. As to the weight of the evidence argument, the liability verdict in Stelwagon's favor does not constitute "a miscarriage of justice." See [Klein, 992 F.2d at 1290](#). The amount of damages, however, is suspect, and forms the basis for the Court's remittitur, also discussed *infra*.

agreement cannot be readily segmented. Tarmac's [**14] conduct indicated the existence of an agreement, and it cannot claim inequity in being held to the full terms of the agreement it entered into. As Justice Musmanno penned in describing the role of the statute of frauds:

[*1367] The laudable purpose of this guardian of truth is to prevent frauds and perjuries. Occasionally, however, an embattled property owner or prospective purchaser of land, summons the statute to enforce a condition which does not seem to coincide with principles of honesty and fair dealing. In such cases the Courts should study the situation involved to make certain that the statute is not being used to perpetrate fraud and perjuries rather than prevent them.

Simplex Precast Indus., Inc. v. Biehl, 395 Pa. 105, 149 A.2d 121, 123 (Pa. 1959). Tarmac's motion for judgment as a matter of law on the statute of frauds issue must be denied.⁹

[**15]

4. Improper instruction on breach of duty of good faith

Tarmac argues that the jury was incorrectly instructed that it could award Stelwagon damages if it found that Tarmac breached the duties of good faith and fair dealing and Stelwagon suffered damages therefrom, citing to Creeger Brick & Building Supply Inc. v. Mid-State Bank & Trust Co., 385 Pa. Super. 30, 560 A.2d 151, 154 (Pa. Super. 1989). Tarmac claims that the Court's charge allowed the jury to award damages without finding that an express term of the contract was breached. This argument is unavailing for two reasons. First, given the Court's lowering, via remittitur, of the breach of contract damages to the specific amount of MAPs sold by Allied in violation of the express terms of the distribution agreement, i.e., in Philadelphia, no damages will be awarded for breach of the duties of good faith and fair dealing. Second, while the actual holding of *Creeger Brick* is that, with a few exceptions, Pennsylvania law does not recognize a duty of good faith in general contract law, see *id. at 153-54*, in this case, Article Two of the UCC expressly imposes such a duty on [**16] every contract for the sale of goods, see 13 Pa. Cons. Stat. Ann. §§ 1203, 2103, and thus this duty informs the performance of the instant contract's terms. See Seal v. Riverside Fed. Sav. Bank, 825 F. Supp. 686, 699 (E.D. Pa. 1993) ("The chief purpose of the good faith obligation is 'to enable enforcement of the contract terms in a manner consistent with the parties' reasonable expectations.'") (quoting Coxfam, Inc. v. AAMCO Transmissions, 1990 U.S. Dist. LEXIS 11838, Civ. A. No. 88-6105, 1990 WL 131064, at * 5 (E.D. Pa. Sept. 6, 1990)). In this case, Stelwagon introduced evidence of Tarmac's skirting the geographic limits of the distributorship agreement by selling to distributors that, while situated just outside of Philadelphia, sold their goods into Philadelphia. See Tr. of 12/14/93, at 113-14 (Keenan). Whether this conduct was consistent with the parties' reasonable expectations of performance was an issue for the jury to decide.¹⁰

[**17] C. Robinson-Patman Act Claim

Stelwagon argued that it suffered a second-line Robinson-Patman Act violation. A second-line injury "is characterized by price discrimination by a seller in sales to competing buyers." J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1526 (3d Cir. 1990), cert. denied, 499 U.S. 921, 113 L. Ed. 2d 246, 111 S. Ct. 1313 (1991); see FTC v. Fred Meyer, Inc., 390 U.S. 341, 348-49, 19 L. Ed. 2d 1222, 88 S. Ct. 904 (1968). Tarmac challenges Stelwagon's verdict on the Robinson-Patman claim, asking for judgment as a matter of law, or, in the alternative, a new trial. Because none of the arguments have merit, the motions will be denied.

⁹ Tarmac argues in the alternative that the failure to show a clear and unequivocal waiver and the Court's incorrect instruction on the performance exception demand a new trial. Tarmac also claims that the jury's verdict on the performance issue was against the weight of the evidence. The Court finds these arguments to be without merit.

¹⁰ Whether there was sufficient evidence to support the damages awarded is a different matter, one taken up below in the discussion of the motion for remittitur.

1. Failure to show harm to competition

"In order to establish a *prima facie* violation of section 2(a) of the [Robinson-Patman] Act, a plaintiff must demonstrate a reasonable possibility that a price difference may harm competition." *J.F. Feeser, 909 F.2d at 1531* (citing *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)). **[**18]** Tarmac argues that Stelwagon failed to present, as a matter of law, any evidence establishing harm to competition, either by showing a substantial price discrimination between competitors over time or by evidence of actual lost sales or profits. See *909 F.2d at 1535*; see also *FTC v. Morton Salt Co.*, 334 U.S. 37, 46-47, 92 L. Ed. 1196, 68 S. Ct. 822 (1948).

The record, however, contains evidence that would support a jury finding of harm to competition under either method. The testimony of Keenan, Amhaus, and two of Stelwagon's territorial managers supported a finding that Stelwagon was competing with Standard Roofing, which was receiving more favorable pricing than Stelwagon. See Tr. of 12/14/93, at 63-65 (Keenan); Tr. of 12/15/93, at 51-52 (Bannon); *id. at 79-80* (Quinn); *id. at 116-18* (Amhaus). Additionally, there was evidence that Celotex competed with Stelwagon, and that Celotex, which was characterized as a manufacturer, was in economic reality acting on the same distribution level as Stelwagon. **[**19]** See *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 552-55, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990); Tr. of 12/15/93, at 4-11 (Keenan) (testifying that Celotex had sold MAPs directly to a roofing contractor to which Stelwagon also sells); Tr. of 12/16/93, at 129-32 (testimony of Marlene E. Granitz) (testifying that Tarmac sometimes shipped Celotex-brand MAPs directly to distributors). Stelwagon also introduced the testimony of Dr. Perry and the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, see *Fed. R. Evid. 803(3)*; *J.F. Feeser, 909 F.2d at 1535 n.11*; *Kraft General Foods, Inc. v. BC-USA, Inc.*, 840 F. Supp. 344, 348 (E.D. Pa. 1993), to establish that it actually lost sales to Celotex and Standard. On this basis, Tarmac's claim that Stelwagon failed to introduce sufficient competent evidence to support a finding of harm to competition must fail.

2. Failure to show antitrust injury

In addition to establishing a *prima facie* Robinson-Patman Act violation, a plaintiff must also show actual damages before **[**20]** it can recover treble damages under the Clayton Act. See *Texaco, Inc.*, 110 S. Ct. at 2551 & n.31; *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-62, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981). Tarmac argues that Stelwagon has failed to establish this antitrust injury that is essential to the verdict entered by the jury. This argument is without merit. Stelwagon presented testimonial witnesses who established that sales were lost to Standard and Celotex due to the lower prices they were able to offer due to the price discrimination, as well as the actual decline in sales Stelwagon suffered during the relevant time period and the expert testimony of Dr. Perry.¹¹

¹¹ Tarmac's repeated attempts to exclude the testimony of Dr. Perry rest largely on the basis that Dr. Perry's methodology is flawed. The Court found Dr. Perry to be qualified, without objection, as an expert in economics and price discrimination analysis. See Tr. of 12/16/93, at 51-52. Review of Dr. Perry's methodology indicates application of standard economic principles. Cf. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 125 L. Ed. 2d 469, U.S. , 113 S. Ct. 2786, 2795-97 (1993) (discussing the application of the Rules of Evidence to proffered scientific expert testimony). Tarmac's complaints are essentially disagreements with Dr. Perry's conclusions as well as the thoroughness of his factual basis. The Court finds that there were sufficient facts upon which to base the opinion and that any flaws in the process are not so substantial to deprive Dr. Perry of "good grounds" for his . . . conclusions." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, slip op. at 49 (3d Cir. 1994). Tarmac's objections are more properly directed at attacking the weight that should be accorded the opinion, not the opinion's admissibility. See *Breidor v. Sears, Roebuck & Co.*, 722 F.2d 1134, 1139-41 (3d Cir. 1983); see also *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993); *Singer Co. v. E.I. du Pont de Nemours & Co.*, 579 F.2d 433, 443 (8th Cir. 1978) (holding that "it is . . . for the jury,

[21] D. Other Trial Errors**

1. No missing witness instruction

Tarmac requested at the close of the evidence that the Court give a missing witness instruction, arguing that Stelwagon's [*1369] witnesses had referred to the statements of customers who were not previously identified. Such an instruction is proper where a witness is peculiarly within the power of one party and would presumably testify in that party's favor, but is not called to testify. See [Graves v. United States, 150 U.S. 118, 121, 37 L. Ed. 1021, 14 S. Ct. 40 \(1893\)](#); [United States v. Nahoom, 791 F.2d 841, 846 \(11th Cir. 1986\)](#); [Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335, 1353 \(7th Cir. 1983\)](#). Where witnesses are equally available to both sides, the instruction is not appropriate. See [United States v. Vastola, 899 F.2d 211, 235](#) (3d Cir.), vacated on other grounds, 497 U.S. 1001 (1990). Tarmac's request was denied, as will be its post-trial motion, because it failed to show that the alleged missing witnesses [**22] were in the peculiar control of Stelwagon. Indeed, Tarmac did not call any of the customers that it admits Stelwagon's witnesses previously identified, witnesses that presumably could have been called by either side. Tarmac's motion for a new trial on this basis is denied.

2. Exclusion of Dr. Kursh's report and testimony

Tarmac also alleges that the expert report prepared by Dr. Samuel J. Kursh on behalf of Stelwagon for use in a separate, unrelated state court action should have been admitted for purposes of impeaching the testimony of Stelwagon's witnesses concerning the reason for the drop in Stelwagon's MAP sales, or that Dr. Kursh should have been allowed to testify to the same. The Court denied the request on the grounds that the probative value of the material offered was substantially outweighed by the prejudicial nature of the report and the eleventh-hour manner by which it was introduced by Tarmac. See [Fed. R. Evid. 403](#). The Court declines the invitation to revisit this determination, and the motion for a new trial is therefore denied.

E. Remittitur

Tarmac argues in the alternative that the Court should grant a remittitur in this case due to the excessiveness [**23] of the damages awarded. Remittitur is appropriate if the Court "finds that a decision of the jury is clearly unsupported and/or excessive." [Spence v. Board of Educ. of Christina Sch. Dist., 806 F.2d 1198, 1201 \(3d Cir. 1986\)](#); see 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2815 (1973). If remittitur is granted, the party against whom it is entered can accept it or can proceed to a new trial on the issue of damages.

In the instant case, the Court is left with the inescapable impression that the damages awarded by the jury in this case are unsupported by the evidence and are grossly excessive. The jury awarded Stelwagon \$ 1,500,000 in damages for the breach of the distributorship agreement. See Tr. of 12/21/93, at 62. Yet, plaintiff's expert was only able to testify as to the damages occasioned by Tarmac's sales to Allied, an amount that he estimated was \$ 42,424. See Pl.'s Ex. 27. Additional damages testimony was offered by Keenan, who testified that the cost of the MAPs was only 40% of the sale in a "new roof" job, with the other 60% composed of the sale of related products with similar profit margins. [**24] See Tr. of 12/14/93, at 59-61. In sales for "re-roof" jobs, the MAPs made up two-thirds of the sale, with the related products making up one third. Keenan also testified that new roofs were about 25% of sales, and re-roofs 75%. Applying these percentages, as well as Dr. Perry's calculation of lost MAP sales and Stelwagon's profit margin, arrives at a figure of \$ 72,242: [*1370]

	Ratio between Related		Total Related Product Sales \$ 15,909
	MAP Sales	Product Sales and MAP	
		Sales	
New Roof	\$ 10,606	1.5	

with the assistance of vigorous cross-examination, to measure the worth of the opinion"). The objections based on the improper admission of Dr. Perry's report are therefore without merit.

		Ratio between Related	Total
	MAP Sales	Product Sales and MAP	Related
		Sales	Product Sales
	$(42,424 \times .25)$	(.60/.40)	
Re-roof	$\$ 31,818$.5	$\$ 15,909$
	$(42,424 \times .75)$	(.33/.66)	
			$\$ 31,818$
		MAP Sales	$\$ 42,424$
			TOTAL SALES

Though damages do not have to be calculated or estimated with mathematical certainty, there must be some basis in the record for a jury's award. See *Advent Sys., 925 F.2d at 681*. There was no evidence presented in this case supporting a figure on the breach of contract claim in excess of \$ 72,242.

Likewise, the figure calculated by Dr. Perry in support of the Robinson-Patman claim is only \$ 257,362. See Pl.'s Ex. 23. Even using the percentages attested to by Keenan, as described *supra*, the amount of damages increases only to \$ 450,383.50, a good deal removed from the \$ 772,000 verdict entered by the jury and subsequently trebled by the Court:

		Ratio between	Total
	MAP Sales	Related Product	Related
		Sales and MAP Sales	Product Sales
New Roof	$\$ 64,340.5$	1.5	$\$ 96,510.75$
	$(257,362 \times .25)$	(.60/.40)	
Re-roof	$\$ 193,021.50$.5	$\$ 96,510.75$
	$(257,362 \times .75)$	(.33/.66)	
			$\$ 193,021.50$
		MAP Sales	$\$ 257,362$
			TOTAL SALES
			$\$ 450,383.50$

Based on the figures just calculated, the Court determines that Stelwagon's **[**25]** total damages in this case, after trebling of the Robinson-Patman damages, should be in the amount of \$ 1,423,392.50.¹² The Court having previously entered judgment in the amount of \$ 3,816,000, Stelwagon will be ordered to remit \$ 2,392,607.50, within twenty days, or, if remittitur is refused, to submit to a new trial on damages.¹³

An appropriate order shall be entered.

ORDER

¹² \$ 74,242 + (\$ 450,383.50 x 3) = \$ 1,423,392.50.

¹³ Given the disposition of defendant's post-trial motion, plaintiff's petition for attorney's fees will be denied without prejudice, pending the final resolution of this litigation.

AND NOW, this 12th day of September, 1994, upon consideration of defendant's motion for judgment as a matter of law, new trial, and/or remittitur (Doc. No. 63), and plaintiff's motion for attorney's fees (Doc. No. 64), for the reasons stated in the Memorandum accompanying this Order, it is hereby **ORDERED** as follows:

1. Defendant's motion for judgment as a matter of law is **DENIED**;
2. Defendant's **[**26]** motion for a new trial is **DENIED**;
3. Defendant's motion for remittitur is **GRANTED**. Plaintiff shall remit \$ 2,392,607.50 within twenty (20) days of this Order, or, if remittitur is refused, shall submit to a new trial on damages; and
- [*1371] 4. Plaintiff's motion for attorney's fees is **DENIED WITHOUT PREJUDICE**.**

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

End of Document



Data Gen. Corp. v. Grumman Sys. Support Corp.

United States Court of Appeals for the First Circuit

September 14, 1994, Decided

No. 93-1637

Reporter

36 F.3d 1147 *; 1994 U.S. App. LEXIS 25459 **; 32 U.S.P.Q.2D (BNA) 1385 ***; Copy. L. Rep. (CCH) P27,319; 1994-2 Trade Cas. (CCH) P70,716

DATA GENERAL CORPORATION, ET AL., Plaintiffs, Appellees, v. GRUMMAN SYSTEMS SUPPORT CORPORATION, Defendant, Appellant.

Prior History: **[**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Walter Jay Skinner, Senior U.S. District Judge.

Core Terms

license, customers, infringement, deposit, profits, district court, patent, equipment owner, exclusionary, consumers, settlement agreement, apportionment, monopolist's, unilateral, Skiing, copies, diagnostics, Copyright Act, damages, trade secret, registration, antitrust, misuse, summary judgment, support services, source code, software, proprietary information, repair, actual damage

LexisNexis® Headnotes

Copyright Law > ... > Damages > Types of Damages > Compensatory Damages

Copyright Law > ... > Remedies > Damages > General Overview

Copyright Law > ... > Remedies > Damages > Measurement of Damages

Copyright Law > ... > Damages > Types of Damages > Infringement Profits

HN1 [▼] Types of Damages, Compensatory Damages

"Nonduplicative profits" are those profits earned by defendant that would not have been available to plaintiff in the absence of defendant's wrongful conduct.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN2 Standards of Review, De Novo Review

Although the reasoning of the court below may provide a useful starting point for analysis, the district court's view of the law is not binding on the court of appeals. Thus, the court exercises independent judgment in evaluating the legal correctness of the district court's jury instructions. Likewise, the court must reach its own conclusion as to a statute's correct construction.

[Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview](#)

[Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review](#)

HN3 Summary Judgment, Opposing Materials

In reviewing a district court's entry of summary judgment, the court determines anew whether the moving party has shown that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. In this context, "genuine" means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party and "material" means that the fact is one that might affect the outcome of the suit under the governing law. Although the court reads the record and indulge all inferences in a light most favorable to the non-moving party the adverse party cannot defeat a well-supported motion by resting upon the mere allegations or denials of its leading.

[Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview](#)

[Evidence > Burdens of Proof > Ultimate Burden of Persuasion](#)

[Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview](#)

HN4 Summary Judgment, Entitlement as Matter of Law

If the nonmovant bears the ultimate burden of persuasion with respect to its claim or defense, it may avert summary judgment only if it identifies issues genuinely in dispute and advances convincing theories as to their materiality. Of course, it may be difficult for a trial court to forecast the reaction of a reasonable jury to an intricate array of complex theories. Nonetheless, [Fed. R. Civ. P. 56](#) applies equally to simple cases as well as cases involving complicated legal principles and theories of recovery. In complex antitrust cases, no different or heightened standard for the grant of summary judgment applies.

[Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review](#)

HN5 Appellate Review, Standards of Review

The court is at liberty to affirm a district court's grant of summary judgment on any ground supported in the record even if the issue was not pleaded, tried or otherwise referred to in the proceedings below.

[Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview](#)

[Copyright Law > ... > Civil Infringement Actions > Elements > Copying by Defendants](#)

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

Copyright Law > ... > Civil Infringement Actions > Presumptions > Validity of Copyright

Copyright Law > ... > Civil Infringement Actions > Presumptions > Validity of Facts

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Registration Requirement

Copyright Law > ... > Damages > Types of Damages > Costs & Attorney Fees

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Deposits > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > Application Requirements

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

Copyright Law > Scope of Copyright Protection > Subject Matter > General Overview

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > General Overview

Copyright Law > ... > Statutory Copyright & Fixation > Fixation Requirement > General Overview

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Original Works of Authorship

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Scope of Protection

Copyright Infringement Actions, Civil Infringement Actions

Registration of a work with the Copyright Office provides several benefits to a plaintiff in an infringement action. First, although copyright protection attaches the day original expression is fixed in a tangible medium, and thus an infringer may be liable for infringement from that day forward, (providing that registration is not a condition of copyright protection), registration of the copyright is a prerequisite to suit under the Copyright Act, [17 U.S.C.S. § 411\(a\)](#). Second, upon accepting the registrant's application, fee, and deposit of a representative copy of the work, the Copyright Office issues a certificate of registration, which is admissible in an infringement action as *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate.

Computer & Internet Law > ... > Formalities & Ownership Interests > Formalities > Deposit

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Computer & Internet Law > ... > Copyright Protection > Civil Infringement > Publication

Computer & Internet Law > ... > Copyright Protection > Formalities & Ownership Interests > General Overview

Computer & Internet Law > ... > Formalities & Ownership Interests > Formalities > General Overview

Computer & Internet Law > ... > Formalities & Ownership Interests > Ownership Interests > General Overview

36 F.3d 1147, *1147* 1994 U.S. App. LEXIS 25459, **1** 32 U.S.P.Q.2D (BNA) 1385, ***1385

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

Copyright Law > ... > Civil Infringement Actions > Presumptions > Deposit

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Registration Requirement

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

Copyright Law > Scope of Copyright Protection > Publication > General Overview

Copyright Law > ... > Protected Subject Matter > Literary Works > General Overview

HN7 Formalities, Deposit

In the case of computer programs which are either unpublished or published only in machine-readable form, the copyright owner must deposit identifying portions of the program, generally the first and last 25 pages of the human-readable source code [37 C.F.R. § 202.20\(c\)\(2\)\(vii\)](#). By questioning plaintiff's compliance with the registration requirements, defendant is effectively claiming that (1) plaintiff may not claim infringement of the copyrights for which plaintiff tendered a defective deposit; and (2) even if plaintiff is free to bring such claims, it is not entitled to a presumption as to the validity of the copyrights at issue.

Copyright Law > ... > Civil Infringement Actions > Elements > Copying by Defendants

Evidence > Burdens of Proof > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

HN8 Elements, Copying by Defendants

To demonstrate copyright infringement, plaintiff has the burden of demonstrating (1) that it owns a valid copyright in the versions of alleged to have been copied, and (2) that defendant copied constituent, original elements of plaintiff's work.

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

HN9 Formalities, Deposit & Registration Requirements

Where the program contains trade secret material, the copyright regulations permit some portions of the deposit to be blocked out, and allow a portion of the deposit to be in machine-readable "object code" (lines of zeroes and ones). If the deposit includes no blocked-out portions and consists entirely of source code, the first and last ten pages of the program will suffice.

Copyright Law > ... > Deposit & Registration Requirements > Registration > Application Requirements

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Registration Requirement

[Copyright Law > Scope of Copyright Protection > Formalities > General Overview](#)

[Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview](#)

[Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview](#)

[Copyright Law > ... > Deposit & Registration Requirements > Registration > Error & Misstatement Correction](#)

[Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates](#)

[HN10](#)[] Registration, Application Requirements

It is well established that immaterial, inadvertent errors in an application for copyright registration do not jeopardize the validity of the registration. A misstatement or clerical error in the registration application if unaccompanied by fraud will not invalidate the copyright nor render the registration certificate incapable of supporting an infringement action. In general, an error is immaterial if its discovery is not likely to have led the Copyright Office to refuse the application.

[Copyright Law > ... > Deposit & Registration Requirements > Registration > Application Requirements](#)

[Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview](#)

[Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof](#)

[Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Registration Requirement](#)

[Copyright Law > Scope of Copyright Protection > Formalities > General Overview](#)

[Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview](#)

[Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview](#)

[Copyright Law > ... > Deposit & Registration Requirements > Registration > Error & Misstatement Correction](#)

[HN11](#)[] Registration, Application Requirements

Some courts have suggested that a defendant must show that it is prejudiced by a fraudulent misstatement or omission in a registration application. Absent intent to defraud and prejudice, inaccuracies in copyright registrations do not bar actions for infringement. Whereas other courts merely require proof that an intentional error, if discovered by the Copyright Office, would have been material to the registration decision.

[Copyright Law > ... > Deposit & Registration Requirements > Registration > Application Requirements](#)

[Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview](#)

[Copyright Law > ... > Deposit & Registration Requirements > Deposits > General Overview](#)

[Copyright Law > ... > Deposit & Registration Requirements > Deposits > Mandatory Deposits](#)

[HN12](#)[] Registration, Application Requirements

In the first place, the registration application described in [17 U.S.C.S. § 409](#), as well as the deposit described in [17 U.S.C.S. § 408\(b\)](#), are both equally mandatory components of the registration process outlined in [17 U.S.C.S. § 408\(a\)](#). Likewise, just as [17 U.S.C.S. § 409](#) sets forth what an application "shall include," [17 U.S.C.S. § 408\(b\)](#) uses the same phrase to prescribe the contents of the deposit.

Business & Corporate Compliance > ... > Formalities & Ownership Interests > Formalities > Registration

Computer & Internet Law > ... > Formalities & Ownership Interests > Formalities > Deposit

Trade Secrets Law > Federal Versus State Law > General Overview

Computer & Internet Law > Intellectual Property Protection > Copyright Protection > General Overview

Computer & Internet Law > ... > Copyright Protection > Formalities & Ownership Interests > General Overview

Computer & Internet Law > ... > Formalities & Ownership Interests > Formalities > General Overview

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

Copyright Law > Scope of Copyright Protection > Subject Matter > General Overview

Copyright Law > ... > Protected Subject Matter > Literary Works > General Overview

Trade Secrets Law > Protected Information > Computer Software

[HN13](#) Copyright Protection, Registration

Pursuant to the Copyright Act, [17 U.S.C.S. § 410\(a\)](#), the Register of Copyrights must register a copyright claim and issue a registration certificate when, after examination, the register determines that the material deposited constitutes copyrightable subject matter. Some provisions of the copyright regulations seek to preserve the same opportunity for examination in relation to the deposit of a relatively small subset of a computer program. In registering all copyright claims, the Copyright Office examines the deposit to determine the existence of copyrightable authorship. In order to allow the office to continue this practice, the new regulations provide that when the applicant's deposit contains portions of the source code of an unpublished computer program with blocked-out trade secrets the deposit must still reveal an appreciable amount of original computer code.

Computer & Internet Law > ... > Formalities & Ownership Interests > Formalities > Deposit

Copyright Law > ... > Deposit & Registration Requirements > Deposits > General Overview

Computer & Internet Law > Intellectual Property Protection > Copyright Protection > General Overview

Computer & Internet Law > ... > Copyright Protection > Formalities & Ownership Interests > General Overview

Computer & Internet Law > ... > Formalities & Ownership Interests > Formalities > General Overview

36 F.3d 1147, *1147* 1994 U.S. App. LEXIS 25459, **1** U.S.P.Q.2D (BNA) 1385, ***1385

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

Copyright Law > ... > Protected Subject Matter > Literary Works > General Overview

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Original Works of Authorship

HN14 [blue icon] **Formalities, Deposit**

Where there are no blocked-out portions in the deposited portions of a computer program, regulations do not specifically require that the deposit contain an appreciable amount of original computer code. In other words, the Copyright Office seems to assume that in such cases the deposited pages are likely to contain sufficient elements of original expression to determine the copyrightability of the work at issue.

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Registration Requirement

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

HN15 [blue icon] **Registration, Registration Certificates**

Discretion resides in the Copyright Office, not the applicant, for [17 U.S.C.S. § 410\(a\)](#) suggests that an applicant must always give the Copyright Office an opportunity to undertake an appropriate examination.

Governments > Legislation > Interpretation

Trademark Law > ... > Similarity of Marks > Appearance, Meaning & Sound > General Overview

HN16 [blue icon] **Legislation, Interpretation**

It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.

Copyright Law > ... > Deposit & Registration Requirements > Registration > Application Requirements

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > General Overview

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Collective Works

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Derivative Works

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Interests > Governmental Works

[**HN17**](#) [blue icon] Registration, Application Requirements

One important function of a registration application is to identify the work in which the applicant claims a copyright. Furthermore, like the deposit, the application also provides some evidence of copyrightability, because it must identify any preexisting work from which the author borrowed in creating a compilation or derivative work. Indeed, the Copyright Office may often be in a better position to assess the originality of the work being registered by reviewing a list of preexisting works than by conducting a cursory inspection of the deposited material. And yet, an inadvertent failure to identify preexisting works on an application is treated no differently from any other application error.

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Civil Infringement Actions > Presumptions > Validity of Copyright

Copyright Law > ... > Civil Infringement Actions > Presumptions > Validity of Facts

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

[**HN18**](#) [blue icon] Scope of Copyright Protection, Formalities

The law is not quite as settled as to the effect of an application error that is inadvertent but nonetheless material. No court has suggested that a registration premised in part on an unintentional material error would fail to satisfy the jurisdictional requirement of [17 U.S.C.S. § 411\(a\)](#). At the same time, at least one court has suggested that in such instances the proper approach might be to prevent the plaintiff from exploiting the presumption of validity that ordinarily attaches to a registered copyright under [17 U.S.C.S. § 410\(c\)](#). The court assumes for argument's sake that a material error in a copyright deposit, even if unintentional, may destroy the presumption of validity.

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Derivative Works

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Copyright Law > Scope of Copyright Protection > Subject Matter > Common Law Copyrights

Copyright Law > ... > Subject Matter > Patent & Utility Considerations > General Overview

[**HN19**](#) [blue icon] Collective & Derivative Works, Derivative Works

[17 U.S.C.S. § 301\(a\)](#) precludes enforcement of any state cause of action which is equivalent in substance to a federal copyright infringement claim. Courts have developed a functional test to assess the question of equivalence. If a state cause of action requires an extra element, beyond mere copying, preparation of derivative works,

36 F.3d 1147, *1147* 1994 U.S. App. LEXIS 25459, **1** U.S.P.Q.2D (BNA) 1385, ***1385

performance, distribution or display, then the state cause of action is qualitatively different from, and not subsumed within, a copyright infringement claim and federal law will not preempt the state action.

Copyright Law > Scope of Copyright Protection > Subject Matter > Common Law Copyrights

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

HN20 [blue] **Subject Matter, Common Law Copyrights**

All legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright are governed exclusively by this [17 U.S.C.S. § 301](#). No person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Copyright Law > Scope of Copyright Protection > Subject Matter > Common Law Copyrights

Torts > ... > Commercial Interference > Contracts > General Overview

HN21 [blue] **Copyright Infringement Actions, Civil Infringement Actions**

Not every "extra element" of a state claim will establish a qualitative variance between the rights protected by federal copyright law and those protected by state law. For example, a state claim of tortious interference with contractual relations may require elements of awareness and intentional interference not necessary for proof of copyright infringement. And yet, such an action is equivalent in substance to a copyright infringement claim where the additional elements merely concern the extent to which authors and their licensees can prohibit unauthorized copying by third parties.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof

Trade Secrets Law > Trade Secret Determination Factors > Business Use

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Elements > Copying by Defendants

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Copyright Law > Scope of Copyright Protection > Subject Matter > Common Law Copyrights

Trade Secrets Law > Federal Versus State Law > General Overview

HN22 [blue document icon] Civil Infringement Actions, Burdens of Proof

A state law misappropriation claim will not escape preemption under [17 U.S.C.S. § 301\(a\)](#) simply because a plaintiff must prove that copying was not only unauthorized but also "commercially immoral" a mere label attached to the same odious business conduct. Nonetheless, a trade secrets claim that requires proof of a breach of a duty of confidentiality stands on a different footing. Such claims are not preempted because participation in the breach of a duty of confidentiality -- an element that forms no part of a copyright infringement claim -- represents unfair competitive conduct qualitatively different from mere unauthorized copying.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Trade Secrets Law > Civil Actions > Burdens of Proof

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Breach of Confidence > Confidential Relationships

Trade Secrets Law > Trade Secret Determination Factors > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Acquisition

Trade Secrets Law > Protection of Secrecy > Reasonable Measures > General Overview

HN23 [blue document icon] Jury Trials, Jury Instructions

To demonstrate misappropriation of trade secrets under Massachusetts law, plaintiff must prove that (1) the work at issue is a trade secret; (2) plaintiff took reasonable steps to preserve the secrecy of the work and (3) defendant used improper means, in breach of a confidential relationship, to acquire and use the trade secret.

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts Law > Contract Interpretation > General Overview

HN24 [blue document icon] Defenses, Ambiguities & Mistakes

Maryland courts do not follow the subjective theory of contracts, which aims to discover the actual intent of the parties even at the expense of unambiguous language to the contrary. Instead, Maryland subscribes to the objective approach. Under that approach, a court may consider extrinsic evidence only in determining whether

contract language is ambiguous. However, as long as the result is objectively reasonable, a court may not use extrinsic evidence to interpret facially explicit contractual terms.

[Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview](#)

[Contracts Law > Contract Interpretation > Parol Evidence > General Overview](#)

[Contracts Law > Defenses > General Overview](#)

[Contracts Law > Defenses > Ambiguities & Mistakes > General Overview](#)

[Contracts Law > Contract Formation > Mistake > General Overview](#)

[HN25](#) [+] **Contract Interpretation, Ambiguities & Contra Proferentem**

Where contract terms are ambiguous, a court may look to extrinsic evidence in order to ascertain the intention of the parties and, if successful, interpret the contract as a matter of law. If, after such examination, the meaning of the ambiguous terms remains in genuine dispute, and the dispute is material to the outcome of the claim or defense at issue, the ambiguity must be resolved by the trier of fact. Only when there is a bona fide ambiguity in the contract's language or legitimate doubt as to its application under the circumstances is the contract submitted to the trier of the fact for interpretation.

[Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements](#)

[Civil Procedure > Settlements > Settlement Agreements > General Overview](#)

[Contracts Law > Contract Interpretation > General Overview](#)

[HN26](#) [+] **Types of Contracts, Settlement Agreements**

Because a settlement agreement is the product of negotiations by sophisticated parties represented by counsel, the secondary rule of construction perhaps should have but slight force.

[Copyright Law > ... > Assignments & Transfers > Transfer Termination > General Overview](#)

[Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview](#)

[HN27](#) [+] **Assignments & Transfers, Transfer Termination**

A license is permission to use the property of another. A license can be general, with few or no restrictions, or quite limited. The use of the word "license" in a contract is clearly evidence of an intent to permit use, but the absence of the word is not dispositive, as long as other contract language grants some permission to use. A nonexclusive license may be granted orally, or may even be implied from conduct.

[Contracts Law > Defenses > Illegal Bargains](#)

[Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets](#)

[**HN28**](#) [blue icon] **Defenses, Illegal Bargains**

A mere agreement to agree to an unspecified future license would be unenforceable as a matter of contract law.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Copyright Law > ... > Subject Matter > Patent & Utility Considerations > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

[**HN29**](#) [blue icon] **Inequitable Conduct, Anticompetitive Conduct**

A "copyright misuse" defense is not without legal support. In a carefully reasoned opinion, the Fourth Circuit recently approves such a defense after noting that it has long been recognized in the analogous context of patent infringement. Since copyright and patent law serve parallel public interests, a "misuse" defense should apply to infringement actions brought to vindicate either right.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

[**HN30**](#) [blue icon] **Misuse of Rights, Copyright & Trademark Misuse Defenses**

A copyright misuse defense does not require proof of an antitrust violation, only proof that the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

36 F.3d 1147, *1147* 1994 U.S. App. LEXIS 25459, **1** 32 U.S.P.Q.2D (BNA) 1385, ***1385

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > Unclean Hands

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN31 [💡] Misuse of Rights, Copyright & Trademark Misuse Defenses

A copyright misuse and its ancestor, patent misuse, are equitable defenses. If copyright misuse is an equitable defense, a defendant that has itself acted inequitably may not be entitled to raise such a defense. The court notes the possible propriety of denying a defense of unclean hands when the defendant has been guilty of conduct more unconscionable and unworthy than the plaintiff's. Mere infringement may not be inequitable in this context because a misuse defense would appear to sanction at least some infringement as a necessary measure of self-help. But violation of a valid injunction against further infringement issued pursuant to a court's equitable powers would constitute blatantly inequitable behavior.

Copyright Law > ... > Damages > Types of Damages > Compensatory Damages

Copyright Law > ... > Civil Infringement Actions > Remedies > General Overview

Copyright Law > ... > Remedies > Damages > General Overview

Copyright Law > ... > Remedies > Damages > Measurement of Damages

Copyright Law > ... > Damages > Types of Damages > Infringement Profits

HN32 [💡] Types of Damages, Compensatory Damages

A successful plaintiff in an infringement action is entitled to actual damages suffered by it as result of the infringement. Actual damages are generally calculated with reference to the loss in the fair market value of the copyright, often measured by the profits lost as a result of the infringement.

Copyright Law > ... > Remedies > Damages > General Overview

Evidence > Burdens of Proof > General Overview

HN33 [💡] Remedies, Damages

The plaintiff bears the burden of proving that the infringement was the cause of its loss of revenue. In defining that burden, it is useful to borrow familiar tort law principles of causation and damages.

Copyright Law > ... > Remedies > Damages > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Copyright Law > ... > Civil Infringement Actions > Remedies > General Overview

Patent Law > Infringement Actions > General Overview

Torts > ... > Types of Damages > Compensatory Damages > Measurements

Torts > ... > Elements > Causation > General Overview

HN34 [+] Remedies, Damages

The plaintiff should first establish that the infringement was the cause-in-fact of its loss by showing with reasonable probability that, but for the defendant's infringement, the plaintiff would not have suffered the loss. In rebuttal defendant may show that this damage would have occurred anyway had there been no taking of copyrighted expression. Damages in patent infringement case are based on what the patent holder's condition would have been if the infringement had not occurred. The plaintiff must also prove that the infringement was a proximate cause of its loss by demonstrating that the existence and amount of the loss was a natural and probable consequence of the infringement.

Copyright Law > ... > Damages > Types of Damages > Compensatory Damages

Copyright Law > ... > Remedies > Damages > General Overview

HN35 [+] Types of Damages, Compensatory Damages

Damages may be recovered only if there is a necessary, immediate and direct causal connection between the wrongdoing and the damages. A plaintiff may seek compensation for both direct and "indirect" losses, as long as the losses claimed are not unduly speculative. Courts recognize the possibility of recovery for loss of "enhanced good will" and "market recognition." Courts also recognize the possibility of recovery for lost sales of noninfringed items. At the same time, the plaintiff need not prove its loss of revenue with mathematical precision. In establishing lost sales due to sales of an infringing product, courts must necessarily engage in some degree of speculation.

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Copyright Law > ... > Remedies > Damages > General Overview

HN36 [+] Relief From Judgments, Additur & Remittitur

Upsetting a jury's damage award is a daunting task for any appellant, for the court must draw all reasonable inferences in favor of the verdict, upholding the award if it derives from any rational appraisal or estimate of the damages that could be based on the evidence before the jury. The likelihood of a victorious appeal is especially remote in the absence of rigorous argumentation. When challenging the sufficiency of the evidence, a defendant-appellant must make a serious effort to analyze the evidence taking it in the light most favorable to the plaintiff and resolving credibility issues in the plaintiff's favor. Moreover, the calculation of lost profits will always involve "some degree of speculation." As a result, the court relies on the appellant to specify with some precision the manner in which unduly speculative reasoning is likely to have infected the jury's verdict.

36 F.3d 1147, *1147* 1994 U.S. App. LEXIS 25459, **1** U.S.P.Q.2D (BNA) 1385, ***1385

Copyright Law > ... > Damages > Types of Damages > Compensatory Damages

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof

Copyright Law > ... > Civil Infringement Actions > Remedies > General Overview

Copyright Law > ... > Remedies > Damages > General Overview

Copyright Law > ... > Remedies > Damages > Measurement of Damages

Copyright Law > ... > Damages > Types of Damages > Infringement Profits

HN37 [+] **Types of Damages, Compensatory Damages**

In addition to actual damages, a copyright plaintiff may also recover the infringer's nonduplicative profits, i.e., any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In the context of infringer's profits, the plaintiff must meet only a minimal burden of proof in order to trigger a rebuttable presumption that the defendant's revenues are entirely attributable to the infringement; the burden then shifts to the defendant to demonstrate what portion of its revenues represent profits, and what portion of its profits are not traceable to the infringement.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof

Copyright Law > ... > Remedies > Damages > General Overview

Copyright Law > ... > Damages > Types of Damages > Infringement Profits

HN38 [+] **Civil Infringement Actions, Burdens of Proof**

In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

Copyright Law > ... > Damages > Types of Damages > Compensatory Damages

Copyright Law > ... > Remedies > Damages > General Overview

Copyright Law > ... > Remedies > Damages > Measurement of Damages

Copyright Law > ... > Damages > Types of Damages > Infringement Profits

Trade Secrets Law > Civil Actions > Burdens of Proof

Trade Secrets Law > Trade Secret Determination Factors > General Overview

HN39 [+] **Types of Damages, Compensatory Damages**

A defendant in a Massachusetts trade secrets action appears to have the same right to ask for apportionment along with the same burden of proof. Citing [17 U.S.C.S. § 504\(b\)](#) as persuasive authority, the Massachusetts Supreme Judicial Court sets forth the following rule for apportionment in trade secrets cases: Once a plaintiff demonstrates that a defendant made a profit from the sale of products produced by improper use of a trade secret, the burden

shifts to the defendant to demonstrate those costs properly to be offset against its profit and the portion of its profit attributable to factors other than the trade secret.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Allen Charges

HN40 [blue icon] Jury Trials, Jury Instructions

The court may overlook its failure to overlook defendant's jury instruction only if there is no basis in law or fact for the application of defendant's theory.

Copyright Law > ... > Damages > Types of Damages > Compensatory Damages

Copyright Law > ... > Remedies > Damages > General Overview

Copyright Law > ... > Remedies > Damages > Measurement of Damages

Copyright Law > ... > Damages > Types of Damages > Infringement Profits

Evidence > Burdens of Proof > General Overview

HN41 [blue icon] Types of Damages, Compensatory Damages

The defendant's burden under the apportionment provision of [17 U.S.C.S. § 504\(b\)](#) is primarily to demonstrate the absence of a causal link between the infringement and all or part of the profits claimed by the plaintiff. Because the rebuttable presumption of causation represents a presumption as to both cause-in-fact and proximate cause, there are two avenues of attack available to a copyright defendant. First, the defendant can attempt to show that consumers would have purchased its product even without the infringing element. Alternatively, the defendant may show that the existence and amount of its profits are not the natural and probable consequences of the infringement alone, but are also the result of other factors which either add intrinsic value to the product or have independent promotional value.

Copyright Law > ... > Damages > Types of Damages > Compensatory Damages

Evidence > Burdens of Proof > General Overview

Copyright Law > ... > Remedies > Damages > General Overview

Copyright Law > ... > Damages > Types of Damages > Statutory Damages

HN42 [blue icon] Types of Damages, Compensatory Damages

If a plaintiff cannot prove actual damages and the defendant shows that none of its gain is attributable to the infringement, the plaintiff would still be entitled to elect statutory damages. [17 U.S.C.S. § 504\(c\)](#).

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

[**HN43**](#) [blue document icon] **Reviewability of Lower Court Decisions, Preservation for Review**

It is usually imprudent for a court of appeals to pass on an issue not presented to the district court in the first instance, and the court declines to do so in these circumstances. The court repeatedly warns that it will not entertain arguments made for the first time on appeal. A litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.

Copyright Law > ... > Remedies > Damages > General Overview

[**HN44**](#) [blue document icon] **Remedies, Damages**

Moreover, although apportionment primarily depends on questions of causation, it is ultimately a delicate exercise informed by considerations of fairness and public policy, as well as fact. The doctrine of apportionment is established upon equitable principles in the analogous context of patent infringement. And, in adopting the principle of apportionment for copyright cases, the court observes that equity is concerned with making a fair apportionment so that neither party will have what justly belongs to the other.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Copyright Law > ... > Damages > Types of Damages > Infringement Profits

Copyright Law > ... > Remedies > Damages > General Overview

[**HN45**](#) [blue document icon] **Contracts, Sales of Goods**

The burden-shifting rule is itself an equitable response to an infringer who has frustrated the task of apportionment by co-mingling profits. Defendant, being responsible for the blending of the lawful with the unlawful, has to abide the consequences where one has wrongfully produced a confusion of goods. Equitable factors may also affect the substance of the apportionment analysis. Where the plaintiff cannot prove actual damages and the defendant's profits are only from the sale of a noninfringing product, the only way to prevent unjust enrichment may be to place more weight on the profit-generating effect of an infringing sales tool used to promote that product. Defendant may not be entitled to retain any of the profits from sale of advertising space where it is plausible that all profits were a direct result of infringing marketing information distributed to potential advertisers.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Elements > Copying by Defendants

Copyright Law > ... > Civil Infringement Actions > Remedies > General Overview

Copyright Law > ... > Damages > Types of Damages > Costs & Attorney Fees

Copyright Law > ... > Remedies > Damages > General Overview

Copyright Law > ... > Damages > Types of Damages > Compensatory Damages

Copyright Law > ... > Damages > Types of Damages > Infringement Profits

36 F.3d 1147, *1147* 1994 U.S. App. LEXIS 25459, **1** 32 U.S.P.Q.2D (BNA) 1385, ***1385

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > General Overview

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Derivative Works

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Business & Corporate Compliance > ... > Ownership Rights > Adaptations > Infringement

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Original Works of Authorship

HN46 [blue icon] Copyright Infringement Actions, Civil Infringement Actions

Apportionment is available in the context of infringing derivative works, perhaps in part because original expression added by infringer is entitled to copyright protection. Where plaintiff is seeking to vindicate its right to exclude others rather than its right to collect a licensing fee, it may be more appropriate to view the infringement as an "overriding" cause of the defendant's profits. Rigid isolation of the value of the infringement to the defendant effectively condones a license plaintiff never wishes to grant. An unjust enrichment theory aims to strip the defendant of its ill-gotten gains encourage compliance with the Copyright Act, [17 U.S.C.S. § 411](#), and perhaps "compensate" a plaintiff unable to prove actual damages. Apportionment of infringer's profits may be particularly appropriate where a concurrent award of actual damages significantly serves all three purposes.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

HN47 [blue icon] Jury Trials, Jury Instructions

The effect of an erroneous instruction can be reasonably approximated to a definite portion of the amount of the verdict, the appellate court may condition its affirmance on the plaintiff remitting that amount of the verdict which is apparently traceable to the error below.

Civil Procedure > Remedies > Damages > Compensatory Damages

Copyright Law > ... > Remedies > Damages > General Overview

Civil Procedure > Remedies > Judgment Interest > General Overview

HN48 [blue icon] Damages, Compensatory Damages

A plaintiff is not required to forsake nonduplicative elements of the various federal and state law remedies. As long as the damages are segregated into federal and state components, plaintiff need not choose one body of law under which all damages will be paid. Plaintiff may not receive award based on federal and state law so as to receive double recovery for same element of relief.

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 > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

[**HN49**](#) [] **Tying Arrangements, Clayton Act**

The Sherman Act, [15 U.S.C.S. § 1](#), prohibits a seller from "tying" the sale of one product to the purchase of a second product if the seller thereby avoids competition on the merits of the "tied" product. Every contract in restraint of trade or commerce is declared to be illegal. In addition to outlawing "positive" ties likely to restrain competition, [Section 1](#) also forbids "negative" ties -- arrangements conditioning the sale of one product on an agreement not to purchase a second product from competing suppliers.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

[**HN50**](#) [] **Antitrust & Trade Law, Sherman Act**

There are essentially four elements of a per se tying claim: (1) the tying and tied products are actually two distinct products; (2) there is an agreement or condition, express or implied, that establishes a tie; (3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers' choices with respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN51**](#) [] **Antitrust & Trade Law, Sherman Act**

To establish the existence of two separate products, defendant must identify the products at issue in each tie and demonstrate that there is sufficient demand for the purchase of the tied product separate from the tying product to identify a distinct product market in which it is efficient to offer the tied product separately from the tying product. When the economic advantages of joint packaging are substantial the package is not appropriately viewed as two products, and that should be the end of the tying inquiry. There must be evidence of sufficient consumer demand for each individual product, and not merely as part of an integrated product "package."

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Burdens of Proof > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN52**](#) [] **Antitrust & Trade Law, Sherman Act**

Proof of a tying arrangement generally requires evidence that the supplier's sale of the tying product is conditioned upon the unwilling purchase of the tied product from the supplier or an unwilling promise not to purchase the tied product from any other supplier. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN53**](#) [] **Antitrust & Trade Law, Sherman Act**

Tying arrangements involve the use of leverage over the market for one product to coerce purchases of a second product. In the absence of an explicit tying agreement, conditioning may be inferred from evidence indicating that the supplier has actually coerced the purchase or non-purchase of another product. In the absence of an explicit agreement requiring the purchase as a condition of the sale, courts will accept proof suggesting any kind of coercion by the seller or unwillingness to take the second product by the buyer.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN54**](#) [] **Antitrust & Trade Law, Sherman Act**

It is well established that coercion may be established by showing that the facts and circumstances surrounding the transaction as a practical matter forced the buyer into purchasing the tied product. In essence, whether the conditioning is explicit or implicit, we will not consider the anti-competitive effects of a tie to be unreasonable per se unless there is evidence that the supplier of the tying product has actually used its market power to impose the condition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

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

[**HN55**](#) [] **Monopolies & Monopolization, Attempts to Monopolize**

The Sherman Act, [15 U.S.C.S. § 2](#), prohibits the monopolization of any part of the trade or commerce among the several States.

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

[**HN56**](#) [] **Defenses, Copyright Misuse**

"Exclusionary conduct" is defined as conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power. The court labels as improper that conduct which harms the competitive process and not conduct which simply harms competitors. That process is harmed when conduct obstructs the achievement of competition's basic goals -- lower prices, better products, and more efficient production methods. There is shift in the emphasis of antitrust policy from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

[**HN57**](#) [] **Regulated Practices, Monopolies & Monopolization**

Exclusionary conduct does not include behavior which poses no unreasonable threat to consumer welfare but is merely a manifestation of healthy competition, an absence of competition, or a natural monopoly. [15 U.S.C.S. § 2](#) punishes only willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

[**HN58**](#) [] **Ownership & Transfer of Rights, Licenses**

The court holds that the desire of an author to be the exclusive user of its original work is a presumptively legitimate business justification for the author's refusal to license to competitors.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

[HN59](#) Sherman Act, Claims

Because a monopolization claim does not require proof of concerted activity, even the unilateral actions of a monopolist can constitute exclusionary conduct. Thus, a monopolist's unilateral refusal to deal with its competitors may constitute *prima facie* evidence of exclusionary conduct in the context of a [15 U.S.C.S. § 2](#) claim. A monopolist may nevertheless rebut such evidence by establishing a valid business justification for its conduct (monopolist may rebut an inference of exclusionary conduct by establishing legitimate competitive reasons for the refusal.) Further sufficient evidence of harm to consumers and competitors triggers further inquiry as to whether the monopolist has persuaded the jury that its harmful conduct was justified by a normal business purpose.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN60](#) Regulated Practices, Monopolies & Monopolization

In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons for an otherwise exclusionary refusal to deal, while the desire to maintain a monopoly market share or thwart the entry of competitors would not. In essence, a unilateral refusal to deal is *prima facie* exclusionary if there is evidence of harm to the competitive process; a valid business justification requires proof of countervailing benefits to the competitive process.

Antitrust & Trade Law > Sherman Act > General Overview

[HN61](#) Antitrust & Trade Law, Sherman Act

Despite the theoretical possibility, there have been relatively few cases in which a unilateral refusal to deal has formed the basis of a successful [15 U.S.C.S. § 2](#) claim. Several of the cases commonly cited for a supposed duty to deal were actually cases of joint conduct in which some competitors joined to frustrate others.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

[HN62](#) Regulated Practices, Monopolies & Monopolization

Antitrust law generally seeks to punish and prevent harm to consumers in particular markets, with a focus on relatively specific time periods. Any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold. That is where anticompetitive forcing has impact. In determining whether conduct is exclusionary in the context of a monopolization claim, the ordinary focus on harm to the competitive process in the relevant market and time period. Confining the competitive process assists courts in deciding particular disputes based primarily on case-specific adjudicative facts rather than generally applicable

"legislative" facts or assumptions. The use and protection of copyrights also affects the "competitive process," but it may not be appropriate to judge the effect of the use of a copyright by looking at one market or one time.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

HN63 [blue icon] Ownership & Transfer of Rights, Licenses

It is not the superiority of a work that allows the author to exclude others, however, but rather the limited monopoly granted by copyright law. Moreover, one reason why the Copyright Act, [17 U.S.C.S. § 410\(a\)](#), fosters investment and innovation is that it may allow the author to earn monopoly profits by licensing the copyright to others or reserving the copyright for the author's exclusive use. The limited copyright monopoly is intended to motivate the creative activity of authors and inventors by the provision of a special reward. Thus, at least in a particular market and for a particular period of time, the Copyright Act tolerates behavior that may harm both consumers and competitors. The primary purpose of the antitrust laws -- to preserve competition -- can be frustrated, albeit temporarily, by a holder's exercise of the patent's inherent exclusionary power during its term.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

HN64 [blue icon] Antitrust & Trade Law, Exemptions & Immunities

Antitrust law is somewhat instructive. Although creation and protection of original works of authorship may be a national pastime, the Sherman Act, [15 U.S.C.S. §1](#) does not explicitly exempt such activity from antitrust scrutiny and courts should be wary of creating implied exemptions.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

36 F.3d 1147, *1147* 1994 U.S. App. LEXIS 25459, **1** 32 U.S.P.Q.2D (BNA) 1385, ***1385

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

HN65 [blue icon] Per Se Rule & Rule of Reason, Per Se Violations

The Supreme Court suggests that an otherwise reasonable yet anti-competitive use of a copyright should not be deemed a per se violation of the Sherman Act, [15 U.S.C.S. § 1](#), but a monopolistic refusal to license might still violate the rule of reason.

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

HN66 [blue icon] Defenses, Copyright Misuse

It is in any event well settled that concerted and contractual behavior that threatens competition is not immune from antitrust inquiry simply because it involves the exercise of copyright privileges. The court holds that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > Sherman Act > General Overview

HN67 [blue icon] Ownership & Transfer of Rights, Licenses

A patent holder who lawfully acquires a patent cannot be held liable under the Sherman Act, [15 U.S.C.S. § 2](#), for maintaining the monopoly power he lawfully acquires by refusing to license the patent to others.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Defenses > General Overview

HN68 [blue icon] Inequitable Conduct, Anticompetitive Conduct

Where a patent has been lawfully acquired, subsequent conduct permissible under the patent laws cannot trigger any liability under the antitrust laws. The patent is itself a government grant of monopoly and is therefore an exception to usual antitrust rules. This exception is inoperable if the patent is unlawfully "acquired."

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Defenses > General Overview

[**HN69**](#) [blue icon] **Ownership & Transfer of Rights, Assignments**

The "patent exception" is largely a means of resolving conflicting rights and responsibilities, i.e., a policy presumption. There is no adverse effect on competition since, as a patent monopolist, the patent holder has the exclusive right to manufacture, use, and sell his invention. At the same time, the exception is grounded in an empirical assumption that exposing patent activity to wider antitrust scrutiny would weaken the incentives underlying the patent system, thereby depriving consumers of beneficial products. Courts state that imposition of antitrust liability for an arguably unreasonable refusal to license a lawfully acquired patent would severely trample upon the incentives provided by patent laws and thus undermine the entire patent system.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Evidence > ... > Demonstrative Evidence > Photographs > Visual Formats

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > ... > Damages > Types of Damages > Costs & Attorney Fees

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Copyright Law > ... > Ownership Rights > Distribution > General Overview

Copyright Law > ... > Protected Subject Matter > Audiovisual Works & Motion Pictures > General Overview

[**HN70**](#) [blue icon] **Types of Contracts, Lease Agreements**

The Copyright Act, [17 U.S.C.S. § 106](#) expressly grants to a copyright owner the exclusive right to distribute the protected work by transfer of ownership, or by rental, lease, or lending. Consequently, the owner of the copyright, if it pleases, may refrain from vending or licensing and content itself with simply exercising the right to exclude others from using its property. The court may also venture to infer that, Congress itself made an empirical assumption that allowing copyright holders to collect license fees and exclude others from using their works creates a system of incentives that promotes consumer welfare in the long term by encouraging investment in the creation of desirable artistic and functional works of expression.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Antitrust & Trade Law > Sherman Act > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Interests > Governmental Works

HN71 [blue icon] **Monopolies & Monopolization, Attempts to Monopolize**

The court cannot require antitrust defendants to prove and reprove the merits of this legislative assumption in every case where a refusal to license a copyrighted work comes under attack. Nevertheless, although nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright, the Copyright Act, [17 U.S.C.S. § 106](#) does not explicitly purport to limit the scope of the Sherman Act, [15 U.S.C.S. § 1](#). If the Copyright Act is silent on the subject generally, the silence is particularly acute in cases where a monopolist harms consumers in the monopolized market by refusing to license a copyrighted work to competitors.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN72 [blue icon] **Inequitable Conduct, Anticompetitive Conduct**

See [35 U.S.C.S. § 271\(d\)](#).

36 F.3d 1147, *1147* 1994 U.S. App. LEXIS 25459, **1** 32 U.S.P.Q.2D (BNA) 1385, ***1385

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN73 [+] Inequitable Conduct, Anticompetitive Conduct

35 U.S.C.S. § 271(d) clearly prevents an infringer from using a patent misuse defense when the patent owner has unilaterally refused a license, and may even herald the prohibition of all antitrust claims and counterclaims premised on a refusal to license a patent. Nevertheless, while 35 U.S.C.S. § 271(d) is indicative of Congressional "policy" on the need for antitrust law to accommodate intellectual property law, Congress did not similarly amend the Copyright Act, 17 U.S.C.S. § 411.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Interests > Governmental Works

HN74 [+] Ownership & Transfer of Rights, Licenses

Since neither the Sherman Act, 15 U.S.C.S. §1, nor the Copyright Act, 17 U.S.C.S. § 411, works a partial repeal of the other, and since implied repeals are disfavored, the court must harmonize the two, mindful of the legislative and judicial approaches to similar conflicts created by the patent laws. The court must not lose sight of the need to preserve the economic incentives fueled by the Copyright Act, but neither may the court ignore the tension between the two very different policies embodied in the Copyright Act and the Sherman Act, both designed ultimately to improve the welfare of consumers in our free market system. The court holds that while exclusionary conduct can

include a monopolist's unilateral refusal to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers.

Antitrust & Trade Law > Sherman Act > Defenses

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

[**HN75**](#) [blue icon] Sherman Act, Defenses

There may be rare cases in which imposing antitrust liability is unlikely to frustrate the objectives of the Copyright Act, [17 U.S.C.S. § 411](#).

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

[**HN76**](#) [blue icon] Regulated Practices, Monopolies & Monopolization

A monopolist may normally keep its innovations secret from its rivals as long as it wishes.

Counsel: Charles A. Gilman, with whom Cahill, Gordon & Reindel, Robert A. Alessi, Marshall Cox, Allen S. Joslyn, Immanuel Kohn, William T. Lifland, Gerard M. Meistrell, Roy L. Regozin, Dean Ringel, Laurence T. Sorkin, Goodwin, Procter & Hoar, and Coudert Brothers, were on brief for appellant.

Robert S. Frank, Jr., with whom Robert M. Buchanan, Jr., Brian A. Davis, Choate, Hall & Stewart, Jacob Frank, and Morris G. Nicholson, were on brief for appellees.

Judges: Before Torruella, Cyr and Stahl, Circuit Judges.

Opinion by: STAHL

Opinion

[***1386] [*1152] STAHL, *Circuit Judge*.

Grumman Systems Support Corporation ("Grumman") assigns error to the district court's handling of litigation arising from Grumman's acquisition, duplication, and use of MV/Advanced Diagnostic Executive System ("ADEX"), a sophisticated computer program developed by Data General Corporation ("DG") to diagnose problems in DG's MV computers. DG claimed that Grumman had infringed DG's ADEX copyrights and misappropriated trade secrets embodied in ADEX. A jury [**2] agreed, awarding DG \$ 27,417,000 in damages (excluding prejudgment interest and attorney's fees). Grumman contends that the district court prematurely dismissed its affirmative defenses and counterclaims and committed several errors during and after the trial.

While this case raises numerous issues touching on copyright law, Grumman's most intriguing argument -- presented below as both a defense and a counterclaim -- is that DG illegally maintained its monopoly in the market for service of DG computers by unilaterally refusing to license ADEX to Grumman and other competitors. The antitrust claims are intriguing because they present a curious conflict, namely, whether (and to what extent) the antitrust laws, in the absence of any statutory exemption, must tolerate short-term harm to the competitive process when such harm is caused by the otherwise lawful exercise of an economically potent "monopoly" in a copyrighted work.

After a careful analysis, we affirm on all but one relatively minor issue concerning the calculation of damages.

I.

BACKGROUND¹

[**3] DG and Grumman are competitors in the market for service of computers manufactured by DG, and the present litigation stems from the evolving nature of their competitive relationship. DG not only designs and manufactures computers, but also offers a line of products and services for the maintenance and repair of DG computers. Although DG has no more than a 5% share of the highly competitive "primary market" for mini-computers, DG occupies approximately 90% of the "aftermarket" for service of DG computers. As a group, various "third party maintainers" ("TPMs") earn roughly 7% of the service revenues; Grumman is the leading TPM with approximately 3% of the available service business. The remaining equipment owners (typically large companies in the high technology industry) generally maintain their own computers and peripherals, although [*1153] they occasionally need outside service on a "time and materials" basis.

A. Computer Service: Outputs and Inputs

Support service for DG computers entails a variety of activities and a corresponding array of goods and services. The principal activities are maintenance and repair of computer equipment. Maintenance includes care of parts subject [**4] to failure as well as replacement [***1387] of hardware components to bring equipment up to date. Repair involves the diagnosis and correction of hardware failure. Service technicians remedy equipment problems either by actually mending a malfunctioning part (e.g., reformatting a "broken" disk drive) or replacing the part.

Each of these support service "outputs" benefit from a range of "inputs." For example, engineering change orders, along with certain documentation and parts, allow service technicians to make technological updates to computer hardware. In order to identify the existence and location of a malfunctioning part, a service technician may use diagnostics (now increasingly sophisticated software), schematics (maps of the location and function of hardware elements), and various types of documentation, together with the technician's own experience acquired by diagnosing equipment problems. In order to actually mend a malfunctioning part, a technician might fix the part on the spot with routine tools or sophisticated software (e.g., a software diagnostic that can reformat a disk drive), or send the part to a repair depot run either by the technician's employer or another service organization. [**5] The repair of a malfunctioning part often requires very detailed information about the part (such as the information provided by schematics and other documentation), and may in turn require smaller replacement parts. Finally, replacement of parts naturally requires the availability of spares. At the core of this litigation is a dispute about Grumman's access to software diagnostics and other service "tools" produced by DG for use in the repair, upgrading, and maintenance of DG equipment.

B. TPM Access to Service Inputs

DG's policies concerning TPM access to DG's service tools have developed over time. As described below, DG's policies have evolved through three stages.

1. Initial Suspicion

TPMs made their debut in the 1970s while DG was still relatively new to the computer manufacturing market. DG was suspicious of the ability of TPMs, often run and staffed by former DG technicians, to service DG computers without running afoul of DG's intellectual property rights or confidentiality agreements binding on former DG employees.

¹ Because the bulk of the fact-related issues on appeal concern the district court's analysis of the record on summary judgment, we generally present the evidence in a light most favorable to Grumman. See, e.g., *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993). Naturally, where the story touches on matters necessarily decided by the jury, we present the evidence in a manner most favorable to DG. See, e.g., *Toucet v. Maritime Overseas Corp.*, 991 F.2d 5, 11 (1st Cir. 1993) (review of jury's damage award).

In 1975, DG converted its suspicions into legal claims, filing suit against Lloyd Root and Robert Montgomery, two of its former employees, as [*^{**6}] well as Computer Systems Support Corporation ("CSSC"), the TPM that Root and Montgomery had founded after leaving DG.² DG's principal allegations were that Root and Montgomery had breached their employment agreements by taking DG information with them when they left DG, and that CSSC personnel had been making unauthorized use of DG proprietary information. It was unclear, however, whether the proprietary items that CSSC was using were items sold or licensed to equipment owners (pursuant to agreements which arguably permitted some use by TPMs),³ or items taken directly from DG by Root and Montgomery.

Lacking promising proof to support its claims, DG proposed a settlement whereby CSSC would [*^{**7}] agree to return any proprietary information that Root and Montgomery unlawfully took from DG, and DG would expressly authorize CSSC (and its successors) to use DG proprietary information in the [*^{**1154}] maintenance and repair of DG computers.⁴ CSSC accepted, and the parties signed a settlement agreement in 1976 ("the Settlement Agreement").⁵

2. Peaceful Coexistence

From 1976 until some point in the mid-1980s, DG affirmatively encouraged the growth of TPMs with relatively liberal policies concerning TPM access to service tools. DG sold or licensed diagnostics directly to TPMs, and allowed TPMs to use diagnostics sold or licensed to DG equipment owners. DG did not restrict [*^{**8}] access by TPMs to spare parts manufactured by DG or other manufacturers. DG allowed (or at least tolerated) requests by TPMs for DG's repair depot to fix malfunctioning circuit boards, the heart of a computer's central processing unit [*^{***1388}] ("CPU"). DG sold at least some schematics and other documentation to TPMs. DG also sold TPMs engineering change order kits. And finally, DG training classes were open to TPM field engineers. Grumman suggests that DG's liberal policies were beneficial to DG because increased capacity (and perhaps competition) in the service aftermarket would be a selling point for DG equipment.⁶

3. Increased Restrictions

In the mid-1980s, DG altered its strategy. With the goal of maximizing revenues from its service business, DG began to refuse to provide many service tools directly to TPMs. DG would not allow TPMs to use the DG repair depot, nor would it permit TPMs [*^{**9}] to purchase schematics, documentation, "change order" kits, or certain spare parts. DG no longer allowed TPM technicians to attend DG training classes. Finally, DG developed and severely restricted the licensing of ADEX, a new software diagnostic for its MV computers. The MV series was at once DG's most advanced computer hardware and an increasingly important source of sales and service revenue for DG.

A number of items unavailable to TPMs directly from DG were either available to all equipment owners (even customers of TPMs) from DG, or were available to TPMs from sources other than DG. For example, DG depot service, change order kits, and at least some documentation were available to all equipment owners. There is also evidence that Grumman had its own repair depot and that Grumman could make use of repair depots run by other service organizations (sometimes called "fourth party maintainers"). Likewise, there is evidence that TPMs could purchase at least some spare parts from sources other than DG.

² For the sake of simplicity, we will refer to all three of the 1975 defendants as "CSSC."

³ There is some evidence that during the 1970s DG sold or licensed proprietary information to equipment owners under agreements which permitted owners to allow third parties to use that information to service the owners' computers.

⁴ DG and Grumman (which acquired CSSC in 1984) vigorously dispute the precise scope of this authorization. See *infra* Sections II.C.1.a and III.A.3.

⁵ Another provision of the Settlement Agreement prohibited CSSC from using DG proprietary information in the design or manufacture of computer equipment. That provision is not at issue in this case.

⁶ Grumman acquired CSSC in 1984, thereby becoming a successor in interest to CSSC's rights under the 1976 Settlement Agreement.

The situation was different with respect to ADEX. DG service technicians would use ADEX in performing service for DG equipment owners. DG would also license ADEX for the exclusive use [**10] of the in-house technicians of equipment owners who perform most of their own service.⁷ However, DG would not license ADEX to its own service customers or to the customers of TPMs. Nor was ADEX available to TPMs from sources other than DG. At least two other diagnostics designed to service DG's MV computers may have become available as early as 1989, but no fully functional substitute was available when this case was tried in 1992.

Grumman found various ways to skirt DG's ADEX restrictions. Some former DG employees, in violation of their employment agreements, brought copies of ADEX when they joined Grumman. In addition, DG field engineers often stored copies of ADEX at the work sites of their service customers, who were bound to preserve the confidentiality of any DG proprietary information in their possession. Although DG service customers had an obligation to return copies of [*1155] ADEX to DG should they cancel their service agreement [**11] and switch to a TPM, few customers did so. It is essentially undisputed that Grumman technicians used and duplicated copies of ADEX left behind by DG field engineers. There is also uncontested evidence that Grumman actually acquired copies of ADEX in this manner in order to maintain libraries of diagnostics so that Grumman technicians could freely duplicate and use any copy of ADEX to service any of Grumman's customers with DG's MV computers.

C. The Present Litigation

In 1988, DG filed suit against Grumman in the United States District Court for the District of Massachusetts.⁸ [**13] DG patterned its suit after a similar action it brought against Service & Training, Inc. ("STI") in the United States District Court for the District of Maryland. See [Service & Training, Inc. v. Data General Corp., 737 F. Supp. 334 \(D. Md. 1990\)](#), aff'd on other grounds, [963 F.2d 680 \(4th Cir. 1992\)](#) ("STI"). STI was another TPM in the DG aftermarket and a successor to Montgomery's interest in the 1976 Settlement Agreement. In one count, DG alleged that Grumman's use and duplication of ADEX infringed DG's ADEX copyrights, and [**12] requested injunctive relief, [17 U.S.C. § 502 \(1988\)](#), as well as actual damages and profits, [17 U.S.C. § 504\(b\) \(1988\)](#). In another count, DG alleged that Grumman had violated [**1389] Massachusetts trade secrets law by misappropriating copies of ADEX in violation of confidentiality agreements binding on former DG employees and DG service customers. On December 29, 1988, the district court issued a preliminary injunction prohibiting Grumman from using ADEX. See [Data General Corp. v. Grumman Sys. Support Corp., No. 88-0033-S, 1988 U.S. Dist. LEXIS 16427](#) (D. Mass. Dec. 29, 1988) ("Grumman I").⁹ The parties then prepared for trial.¹⁰

[**14] 1. Pre-Trial Issues

⁷ This latter group is comprised of Cooperative Maintenance Organizations ("CMOs").

⁸ Grumman subsequently filed an action in the United States District Court for the Northern District of California alleging that DG had violated California's antitrust laws. See [Grumman Sys. Support Corp. v. Data General Corp., 125 F.R.D. 160 \(N.D. Cal. 1988\)](#). That court later dismissed Grumman's action on the grounds that the claim was a compulsory counterclaim to DG's copyright infringement action pending in the District of Massachusetts. *Id.*

⁹ The jury subsequently found that Grumman continued to use ADEX in violation of the injunction. That finding is unchallenged on appeal.

¹⁰ In the course of the pre- and post-trial litigation, the district court issued a series of published and unpublished opinions which contain additional background material. See, e.g., [Data General Corp. v. Grumman Sys. Support Corp., 761 F. Supp. 185 \(D. Mass. 1991\)](#) ("Grumman II"); [Data General Corp. v. Grumman Sys. Support Corp., No. 88-0033-S \(D. Mass. May 2, 1991\)](#) ("Grumman III"); [Data General Corp. v. Grumman Sys. Support Corp., 795 F. Supp. 501 \(D. Mass. 1992\)](#) ("Grumman IV"); [Data General Corp. v. Grumman Sys. Support Corp., 834 F. Supp. 477 \(D. Mass. 1992\)](#) ("Grumman V"); [Data General Corp. v. Grumman Sys. Support Corp., 825 F. Supp. 340 \(D. Mass. 1993\)](#) ("Grumman VI"); [Data General Corp. v. Grumman Sys. Support Corp., 825 F. Supp. 361 \(D. Mass. 1993\)](#) ("Grumman VII").

Grumman raised a host of affirmative defenses and counterclaims, all eventually rejected by the district court in response to DG's motions for partial summary judgment. Three of these issues play a pivotal role in Grumman's appeal.

a. 1976 Settlement Agreement

Grumman alleged that the 1976 Settlement Agreement authorized it (as a successor to CSSC) to "acquire, possess, copy and use" all DG diagnostics, including ADEX. Liberally construed, Grumman's allegation of a right to "copy and use" ADEX fairly includes an allegation that Grumman has a right to copy and use DG diagnostic software in the possession of DG equipment owners. Judge Skinner rejected the Settlement Agreement defense by adopting the reasoning of the *STI* courts, which had rebuffed the same arguments on a nearly identical record. See *Grumman V*, 834 F. Supp. at 482-83. In the district court decision in *STI*, Judge Motz analyzed the language of the Settlement Agreement, testimony from the lawyers who negotiated it, and evidence of the parties' subsequent conduct. 737 F. Supp. at 339-41. On the basis of this evidence, Judge Motz [**15] concluded that the Settlement Agreement did not require DG to license any proprietary information to CSSC or its customers, nor [*1156] did the Settlement Agreement prevent DG from prohibiting CSSC from copying and using proprietary information in the custody of DG service customers. *Id.*¹¹

b. Antitrust Defenses

Grumman also claimed that DG could not maintain its infringement action because DG had used its ADEX copyrights to violate Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2 (1988 & Supp. IV 1992).¹² Specifically, Grumman charged that DG misused its copyrights by (1) tying the availability of ADEX to a consumer's agreement either to purchase DG support services (a "positive tie") or not to purchase support services from TPMs (a "negative tie"), [**16] and (2) willfully maintaining its monopoly in the support services aftermarket by imposing the alleged tie-in and refusing to deal with TPMs.

Concerning the tying claim, the district court again adopted the reasoning of the Fourth Circuit in *STI*, this time for the proposition that there was insufficient proof of a tying agreement to withstand summary judgment. *Grumman V*, 834 F. Supp. at 484-85. The Fourth Circuit held that there was no positive tie for two independent reasons. First, the court noted that DG did not actually license ADEX to its service customers. *STI*, 963 F.2d at 686-87. Second, the court held that there was not enough evidence to prove that any license to use ADEX was conditioned on the purchase of DG support services. *Id.* at 687. The court noted that there was no explicit tying condition in any written agreement. *Id.* The [**17] court also noted that there was insufficient evidence of unwilling purchases of DG support service so as to justify an inference of an implicit condition; customers may simply prefer service supported by ADEX diagnostics over service that is not. *Id.* at 687-88. The court further [***1390] held that there was insufficient evidence of a negative tie because, on the record before the court, "the fact that CMOs do not purchase repair services . . . is at least as consistent with the legitimate and independent business decision not to purchase unneeded services as it is with an agreement not to purchase such services." *Id.* at 686.

Judge Skinner conducted his own exhaustive analysis of the monopolization claim, concluding that Grumman failed to "assert[] any facts that would indicate that DG has engaged in any unlawful exclusionary conduct." *Grumman II*, 761 F. Supp. at 192. The court essentially narrowed the question to whether DG's restrictive policies with respect to TPMs constitute unlawful unilateral refusals to deal, reasoning that DG's actions do not rise to the level of unlawful exclusionary conduct [**18] for several reasons. The court agreed with Grumman that this case, like *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985), raises "the issue of prior promotion of competition in a market that is later halted," *Grumman II*, 761 F. Supp. at 190. The district court nonetheless concluded that Grumman had failed to demonstrate that DG's restrictive policies have unreasonably harmed the competitive process. In particular, the court noted that DG's policies with respect to most service

¹¹ Although the reasoning of the Fourth Circuit's affirmance differed from that of Judge Motz on other issues, the two courts appear to have been in total agreement with respect to the Settlement Agreement issue.

¹² Grumman presented the antitrust claims as independent counterclaims as well.

products do not prevent TPMs from competing in the service market because "DG will sell its service products, except [ADEX and schematics], to any ultimate consumer regardless of whether [the consumer] now or later uses a TPM." *Id. at 191*. The court also observed that "TPMs have demonstrated the ability to develop diagnostics [without schematics], even if they are not as efficient as MV/ADEX." *Id.* Lastly, the court suggested that the Sherman Act would not compel DG to disclose its schematics, in part because such compulsory **[**19]** disclosure would undermine the incentives of copyright and patent laws. *Id. at 192.*¹³

[*1157] In rejecting Grumman's motion for reconsideration of the grant of summary judgment on the monopolization claim, the district court also directly addressed Grumman's contention that DG's refusal to license ADEX to TPMs constitutes exclusionary conduct. The court stated that DG's refusal to license ADEX to TPMs was not exclusionary because "DG offers to the public a license to use MV/ADEX on any computer owned by the customer," and therefore DG "'did not withhold from one member of the public a service offered to the rest[.]'" *Grumman III*, slip op. at 5 (citing *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 377 (7th Cir. 1986), **[**20]** cert. denied, 480 U.S. 934, 94 L. Ed. 2d 765, 107 S. Ct. 1574 (1987)).

c. Federal Preemption of State Trade Secrets Claim

Grumman unsuccessfully sought to convince the district court that *Section 301* of the Copyright Act of 1976, **17 U.S.C. § 301 (1988 & Supp. IV 1992)**, preempts DG's state law action for misappropriation of trade secrets. The district court held that DG's trade secrets claim was not preempted because DG did not simply allege conduct equivalent to the copying and use which form the basis of an infringement claim; instead, DG's trade secrets claim was based on Grumman's acquisition of ADEX in violation of confidentiality agreements binding on former DG employees and service customers. *Grumman IV*, 795 F. Supp. at 507.

2. Trial Issues

Stripped of its affirmative defenses, Grumman proceeded to trial. Grumman focused its defensive energies in two areas. Grumman attacked DG's proof of the prima facie elements of copyright infringement and misappropriation of trade secrets, and attempted to undermine DG's broad-gauged request for compensation **[**21]** for lost profits and disgorgement of Grumman's MV-related profits.

a. Validity of Copyright Registration

During the trial, it became evident that DG had made several errors in registering its ADEX copyrights. After Edward Gove, a DG official, testified that DG had deposited with the Copyright Office the correct excerpts of human-readable "source code," ¹⁴ **[**22]** **[***1391]** Grumman introduced evidence that there were some errors in the deposits for the first three versions of ADEX. In rebuttal testimony, Gove confirmed that there were a number of minor, inadvertent errors in the deposits that would not affect the operation of the programs.¹⁵

Grumman argued to the district court that any error in a copyright deposit renders the registration invalid, and requested that the court so instruct the jury. The district court refused, instructing the jury instead that minor, inadvertent errors in the deposit of excerpts of computer code do not threaten the validity of the copyright

¹³ The district court also held that neither ADEX nor DG's schematics were "essential facilities" that DG (as a monopolist in the service aftermarket) must share with its competitors. *Id. at 191-92*. Grumman does not assign error to this aspect of the district court's decision.

¹⁴ "Source code" refers to an annotated text, written in a programming language intelligible to humans, that represents the set of instructions comprising a particular computer program. See *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 22 F.3d 32, 33 n.1 (2d Cir. 1994); *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 n.2 (9th Cir. 1989). "Object code" refers to the text of the same set of instructions, translated into binary form (a sequence of zeros and ones) intelligible to the computer itself. See *id.*

¹⁵ The errors are described *infra*, note 23.

registration. As a fall-back tactic, Grumman renewed its previous request that the district court compel DG to produce the entire human-readable source code for each version of ADEX so that Grumman could more effectively cross-examine Gove about the significance of the errors. The district court refused to do so, and later explained its discretionary decision by finding that "Grumman had an adequate opportunity to explore the errors contained in the initial copyright deposits, to challenge Data General's explanation of those errors, and to argue these issues before the jury." [Grumman VI, 825 F. Supp. at 352](#). Using a special verdict form, the jury found that DG had properly registered each [\[**23\]](#) of the ADEX copyrights.

b. Actual Damages and Profits

Grumman argued that the jury should identify and ignore that portion of Grumman's [\[*1158\]](#) profits which was not attributable to Grumman's use of ADEX. To this end, Grumman introduced evidence that some of its revenues were derived from servicing DG computers that cannot or need not be serviced with ADEX, and that the value of Grumman's use of ADEX to service customers with MV computers was distinct from the value of other products and services Grumman provided to those customers.

In contrast, DG offered evidence that because equipment owners prefer to purchase all service from one vendor, equipment owners with both MV computers and other DG computers ("mixed-equipment customers") would not have purchased service from Grumman if Grumman had lacked access to ADEX. DG also offered evidence tending to show that, even if Grumman did not always use ADEX in servicing a computer, Grumman could not have attracted and retained its MV-related business had it not been for Grumman's use of ADEX. DG's expert witness opined that DG's damages totaled \$ 28,003,000 -- \$ 26,364,000 in DG's lost profits and \$ 1,639,000 in nonduplicative profits¹⁶ [\[**24\]](#) earned by Grumman as a result of its acquisition and use of ADEX.

Attempting to blunt at least part of DG's sweeping "but for" theory, Grumman asked the district court to instruct the jury to discount that portion of Grumman's profits which was not attributable to the infringement. The court instructed the jury that DG could recover that portion of Grumman's profits that was "attributable to the infringement," but did not elaborate on the jury's task in this regard. Left to choose between the parties' theories, the jury apparently accepted the essence of DG's theory, though the total award of compensatory damages was \$ 27,417,000, [\[**25\]](#) somewhat less than DG requested.¹⁷

3. Post-Trial Issues

Grumman sought relief from the judgment on a number of grounds, two of which are most relevant to this appeal.

a. Actual Damages and Profits

Claiming that the jury's award was speculative and excessive, Grumman moved for a new trial or, in the alternative, remittitur. See [Fed. R. Civ. P. 59\(a\)](#). As the district court related:

Grumman complains that the jury awarded speculative and excessive damages because it uncritically adopted the plaintiff's damage analysis in its entirety which was built on theoretically unsound and factually inaccurate assumptions. More specifically, defendant contends that the plaintiff's damage analysis failed to identify relevant revenues, failed to apply a reasonable profit margin, and failed to apportion service profits between infringing and non-infringing activities.

¹⁶ [HN1](#)  "Nonduplicative profits" are those profits earned by Grumman that would not have been available to DG in the absence of Grumman's wrongful conduct. See [17 U.S.C. § 504\(b\)](#) (providing that copyright owner may "recover . . . any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages").

¹⁷ On the verdict slip, the jury assessed the same amount of damages -- \$ 27,417,000 -- for Grumman's misappropriation of trade secrets.

[***1392] [Grumman VI, 825 F. Supp. at 349](#) [**26] (footnote omitted). The district court denied the motion, ruling in essence that DG's theory of damages was proper and that the jury was free to weigh the testimony of DG's experts more heavily than that of Grumman's experts. [*Id. at 349-51.*](#)

b. Attorney's Fees

The district court included in its judgment order an award of attorney's fees under the Copyright Act, although it appears that the court has not yet fixed the amount. Grumman argued that the court should not award attorney's fees because DG had "elected" only those remedies available under Massachusetts trade secrets law, which does not allow an award of attorney's fees.¹⁸ The district court denied the motion, finding that DG had merely sought to maximize the judgment by selecting the most generous body of [*1159] law for each element of its recovery. [Grumman VI, 825 F. Supp. at 346](#). The district court reasoned further that because DG would not receive a double award of attorney's fees, the judgment was in no need of correction. [*Id. at 346-47.*](#)

[**27] 4. Issues on Appeal

Grumman renews its arguments concerning the pre-trial, trial, and post-trial issues described above. Grumman claims that the district court erred in entering summary judgment on its affirmative defenses, questions the propriety of certain of the district court's jury instructions, maintains that the jury's award of damages lacks evidentiary support, and insists that DG is not entitled to recover attorney's fees. After reviewing the procedural rules that govern this appeal, we address each of Grumman's arguments in turn.

II.

PROCEDURAL PRINCIPLES

[HN2](#) [↑] Because this appeal turns largely on questions of law, we outline the corresponding standard of review. Although the reasoning of the court below may provide a useful starting point for analysis, the district court's view of the law is not binding on a court of appeals. See [Williams v. Poulos, 11 F.3d 271, 278 \(1st Cir. 1993\)](#) (citing [Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 457 \(1st Cir. 1992\)](#)). Thus, we exercise our independent judgment in evaluating the legal correctness of the district court's jury instructions. [**28] Likewise, we must reach our own conclusion as to a statute's correct construction. See [FDIC v. Keating, 12 F.3d 314, 316 \(1st Cir. 1993\)](#).

Similarly, [HN3](#) [↑] in reviewing a district court's entry of summary judgment, we determine anew whether the moving party has shown "that there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56\(c\)](#). See also [Bird v. Centennial Ins. Co., 11 F.3d 228, 231 \(1st Cir. 1993\)](#). "In this context, 'genuine' means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party and 'material' means that the fact is one that might affect the outcome of the suit under the governing law." [Pagano v. Frank, 983 F.2d 343, 347 \(1st Cir. 1993\)](#) (citations, internal quotation marks, and brackets omitted). Although "we read the record and indulge all inferences in a light most favorable to the non-moving party," [Rivera-Ruiz v. Gonzalez-Rivera, 983 F.2d 332, 334 \(1st Cir. 1993\)](#), the adverse party cannot defeat a well-supported [**29] motion by "resting upon the mere allegations or denials of [its] pleading," [Fed. R. Civ. P. 56\(e\)](#). [HN4](#) [↑] If the nonmovant bears the ultimate burden of persuasion with respect to its claim or defense, it may avert summary judgment only if it identifies issues genuinely in dispute and advances convincing theories as to their materiality. See [Pagano, 983 F.2d at 347](#) (citing [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#)). Of course, it may be difficult for a trial court to forecast the reaction of a reasonable jury to an intricate array of complex theories. Nonetheless, [Rule 56](#) applies equally to simple cases as well as cases involving complicated legal principles and theories of recovery. See, e.g., [Amerinet, Inc. v. Xerox Corp., 972 F.2d](#)

¹⁸ Massachusetts law provides for a higher rate of prejudgment interest on compensatory damages than does federal law.

1483, 1490 (8th Cir. 1992) ("In complex antitrust cases, no different or heightened standard for the grant of summary judgment applies."), cert. denied, 122 L. Ed. 2d 356, 113 S. Ct. 1048 (1993).

Finally, we note that HN5¹⁸ we are **[**30]** at liberty to affirm a district court's grant of summary judgment "on any ground supported in the record even if the issue was not pleaded, tried or otherwise referred to in the proceedings below." de Casenave v. United States, 991 F.2d 11, 12 n.2 (1st Cir. 1993). **[***1393]**

III.

DISCUSSION

A. DG's Intellectual Property Claims

We first examine the two arguments that strike at the heart of DG's right to pursue its claims: DG's alleged failure to comply with the copyright registration requirements and the possible preemption of the state trade secrets claim by Section 301 of the Copyright **[*1160]** Act. We then discuss Grumman's two affirmative defenses -- the 1976 Settlement Agreement Defense and the "misuse" defense -- each of which is intended to undermine both the copyright claim and the trade secrets claim. Finally, we review Grumman's challenges to the award of actual damages, infringer's profits, and attorney's fees.

1. Validity of Copyright Registration

HN6¹⁹ Registration of a work with the Copyright Office provides several benefits to a plaintiff in an infringement action. First, although copyright protection attaches the day original **[**31]** expression is fixed in a tangible medium, see 17 U.S.C. § 102(a) (1988 & Supp. IV 1992), and thus an infringer may be liable for infringement from that day forward, see 17 U.S.C. § 408(a) (1988 & Supp. IV 1992) (providing that "registration is not a condition of copyright protection"), registration of the copyright is a prerequisite to suit under the Copyright Act, 17 U.S.C. § 411(a) (1988 & Supp. IV 1992). Second, upon accepting the registrant's application, fee, and deposit of a representative copy of the work, see 17 U.S.C. § 408, the Copyright Office issues a certificate of registration, which is admissible in an infringement action as "prima facie evidence of the validity of the copyright and of the facts stated in the certificate," 17 U.S.C. § 410(c) (1988).²⁰ HN7²¹ In the case of computer programs which, like ADEX, are either unpublished or published only in machine-readable form, the copyright owner must deposit "identifying portions of the program," generally the first and last 25 pages **[**32]** of the human-readable source code 37 C.F.R. § 202.20(c)(2)(vii) (1993).²² By questioning DG's compliance with the registration requirements, Grumman is effectively claiming that (1) DG may not claim infringement of those ADEX copyrights for which DG tendered a defective deposit; and (2) even if DG is free to bring such claims, it is not entitled to a presumption as to the validity of the copyrights at issue.

[33]** Essentially, Grumman's argument is that the district court erred in instructing the jury that minor, inadvertent errors in material deposited with a registration application do not affect the validity of the registration.²³ **[**34]** DG

¹⁹ HN8²⁴ To demonstrate copyright infringement, DG had the burden of demonstrating (1) that it owns a valid copyright in the versions of ADEX alleged to have been copied, and (2) that Grumman copied constituent, original elements of ADEX. See Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 111 S. Ct. 1282, 1296, 113 L. Ed. 2d 358 (1991); Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 605 (1st Cir. 1988); 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.01, at 13-5 to 13-6 (1993) (hereinafter "Nimmer").

²⁰ HN9²⁵ Where the program contains trade secret material, the copyright regulations permit some portions of the deposit to be blocked out, and allow a portion of the deposit to be in machine-readable "object code" (lines of zeroes and ones). 37 C.F.R. § 202.20(c)(2)(vii)(A)(2). If the deposit includes no blocked-out portions and consists entirely of source code, the first and last ten pages of the program will suffice. *Id.*

²¹ The district court instructed the jury as follows:

admits that there were inadvertent errors in the material deposited with the registration application for ADEX Revisions 0.0 to 2.0,²² but maintains that the errors are inconsequential.²³ Grumman does not quibble [***1394] [*1161] with DG's denial of intent, but argues in effect that *any* error, however minor, precludes a finding that the plaintiff complied with [Section 408\(b\)](#). Alternatively, Grumman argues that an unintentional error in the deposit may still invalidate a copyright registration if the error is material. Grumman contends further that the district court erred in refusing Grumman's request for production of the entire source code for each of the first three versions of ADEX, a decision which allegedly prejudiced Grumman's ability to demonstrate that the defects in the deposit were not minor. We address these contentions *seriatim*.

[**35] a. *Immaterial Errors in the Copyright Deposit*

[HN10](#) [↑] It is well established that immaterial, inadvertent errors in an application for copyright registration do not jeopardize the validity of the registration. See [Masquerade Novelty, Inc. v. Unique Indus., Inc.](#), 912 F.2d 663, 667-68 & n.5 (3d Cir. 1990); [Whimsicality, Inc. v. Rubie's Costume Co.](#), 891 F.2d 452, 456 (2d Cir. 1989) (citing [Eckes v. Card Prices Update](#), 736 F.2d 859, 861-62 (2d Cir. 1984)); [Harris v. Emus Records Corp.](#), 734 F.2d 1329, 1335 (9th Cir. 1984); [Original Appalachian Artworks, Inc. v. Toy Loft, Inc.](#), 684 F.2d 821, 828 (11th Cir. 1982); 2 [Nimmer](#) § 7.20, at 7-201 ("[A] misstatement or clerical error in the registration application if unaccompanied by fraud will not invalidate the copyright nor render the registration certificate incapable of supporting an infringement action."). In general, an error is immaterial if its discovery is not likely to have led the Copyright Office to refuse the application. See [Eckes](#), 736 F.2d at 861-62. [**36] ²⁴

Grumman observes that the cases approving substantial compliance with registration requirements concern errors in the *application*, not the *deposit*, and suggests that we adopt a rule demanding strict compliance with the deposit requirement. Although a different rule for deposit errors might be warranted if the language and underlying purposes [**37] of the deposit requirement were of a significantly different character than that of the application requirement, we do not find that to be the case.

Because the function or registration [with respect to computer programs] is symbolic, clerical errors in the materials deposited with the application for registration do not affect the validity of the registration. For instance, discrepancies in the dates, filing the wrong pages, or partial pages, and similar errors, if accepted by the Copyright Office, do not impeach the validity and effect of the registration. If the errors were intentional, however, for purposes of deceiving the Copyright Office and perpetrating a fraud, the errors invalidate the registration.

²² Grumman does not question the validity of the copyright registration for the *last* five versions of ADEX, which Grumman also admitted it copied and used. Therefore, Grumman's argument, if persuasive, would not constitute a complete defense to the infringement action; the real issue is the extent of infringement properly subject to suit.

²³ With respect to ADEX Revisions 0.0, 1.0, and 2.0, DG attempted to deposit the first and last ten pages of source code (with no trade secrets blocked-out) in accordance with [37 C.F.R. § 202.20\(c\)\(2\)\(vii\)\(A\)\(2\)](#). In all three instances, DG deposited the correct last ten pages but did not deposit the correct first ten pages. Nonetheless, in the case of ADEX Revisions 1.0 and 2.0, there was only one difference between the deposited pages and the pages DG intended to deposit: the Primary Label Block on the copyright deposit designates "1982" rather than "1983" as the copyright date. The same error occurred in the deposit for ADEX Revision 0.0, although there were three additional errors: two other discrepancies concerning the Primary Label Block, and one line of code missing from the deposited pages. The district court observed that "the Primary Label Block, which contains descriptive information about the tape, does not instruct or direct the computer." [Grumman VI](#), 825 F. Supp. at 356. In addition, Mr. Gove, DG's expert, testified that the few errors in the deposited pages would have no bearing on the operation of the programs.

²⁴ [HN11](#) [↑] Some courts have suggested that a defendant must show that it was *prejudiced* by a fraudulent misstatement or omission in a registration application, see, e.g., [Harris](#), 734 F.2d at 1335 ("Absent intent to defraud and prejudice, inaccuracies in copyright registrations do not bar actions for infringement."), whereas others merely require proof that an intentional error, if discovered by the Copyright Office, would have been *material* to the registration decision, see, e.g., [Eckes](#), 736 F.2d at 861-62. Any substantive difference in these standards has no bearing on our decision today.

HN12[²⁴] In the first place, the registration application described in [Section 409](#), as well as the deposit described in [Section 408\(b\)](#), are both equally mandatory components of the registration process outlined in [Section 408\(a\)](#). Likewise, just as [Section 409](#) sets forth what an application "shall include," (emphasis added), [Section 408\(b\)](#) uses the same phrase to prescribe the contents of the deposit. There is nothing in this language that would prevent our interpreting both the application requirements and the deposit requirements in a consistent and practical manner.

Nor do the apparent purposes of the deposit requirement counsel a different result. Although related to the deposit requirement in Section 407, which is designed to further the acquisitions policy of the Library of Congress, the deposit required by [Section 408\(b\)](#) serves the separate purpose of providing the Library's Copyright Office with sufficient material to identify the work in which the registrant claims a copyright. See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 5 [^{**38}] (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5766-70; see also [37 C.F.R. § 202.20\(c\)\(2\)\(vii\)](#) (requiring deposit of "identifying portions" of [**1162**] programs that are unpublished or published only in machine-readable form). In other words, a key purpose of the [Section 408\(b\)](#) deposit requirement is to prevent confusion about which work the author is attempting to register.

A second apparent aim of [Section 408\(b\)](#) is to furnish the Copyright Office with an opportunity to assess the copyrightability of the applicant's work. **HN13**[²⁵] Pursuant to the Copyright Act, the Register of Copyrights must register a copyright claim and issue a registration [^{***1395}] certificate "when, after examination, the Register . . . determines that . . . the material deposited constitutes copyrightable subject matter." [17 U.S.C. § 410\(a\) \(1988\)](#).

²⁵ [^{**40}] Some provisions of the copyright regulations seek to preserve the same opportunity for examination in relation to the deposit of a relatively small subset of a computer program. In adopting regulations encouraging source code deposits for computer programs, the Copyright Office explained that "in registering all copyright claims, the Copyright Office [^{**39}] examines the deposit to determine the existence of copyrightable authorship." [54 Fed. Reg. 13,173 \(1989\)](#). In order to allow the Office to continue this practice, the new regulations provide, for example, that when the applicant's deposit contains portions of the source code of an unpublished computer program with blocked-out trade secrets the deposit must still "reveal[] an appreciable amount of *original* computer code." See [37 C.F.R. § 202.20\(c\)\(2\)\(vii\)\(A\)\(2\)](#) (emphasis added). On the other hand, **HN14**[²⁶] where there are no blocked-out portions in the deposited portions of a computer program, the regulations do not specifically require that the deposit contain "an appreciable amount of original computer code." In other words, the Copyright Office seems to have assumed that in such cases the deposited pages are likely to contain sufficient elements of original expression to determine the copyrightability of the work at issue. At any rate, it appears that Congress viewed the deposit requirement as a means of collecting information that the Copyright Office may use in resolving the question of copyrightability for the purposes of [Section 410](#).²⁶

²⁵ Because [Section 410\(a\)](#) does not specify the nature of the "examination," and because there is evidence that Congress intended the government to play a role in copyright registration that is much more limited than its extensive responsibilities in overseeing patent registration, the Copyright Office may have the discretion to limit its examination to the facial validity of the application and deposit. See [Midway Mfg. Co. v. Bandai-America, Inc.](#), 546 F. Supp. 125, 143-44 (D.N.J. 1982) (citing, *inter alia*, [Donald v. Uarco Business Forms](#), 478 F.2d 764, 765 n.1 (8th Cir. 1973)). Nevertheless, any such **HN15**[²⁷] discretion resides in the Copyright Office, not the applicant, for [Section 410\(a\)](#) suggests that an applicant must always give the Copyright Office an opportunity to undertake an appropriate examination.

²⁶ Another objective of [Section 408\(b\)](#) might be to give would-be infringers notice of the extent of their civil liability. Yet, this can hardly have been an important legislative goal because a copyright owner is free to register any time before filing suit, even after the act of infringement. See [17 U.S.C. § 408\(a\); Twentieth Century-Fox Film Corp. v. Dunnahoo](#), 637 F.2d 1338, 1342-43 (9th Cir. 1981); see also [Olan Mills, Inc. v. Linn Photo Co.](#), 23 F.3d 1345, 1349 (8th Cir. 1994); [Konor Enters. v. Eagle Publications, Inc.](#), 878 F.2d 138, 140 (4th Cir. 1989). In addition, because Congress had included a recordation requirement elsewhere in the copyright laws until 1988, see [17 U.S.C.A. § 205\(d\) \(West 1977\)](#) (providing that recordation of transfer of copyright ownership is prerequisite to infringement suit by transferee), but did not do so in the context of [Section 408](#), we may infer that affording notice to potential infringers was not Congress's primary motivation in drafting [Section 408\(b\)](#). See [City of Chicago v. Environmental Defense Fund](#), 128 L. Ed. 2d 302, 114 S. Ct. 1588, 1593 (1994) ("It **HN16**[²⁸] is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (citation,

[**41] Neither of these objectives differs so significantly from those of the application requirement as to justify a departure from the rule governing application errors. Quite naturally, [HN17](#)²⁷ one important function of a registration application is to identify the work in which the applicant claims a copyright. See [17 U.S.C. § 409 \(1988 & Supp. IV 1992\)](#) (requiring application to include, *inter alia*, title of work, dates of completion and publication, along with "any other information . . . bearing upon the . . . identification of the work"). Furthermore, like the deposit, the [**1163] application also provides some evidence of copyrightability, because it must identify any preexisting work from which the author borrowed in creating a compilation or derivative work. See [17 U.S.C. § 409\(9\)](#). Indeed, the Copyright Office may often be in a better position to assess the originality of the work being registered by reviewing a list of preexisting works than by conducting a cursory inspection of the deposited material. And yet, an inadvertent failure to identify preexisting works on an application is treated no differently from [**42] any other application error. See, e.g., [Toy Loft, 684 F.2d at 828](#) (analyzing in similar fashion failure to mention co-author and failure to mention preexisting works).

We conclude that there is no support in law or reason for a rule that penalizes immaterial, inadvertent errors in a copyright deposit.²⁷ Accordingly, we find no flaw in the [***1396] district court's instruction that such errors "do not impeach the validity and effect of the registration."

[**43] b. Material Errors in the Copyright Deposit

[HN18](#)²⁸ The law is not quite as settled as to the effect of an application error that is inadvertent but nonetheless material. No court has suggested that a registration premised in part on an unintentional material error would fail to satisfy the jurisdictional requirement of [Section 411\(a\)](#). At the same time, at least one court has suggested that in such instances the proper approach might be to prevent the plaintiff from exploiting the presumption of validity that ordinarily attaches to a registered copyright under [Section 410\(c\)](#). [Masquerade Novelty, 912 F.2d at 668 n.5](#) (dictum). We assume for argument's sake that a material error in a copyright deposit, even if unintentional, may destroy the presumption of validity.

c. Refusal to Compel Production of Source Code

Grumman next argues that it was unfairly deprived of an opportunity to prove that the errors in the deposits were material. Specifically, Grumman claims that the district court abused its discretion when, during the trial, it refused to compel DG to produce roughly 40,000 pages of source code (on approximately 33,000 floppy disks) for each of [**44] the first three versions of ADEX (0.0 to 2.0). See [Geremia v. First Nat'l Bank, 653 F.2d 1, 5-6 \(1st Cir. 1981\)](#) (reviewing denial of mid-trial discovery motion for abuse of discretion).

Grumman renewed its unsuccessful pre-trial requests for the source code after Edward Gove, a DG witness, admitted on cross-examination that there were some discrepancies between the source code deposited with the Copyright Office and the actual source code for ADEX 0.0 to 2.0, and then explained in rebuttal testimony that those errors were minor and of no consequence to the operation of the diagnostic program as a whole. In response

internal quotation marks, and brackets omitted); [United States ex rel S. Prawer & Co. v. Fleet Bank, 24 F.3d 320, 329 \(1st Cir. 1994\)](#) (similar).

²⁷ Contrary to Grumman's vigorous assertions, this court's opinion in [Unistrut Corp. v. Power, 280 F.2d 18 \(1st Cir. 1960\)](#), does not compel a different rule. In that case, plaintiff claimed infringement of the 1942 edition of its catalog but apparently sought to prove unauthorized copying at trial by demonstrating the similarity of the defendant's work to the 1943 edition of plaintiff's catalog, "which admittedly contained some, unspecified, additions." *Id. at 23*. Because "there was no proof that copies of this later edition were deposited with the Copyright Office, and there was no proof that the infringed material was contained in the 1942 edition," we held that there was insufficient proof of infringement of the earlier edition. *Id.* *Unistrut* is distinguishable in at least two respects. First, our opinion in *Unistrut* does not suggest that the plaintiff mistakenly deposited the 1943 edition when attempting to register a copyright claim concerning the 1942 edition; hence, *Unistrut* cannot serve as authority on the legal ramifications of registration errors. Second, in this case there is evidence that sections of source code from ADEX Revisions 0.0 to 2.0 were among the pages deposited with the Copyright Office, even if other portions of the deposited material came from other computer programs.

to the renewed request, DG provided Grumman with those portions of the source codes for ADEX Revisions 0.0 to 2.0 necessary to conduct a character-by-character comparison of the intended deposits of source code with those portions of source code actually deposited.²⁸ Nonetheless, [*1164] Grumman insisted that it was entitled to the entire source code for all three versions.

[**45] Grumman apparently sought the three sets of source code because it believed that analysis of the entire source code would permit a more effective cross-examination of the DG witness about the magnitude of the discrepancies during DG's rebuttal. It seems that Grumman had one main goal: it believed it might be able to show that, although the discrepancies were few in number and seemingly minor in character, ADEX would not function properly if the source code deposited with the Copyright Office had been inserted into the versions of ADEX DG intended to register.

The marginal benefit to Grumman of obtaining the balance of the source code was at best highly uncertain, and all indications were that such a test would produce no compelling results. Even if Grumman could demonstrate that inserting the errors would impair the operation of ADEX, it is extremely unlikely that this would establish the materiality of the errors. Grumman does not allege that any of the errors, if discovered, would have led the Copyright Office to refuse registration of DG's copyright claims. Nor does Grumman contend that the Copyright Office would have been unable to use [***1397] the correct portions of the deposits to identify [**46] the works DG intended to register or make a preliminary determination concerning the copyrightability of those works.²⁹ In contrast, DG produced evidence that production of the requested material would be an extremely cumbersome process, a point Grumman does not contest. We find no abuse of discretion in the district court's decision to deny Grumman's mid-trial discovery request.

[**47] 2. Preemption of Trade Secrets Claim

Seeking to avoid the additional damages associated with the trade secrets remedies selected by DG, Grumman argues that the state claim is preempted by [Section 301](#) of the Copyright Act, [17 U.S.C. § 301\(a\)](#).

[HN19](#) [Section 301(a)] precludes enforcement of any state cause of action which is equivalent in substance to a federal copyright infringement claim.³⁰ See generally [Gates Rubber Co. v. Bando Chem. Indus., Ltd.](#), [9 F.3d 823, 846-47 \(10th Cir. 1993\)](#); [Trandes Corp. v. Guy F. Atkinson Co.](#), [996 F.2d 655, 658-60](#) (4th Cir.), cert. denied, [126 L. Ed. 2d 377, 114 S. Ct. 443](#) (1993); 1 [Nimmer § 1.01\[B\]\[h\]](#), at 1-35 to 1-36.1. Courts have developed a functional test to assess the question of equivalence. "If a state cause of action requires an extra element, beyond mere copying, preparation of derivative works, performance, distribution or display, then the state cause of action is qualitatively different from, and not subsumed within, a copyright infringement claim and federal law will not preempt the [**48] state action." [Gates Rubber](#), [9 F.3d at 847](#) (citing [Computer Assocs. Int'l, Inc. v. Altai, Inc.](#), [982 F.2d 693, 716 \(2nd Cir. 1992\)](#)).

²⁸ In its brief, DG states that "Data General collected and provided to Grumman copies of the entire source code of all of the sub-programs that were, or should have been, filed in the Copyright Office for each of the relevant revisions of MV/ADEX." Grumman does not challenge this assertion.

²⁹ If a showing of prejudice is necessary to enable a defendant to use a registration error as a defense to an infringement action, see *supra* note 24, Grumman has failed in this respect as well because Grumman has not shown that it was misled as to the copyrightability of ADEX Revisions 0.0 to 2.0. It appears that Grumman has always acted in a manner consistent with the belief that each revision of ADEX contains copyrightable elements. In these proceedings, moreover, Grumman has never seriously argued that the first three versions of ADEX are entirely devoid of original computer code, and has consistently admitted that it made identical copies of the entire contents of each version of ADEX at issue in this action. Accordingly, we are unable to see why Grumman was disadvantaged by bearing the burden of proving that there are no copyrightable elements in the first three versions of ADEX, a task even Grumman seems to have forsaken.

³⁰ In pertinent part, [Section 301\(a\)](#) provides that "all [HN20](#) legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title. No person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."

HN21[] Not every "extra element" of a state claim will establish a qualitative variance between the rights protected by federal copyright law and those protected by state law. For example, a state claim of tortious interference with contractual relations may require [*1165] elements of awareness and intentional interference not necessary for proof of copyright infringement. And yet, such an action is equivalent in substance to a copyright infringement claim where the additional elements merely concern ****49** *the extent to which* authors and their licensees can prohibit unauthorized copying by third parties. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985). Similarly, **HN22**[] a state law misappropriation claim will not escape preemption under *Section 301(a)* simply because a plaintiff must prove that copying was not only unauthorized but also "commercially immoral[,]" a mere "label attached to [the same] odious business conduct." *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985). Nonetheless, a trade secrets claim that requires proof of a breach of a duty of confidentiality stands on a different footing. Such claims are not preempted because participation in the breach of a duty of confidentiality -- an element that forms no part of a copyright infringement claim -- represents unfair competitive conduct qualitatively different from mere unauthorized copying. See *Gates Rubber*, 9 F.3d at 847-48; ****50** *Trandex Corp.*, 996 F.2d at 660; *Computer Associates*, 982 F.2d at 717; *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1090 n.13 (9th Cir. 1989).³¹

*****1398** DG's trade secrets claim fits comfortably within this category. **HN23**[] To demonstrate misappropriation of trade secrets under Massachusetts law, DG must ****51** prove that "(1) MV/ADEX is a trade secret; (2) Data General took reasonable steps to preserve the secrecy of MV/ADEX; and (3) Grumman used improper means, in breach of a confidential relationship, to acquire and use the trade secret." *Grumman VI*, 825 F. Supp. at 357 (citing, *inter alia*, *J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc.*, 357 Mass. 728, 260 N.E.2d 723, 729-31 (Mass. 1970)). The district court instructed the jury that "wrongful acquisition" is an element of a Massachusetts trade secrets claim, and that "acquisition of a trade secret is wrongful . . . if it is by theft of property known to belong to another, or by *knowing participation in the breach of an express or implied confidentiality agreement* by, for instance, a former employee or customer of Data General." (Emphasis added.) Grumman does not assign error to this portion of the charge, which thus becomes the law of the case. See *United States v. Connell*, 6 F.3d 27, 30 (1st Cir. 1993) (explaining that unchallenged legal decisions are ordinarily unassailable at later stages in litigation). ****52** Furthermore, DG's theory was precisely that Grumman acquired ADEX by participating in the breach of confidentiality agreements binding on former employees and service customers of DG.³² Because the Copyright Act does not prevent the states from imposing liability for such conduct, the district court was correct to spare DG's trade secrets claim from preemption under *Section 301(a)*.

3. 1976 Settlement Agreement Defense

Grumman denies its liability for copyright infringement and misappropriation of trade secrets, arguing that the Settlement Agreement contains a license allowing Grumman to copy and use ADEX in the maintenance and repair of DG computers. The district court granted DG's motion for partial summary judgment on this issue, and Grumman now appeals that decision on two alternative grounds: (1) the Settlement Agreement unambiguously grants Grumman a license to use ADEX; or (2) the Settlement Agreement is at least ambiguous, and conflicting ****53** extrinsic evidence about the scope of the license presents a factual dispute worthy of resolution by a jury.

***1166] a. Maryland Contract Law**

³¹ Grumman insists that acquisition of copyrightable software in violation of confidentiality agreements is equivalent to unauthorized copying where, as appears to be the case here, the defendant does not actually *learn* the trade secrets embodied in the software. The qualitative difference between unauthorized copying and such acts as the discovery of wrongfully acquired trade secrets and the illegal use of that knowledge may be more striking than the difference between unauthorized copying and mere participation in the breach of a confidentiality agreement. But we cannot agree that the latter relationship is one of equivalence.

³² The relevant contract language appears *infra*, note 37.

The parties agree that the Settlement Agreement, executed in Maryland, is governed by Maryland contract law. **HN24**²⁴ Maryland courts do not follow the subjective theory of contracts, which aims to discover the actual intent of the parties even at the expense of unambiguous language to the contrary. See *Hershon v. Gibraltar Bldg. & Loan Ass'n*, 275 U.S. App. D.C. 26, 864 F.2d 848, 851 (D.C. Cir. 1989) (applying Maryland law). Instead, Maryland subscribes to the objective approach. See *id.* Under that approach, a court may consider extrinsic evidence only in determining whether contract language is ambiguous. See *864 F.2d at 852*. However, as long as the result is objectively reasonable, a court may not use extrinsic evidence "to interpret facially explicit contractual terms." *Id. at 851-52*. See also *General Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 492 A.2d 1306, 1310 (Md. 1985).

HN25²⁵ Where contract terms are ambiguous, a court may look to **[**54]** extrinsic evidence in order to ascertain the intention of the parties and, if successful, interpret the contract as a matter of law. See *Collier v. MD-Individual Practice Ass'n*, 327 Md. 1, 607 A.2d 537, 541 (Md. 1992); *Truck Ins. Exch. v. Marks Rentals, Inc.*, 288 Md. 428, 418 A.2d 1187, 1190 (Md. 1980). If, after such examination, the meaning of the ambiguous terms remains in genuine dispute, and the dispute is material to the outcome of the claim or defense at issue, the ambiguity must be resolved by the trier of fact. See *id.*; *Monumental Life Ins. Co. v. United States Fidelity & Guar. Co.*, 94 Md. App. 505, 617 A.2d 1163, 1174 (Md. Ct. Spec. App.) ("Only when there is a bona fide ambiguity in the contract's language or legitimate doubt as to its application under the circumstances is the contract submitted to the trier of the fact for interpretation."), cert. denied, 330 Md. 319, 624 A.2d 491 (Md. 1993).³³

[*1399] [**55] b. Areas of Agreement**

In order to focus our analysis of DG's entitlement to summary judgment, we first determine the reach of Grumman's contentions in light of the existing areas of agreement.

In the first place, the parties agree that the existence and scope of a license turn on the interpretation of the "maintenance or repair" exception to the general prohibition of paragraph four of the Settlement Agreement, which provides that Grumman's predecessor "will not, directly or indirectly, copy or utilize 'Proprietary Information' of DG for the design or manufacture of computers or any other purpose."³⁴ In addition, DG admits that the Settlement Agreement gives Grumman a right to use some of DG's proprietary information for some purposes. Although DG denies that the Settlement Agreement allows Grumman to use ADEX itself, DG nonetheless admitted in its answers to Grumman's request for admissions "that, as part of the settlement of the CSSC litigation, Data General agreed that CSSC could use Data General proprietary information that was defined in the Agreement and the nature of which was then understood by **[*1167]** and agreed to by the parties, to maintain or repair Data General computers." **[**56]** While the Settlement Agreement does not bear many of the traits of a traditional licensing agreement, it does grant some permission to use DG's intellectual property, at least in certain circumstances, and

³³ Grumman asserts that any ambiguity must be interpreted against DG as the drafter of the Settlement Agreement. However, **HN26**²⁶ because the Settlement Agreement is the product of negotiations by sophisticated parties represented by counsel, this "secondary rule of construction . . . perhaps should have but slight force." *Acme Markets, Inc. v. Dawson Enters.*, 253 Md. 76, 251 A.2d 839, 847 (Md. 1969) (quoting *Rossi v. Douglas*, 203 Md. 190, 100 A.2d 3, 6 (Md. 1953)). In any event, this interpretive presumption has no application where, as here, the record contains extrinsic evidence sufficient to discover the intention of the parties to the Settlement Agreement. See *Pacific Indem. Co. v. Interstate Fire & Casualty Co.*, 302 Md. 383, 488 A.2d 486, 497 (Md. 1985); *St. Paul Fire & Marine Ins. Co. v. Pryserski*, 292 Md. 187, 438 A.2d 282, 288 (Md. 1981).

³⁴ In its entirety, paragraph four reads as follows:

4. Defendants [CSSC, Lloyd Root, and Robert Montgomery] agree, jointly and severally, that they will not, directly or indirectly, copy or utilize "Proprietary Information" of DGC for the design or manufacture of computers or any other purpose except [i] maintenance or repair of DGC equipment, [ii] installation and integration of equipment manufactured or sold by companies other than DGC, or [iii] other purposes permitted by any proprietary or confidentiality legends accompanying or made part of any data or documentation comprising Proprietary Information. "Proprietary Information" of DGC shall mean data and documentation which is marked confidential or proprietary to DGC by appropriate legend.

therefore creates some type of "license."³⁵ **[**57]** Consequently, Grumman's defense turns on the scope of the license.³⁶

Also worthy of note are undisputed facts concerning the nature of Grumman's acquisition and use of ADEX. Grumman did not simply gain access to copies of ADEX left at the sites of former DG service customers solely for the purpose of using on-site maintenance tools to service computers at that site. Rather, Grumman *acquired* copies of ADEX from former service customers in an effort to expand its own library of MV diagnostic software, which **[**58]** Grumman technicians freely copied and used in servicing the computers of any Grumman customer with MV equipment. Moreover, there is no evidence that Grumman acquired ADEX from equipment owners at a time when those equipment owners were also customers of DG. Nor is there evidence that Grumman acquired ADEX directly from DG, or from current or former CMO customers. In addition, the record reveals that DG service customers were contractually bound both to prevent ADEX from falling into the hands of third parties such as TPMs and to return copies of ADEX to DG after the termination of the relevant service agreement.³⁷ Thus, Grumman acquired ADEX from those customers who no longer had lawful possession **[***1400]** of the program and had no right to transfer it.³⁸

[59]** The question we must resolve is whether the "maintenance or repair" exception authorized Grumman both to gain access to and acquire copies of ADEX in the possession of former DG service customers despite the fact that these customers had agreed not only to prevent such third-party access but also to return copies of ADEX to DG after the termination of their service contract.

d. Scope of the License

The plain language of the Settlement Agreement does not answer our question. Despite the fact that the exception anticipates that Grumman will "copy or utilize" DG proprietary information for the "maintenance and repair of DGC equipment," the Settlement Agreement does not specify whether it merely refers to Grumman's right to gain access to maintenance tools it finds at a customer site (including the routine copying and use inherent in the operation of a computer program), or whether the exception somehow allows Grumman to acquire such tools for the service of DG computers at other sites. Similarly, the Settlement Agreement **[*1168]** contains no prescription for resolving potential conflicts between the "maintenance or repair" exception and provisions in DG's Service Agreement prohibiting **[**60]** third-party access during the term of the Agreement and retention of DG proprietary information thereafter. Accordingly, we turn to the extrinsic evidence in the record in an attempt to resolve the ambiguity.

³⁵ Because neither party has offered a legal definition of a license, we will regard the term as carrying its usual definition: [HN27](#) [↑] permission to use the property of another. *Black's Law Dictionary* 829-30 (5th ed. 1979). A license can be general, with few or no restrictions, or quite limited. The use of the word "license" in a contract is clearly evidence of an intent to permit use, but the absence of the word is not dispositive, as long as other contract language grants some permission to use. Cf. 3 [Nimmer § 10.03\[A\]](#), at 10-38 (explaining that "[a] nonexclusive license may be granted orally, or may even be implied from conduct") (footnotes omitted).

³⁶ DG argues that the Settlement Agreement was not intended to apply to proprietary information created by DG after settlement of the 1975 lawsuit. We cannot agree. The language "'Proprietary Information' of DGC" strikes us as unambiguous, and unqualifiedly embraces *all* DG proprietary information, whether in existence in 1976 or not. However, even if the phrase were ambiguous, an examination of the extrinsic evidence reveals that DG would still not be entitled to summary judgment on this basis because there is extrinsic evidence that would allow a reasonable jury to find that the Settlement Agreement was intended to apply to information in the future.

³⁷ For example, in one version of DG's On-Call Service Agreement, service customers agreed "NOT TO DISCLOSE OR MAKE AVAILABLE TO ANY THIRD PARTY THE PROPRIETARY ITEMS [installed at customer locations by DG;] AND . . . TO RETURN ALL THE PROPRIETARY ITEMS TO [DG] UPON EXPIRATION OR CANCELLATION/TERMINATION OF THIS AGREEMENT."

³⁸ Grumman also acquired copies of ADEX from former DG employees who brought copies of the program with them, in violation of their employment agreements. Grumman does not maintain that the Settlement Agreement gives it the right to duplicate and use copies of ADEX acquired in this manner.

Even when viewed in a light most favorable to Grumman, the record evidence makes clear that the parties to the Settlement Agreement intended the "maintenance and repair" exception to function as what we shall call a "third-party access agreement," allowing CSSC, Grumman's predecessor in interest, to gain access to proprietary information that DG sold, licensed, or otherwise entrusted to owners of DG equipment. For example, when called to testify in the *STI* litigation, Edward Canfield, CSSC's attorney at the time, used these words to describe his contemporary understanding of the "maintenance and repair" exception: "If the customer had it, [CSSC] had a right to use it." ³⁹ In addition, the language of DG licensing agreements in the 1970s as well as the pleadings in the 1975 litigation strongly corroborate the view that the settlement negotiations primarily concerned CSSC's right to use proprietary information in the hands of DG equipment owners. As late as 1976, DG licensed **[**61]** proprietary maintenance information to equipment owners under an agreement which specifically allowed licensees to grant access to third parties "on LICENSEE's premises with LICENSEE's permission for purposes specifically related to LICENSEE's use of the Licensed Program." Moreover, in its 1975 counterclaim, CSSC intimated that DG had begun to undermine the ability of TPMs to gain access to maintenance information in the hands of equipment owners, alleging that DG had attempted "to prevent owners of DGC Mini-computers from having their equipment serviced and maintained by any competitor of DGC . . . by restricting the use those owners make of their owner maintenance information."

There is also specific evidence that the parties to the Settlement Agreement were not negotiating about the ongoing transfer of proprietary information directly from DG to CSSC. For example, during the *STI*/**[**62]** trial, counsel for DG asked Canfield whether, under the Settlement Agreement, DG had an "obligation to give [CSSC] something." "No sir," replied Canfield, "Data General was not offering to give us anything."

The nature of the "maintenance and repair" exception as a third-party access agreement has several ramifications. As a provision designed to ensure access to Grumman, the exception was arguably intended to override contrary restrictions in proprietary legends and confidentiality agreements. Indeed, there is evidence that this was the case. A letter to Canfield from Carl Kaplan, a lawyer who represented DG in the settlement negotiations, outlined the proposed settlement, stating that improper utilization of DG proprietary information "would be the use of that information other than as marked by DGC or without DGC's express written permission." (Emphasis added.) Kaplan added that "use of DGC proprietary information for the maintenance of DGC equipment would expressly be permitted the defendants." *Id.* In addition, Canfield's deposition testimony suggests that his primary concern was for DG to guarantee CSSC's **[***1401]** right to use proprietary information distributed to DG equipment **[**63]** owners, notwithstanding future restrictions on third-party access to such information. Thus, a jury could reasonably conclude that the Settlement Agreement allowed Grumman to gain access to information in the hands of DG equipment owners for the purpose of maintaining DG computers, even if equipment owners generally could not allow third parties access to DG proprietary information.

Characterizing the exception as a third-party access agreement also means that Grumman's right to use copies of ADEX in the possession of DG equipment owners is necessarily derivative of the rights of those equipment owners. As a consequence, **[*1169]** Grumman only has the right to *operate* a customer's copy of ADEX for the benefit of that customer; there is no basis for the proposition that Grumman can use its third-party access rights to *acquire* copies of ADEX for unlimited copying and use in the service of any MV computer. Indeed, this was the import of Canfield's testimony in *STI*. Referring to a CSSC customer as a "party," Canfield stated that he understood the Settlement Agreement to allow "[CSSC] to use whatever [was] on the party's equipment . . . for the repair and maintenance of *that party's* **[**64]** equipment." (Emphasis added). ⁴⁰ Furthermore, to the extent that an equipment

³⁹ The district court accepted a transcript of Canfield's testimony in *STI* as part of the summary judgment record in this case.

⁴⁰ We note in passing that *STI* appeared to adopt Canfield's statement in the course of the *STI* trial. When Judge Motz characterized Canfield's testimony as stating that proprietary maintenance tools in the hands of CSSC's customers "were to be used . . . for the customer's own computers," counsel for *STI* responded, "I don't have a problem with that."

owner no longer has the right to possess copies of ADEX, as in the case of a former DG service customer, Grumman's rights as a third party are extinguished.⁴¹

[**65] In summary, we conclude that the Settlement Agreement merely grants Grumman the right to gain access to copies of ADEX lawfully possessed by a DG equipment owner in order to service the computers of that particular equipment owner. Because Grumman's copying and use of ADEX does not fall within this category, the Settlement Agreement does not serve as a defense either to the infringement action or the trade secrets claims. The district court did not err in granting partial summary judgment for DG on Grumman's Settlement Agreement defense.

4. Misuse Defense

Grumman claims that DG is not entitled to enforce its copyrights or its rights under state trade secrets law because it has "misused" those property rights by engaging in anti-competitive behavior in violation of federal antitrust laws. DG argues that there is no "copyright misuse" defense to a federal copyright infringement claim and no applicable "unclean hands" defense to the state claim for misappropriation of trade secrets. Alternatively, DG argues that it did not violate the antitrust laws.

HN29 [+] A "copyright misuse" defense is not without legal support. In a carefully reasoned opinion, the Fourth Circuit recently approved [**66] such a defense after noting that it has long been recognized in the analogous context of patent infringement. See *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 976 (4th Cir. 1990) ("Since copyright and patent law serve parallel public interests, a 'misuse' defense should apply to infringement actions brought to vindicate either right."); see also 3 *Nimmer § 13.09[A]*, at 13-269 to 13-276 (collecting conflicting decisions of lower courts); Ramsey Hanna, Note, *Misusing Antitrust: The Search for Functional Copyright Misuse Standards*, *46 Stan. L. Rev.* 361, 404-10 (1994) (charting the development of the copyright misuse defense). Although DG correctly notes that the misuse in *Lasercomb* (conditioning a copyright license on a noncompetition agreement) is not identical to the misuse alleged in this case (tying access [**1402] to ADEX to the purchase of DG service and refusing to license ADEX to TPMs), the reasoning of *Lasercomb* does not turn on the particular type of anti-competitive behavior [*1170] alleged. DG also suggests that the policy rationale for a copyright misuse defense is weaker than in the case of patent misuse [**67] because an exclusive right to express an idea in a particular way (a copyright) is a lesser threat to competition than an exclusive right to use the idea itself (a patent). We acknowledge that it is often more difficult to prove an antitrust violation when the claim rests on the questionable market power associated with a copyright, but that would not be a reason to prohibit a defendant from attempting to meet its burden of proof, and would be a poor reason to refrain entirely from recognizing a copyright misuse defense.

Nevertheless, this case does not require us to decide whether the federal copyright law permits a misuse defense. Nor need we determine whether Massachusetts recognizes an unclean hands defense to a claim for misappropriation of trade secrets. Grumman does not claim that DG misused its copyright or acted inequitably in any fashion other than through its alleged violations of the Sherman Act.⁴² [**68] And, because we conclude *infra*,

⁴¹ Our conclusion that the "maintenance or repair" exception was intended to be a third-party access agreement also disposes of Grumman's assertion that the Settlement Agreement somehow obligates DG to distribute its proprietary maintenance information either to Grumman's customers or directly to Grumman. As explained above, the extrinsic evidence demonstrates that the Agreement concerns Grumman's right to gain access to proprietary information that DG distributes to equipment owners. Nowhere does the Agreement say that DG will distribute to Grumman proprietary information DG chooses to distribute only to its own field engineers. Further, it would be unreasonable to interpret the Agreement as providing for direct licensing of proprietary information on demand given that the Agreement did not even allow the individual parties to the Agreement (Root and Montgomery, both former DG employees) to retain or purchase any proprietary information they acquired during their employment with DG. And finally, **HN28** [+] a mere agreement to agree to an unspecified future license would be unenforceable as a matter of contract law. See *STI*, 737 F. Supp. at 339 (citing *First Nat'l Bank v. Burton, Parsons & Co.*, 57 Md. App. 437, 470 A.2d 822, 828 (Md. Ct. Spec. App.), cert. denied, 300 Md. 90, 475 A.2d 1201 (Md. 1984)).

Section III.B., that there is insufficient evidence to justify a trial on either of Grumman's antitrust counterclaims, Grumman's misuse and unclean hands defenses are equally devoid of merit.⁴³

[**69] 5. Damages

Grumman's principal assault on the jury's award of \$ 27,417,000 in damages (DG's lost profits and Grumman's nonduplicative profits) is that the district court failed to give the jury adequate guidance to find the necessary causal connection between Grumman's infringement and DG's damages. Because the calculus of causation is partly a function of the particular theory of damages advanced by the plaintiff, we divide our discussion accordingly.

a. Actual Damages

HN32 [↑] A successful plaintiff in an infringement action is entitled to "actual damages suffered by [it] as result of the infringement." [17 U.S.C. § 504\(b\)](#). Actual damages are generally calculated with reference to the loss in the fair market value of the copyright, often measured by the profits lost as a result of the infringement. See, e.g., [Eales v. Envtl. Lifestyles, Inc.](#), [958 F.2d 876, 880](#) (9th Cir.), cert. denied, [113 S. Ct. 605](#) (1992); see generally 3 [Nimmer](#) § 14.02[A], at 14-8 to 14-9.

HN33 [↑] The plaintiff bears the burden of proving that the infringement was the cause of its loss of revenue. [**70] See [Harper & Row, Publishers, Inc. v. Nation Enters.](#), [471 U.S. 539, 567, 85 L. Ed. 2d 588, 105 S. Ct. 2218](#) (1985); [Frank Music Corp. v. MGM, Inc.](#), [772 F.2d 505, 514 n.8](#) (9th Cir. 1985) (citing [Shapiro, Bernstein & Co. v. 4636 S. Vermont Ave., Inc.](#), [367 F.2d 236, 241](#) (9th Cir. 1966)). In defining that burden, it is useful to borrow familiar tort law principles of causation and damages. See [Deltak, Inc. v. Advanced Sys., Inc.](#), [574 F. Supp. 400, 403](#) (N.D. Ill. 1983) [*1171] (Posner, J., sitting by designation) (referring to "normal tort damages principles" in discussion of copyright damages), vacated on other grounds, [767 F.2d 357](#) (7th Cir. 1985); 3 [Nimmer](#) § 14.02[A], at 14-11, 14-20 to 14-21 n.49.8 (alluding to notions of "but for" and proximate causation). Thus, **HN34** [↑] the plaintiff should first establish that the infringement was the cause-in-fact of its loss by showing with reasonable [***1403] probability that, but for the defendant's infringement, the plaintiff would not have suffered the loss. See [**71] , e.g., [Robert R. Jones Assocs. v. Nino Homes](#), [858 F.2d 274, 281](#) (6th Cir. 1988); 3 [Nimmer](#), § 14.02[A], at 14-9; cf. [Harper & Row](#), [471 U.S. at 567](#) (noting that in rebuttal defendant may "show that this damage would have occurred [anyway] had there been no taking of copyrighted expression"); [Aro Mfg. Co. v. Convertible Top Replacement Co.](#), [377 U.S. 476, 507, 12 L. Ed. 2d 457, 84 S. Ct. 1526](#) (1964) (noting that actual damages in patent infringement case are based on "what [the patent holder's] condition would have been if the infringement had not occurred") (citation and internal quotation marks omitted). The plaintiff must also prove that the infringement was a proximate cause of its loss by demonstrating that the existence and amount of the loss was a natural and probable consequence of the

⁴² Note that the *Lasercomb* court held that **HN30** [↑] a copyright misuse defense does not require proof of an antitrust violation, only proof that "the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright." [911 F.2d at 978](#).

⁴³ Even if Grumman's antitrust counterclaims could survive summary judgment, Grumman would not necessarily have the privilege of interposing its counterclaims as defenses. *Lasercomb* explains that **HN31** [↑] copyright misuse and its ancestor, patent misuse, are equitable defenses. See [911 F.2d at 976-77](#). If copyright misuse is an equitable defense, a defendant that has itself acted inequitably may not be entitled to raise such a defense. Cf. 3 [Nimmer](#) § 13.09[B], at 13-278 to 13-279 (noting the possible propriety of denying a defense of unclean hands "when the defendant has been guilty of conduct more unconscionable and unworthy than the plaintiff's"). Mere infringement may not be inequitable in this context because a misuse defense would appear to sanction at least some infringement as a necessary measure of self-help. But violation of a valid injunction against further infringement issued pursuant to a court's equitable powers would constitute blatantly inequitable behavior. Here, the jury specifically found that Grumman violated the district court's 1988 injunction against the use of ADEX. Grumman does not appeal that finding. Accordingly, while Grumman may be free to pursue antitrust counterclaims, cf. [Perma Life Mufflers, Inc. v. International Parts Corp.](#), [392 U.S. 134, 138-40, 20 L. Ed. 2d 982, 88 S. Ct. 1981](#) (1968) (holding that doctrine of *in pari delicto* is not a defense to an antitrust suit), it would not necessarily be entitled to raise a defense of copyright misuse predicated on antitrust violations.

infringement. See *Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 509 (2d Cir. 1977) ("HN35")⁴⁴ Damages may be recovered only if there is a necessary, immediate and direct causal connection between the wrongdoing [**72] and the damages."). A plaintiff may seek compensation for both direct and "indirect" losses, as long as the losses claimed are not unduly speculative. See *Business Trends Analysts, Inc. v. Freedonia Group, Inc.*, 887 F.2d 399, 404 (2d Cir. 1989) (recognizing possibility of recovery for loss of "enhanced good will" and "market recognition"); *Abeshouse v. Ultragraphics, Inc.*, 754 F.2d 467, 471 (2d Cir. 1985) (ruling that claimed harm to "reputation" and "marketability" of copyrighted poster was "too speculative to support any award of actual damages"); *Sunset Lamp Corp. v. Alsip Corp.*, 749 F. Supp. 520, 524-25 (S.D.N.Y. 1990) (recognizing possibility of recovery for lost sales of noninfringed items); 3 *Nimmer* § 14.02[A], at 14-11 to 14-21. At the same time, the plaintiff need not prove its loss of revenue with mathematical precision. See, e.g., *Stevens Linen Assocs. v. Mastercraft Corp.*, 656 F.2d 11, 14 (2d Cir. 1981) ("In establishing lost sales due to sales of an infringing product, courts must necessarily engage in some degree of speculation.").

[**73] DG argued at trial that ADEX capability was essential both to service MV computers and attract customers, and therefore nearly all of Grumman's MV customers would have remained with DG (or would have switched back to DG) had Grumman not touted its possession and use of ADEX. In opposition, Grumman introduced evidence that ADEX was of little use to Grumman's field engineers and only a minor factor in consumer's selection of a service vendor. In effect, Grumman argued that, even without ADEX, customers would have switched to (or remained with) Grumman in order to take advantage of its lower prices and allegedly higher-quality service.

In its objections to the jury charge, Grumman expressed concerns about the court's instructions on causation in the lost profits context. Grumman asked the court to instruct the jury that it was free to consider whether factors other than Grumman's infringement enabled Grumman to win customers from DG. On appeal, Grumman continues to challenge the adequacy of the district court's instructions on causation, and raises several questions about the sufficiency of the evidence.

(1) *Jury Instructions*

The district court's charge, relevant portions of which [**74] are set forth in the margin, invited the jury to consider the "diverse factors" that make up a customer's choice of a service organization, and properly allowed the jury to consider whether the majority of MV equipment owners would have turned to DG for service had Grumman not possessed and used ADEX.⁴⁴ [**75] The instructions also introduced [*1172] the jury to the concept of proximate cause. The charge not only mentioned the concept by name but also gave it content by explaining, among other things, that the plaintiff "bears the burden of proving its damages to a reasonable degree of certainty," may not be compensated for "purely speculative" damages, and is entitled only to "reasonable" damages. We conclude that the charge adequately equipped the jury to determine whether or not DG had established the requisite causal link between Grumman's infringement and the profits DG claimed to have lost.⁴⁵

⁴⁴ In its charge, the district court stated:

If you conclude that Grumman would not have been in the business of servicing MV computers but for its possession and use of MV/ADEX, or that some or all of Grumman's customers would not have hired Grumman to maintain or repair their computers if Grumman had not infringed Data General's copyrights, then you should consider what percentage of those customers would have done business with Data General instead.

You may take into account all the diverse factors which . . . might bear on the determination, including price, customer loyalty and level of customer satisfaction.

⁴⁵ Grumman's other challenges to the jury instructions are either meritless or moot. First, Grumman claims that an apportionment instruction (the subject of the following section) would have affected the outcome of the lost profits analysis. As we explained above, however, the district court's instructions enabled the jury to make findings about the relative role of infringing and noninfringing factors in customers' selection of Grumman over DG. Further examination of the value added by Grumman to its own products would have been unnecessary. Second, Grumman contends that it was impermissible for DG to calculate its lost profits based on its monopoly prices. This argument is untimely because Grumman did not raise this issue in its objections to the jury instructions. In any event, Grumman has not established that DG's exploitation of its monopoly is unlawful, *infra*, Section

[***1404] [**76] (2) *Sufficiency of the Evidence*

Grumman's challenge to the evidentiary basis for the jury's award of actual damages is less developed and equally unavailing. [HN36](#)⁴⁵ Upsetting a jury's damage award is a daunting task for any appellant, for we must draw all reasonable inferences in favor of the verdict, upholding the award if it derives from "any rational appraisal or estimate of the damages that could be based on the evidence before the jury." [Anthony v. G.M.D. Airline Servs., 17 F.3d 490, 493 \(1st Cir. 1994\)](#) (citations and internal quotation marks omitted). The likelihood of a victorious appeal is especially remote in the absence of rigorous argumentation. Cf. [Chakrabarti v. Cohen, 31 F.3d 1 \(1st Cir. 1994\)](#), [Nos. 92-1987 and 92-1988, slip op. at 8] (suggesting that, when challenging the sufficiency of the evidence, a defendant-appellant must make a "serious effort . . . to analyze the evidence taking it in the light most favorable to [the plaintiff] and resolving credibility issues in [the plaintiff's] favor"). Moreover, the calculation of lost profits will always involve "some degree of speculation." [Stevens Linen Assocs., 656 F.2d at 14](#). [**77] As a result, we rely on the appellant to specify with some precision the manner in which unduly speculative reasoning is likely to have infected the jury's verdict.

Grumman raises several specific concerns. First, Grumman complains that the jury had no basis to conclude that Grumman would not be in the MV business because DG's damage expert, Alan Friedman, did not consider the relative infrequency of Grumman's use of ADEX, or the value Grumman added to its product through "substantially lower prices, superior service and higher level of customer satisfaction." Grumman's ultimate concern is that "no attempt at apportionment was made." But Friedman did not set out to show that there was *nothing* attractive about Grumman service apart from its possession and use of ADEX. Instead, he reported -- and the jury apparently believed -- that, for most owners of MV equipment, ADEX capability was the critical attribute in a service vendor. As a result, Friedman concluded, ADEX capability was the *sine qua non* of Grumman's success in its chosen niche as a national vendor of MV service. Drawing all reasonable inferences in favor of DG, we [[*1173](#)] conclude that a reasonable jury was free to agree.

[**78] Grumman also argues that the jury must have improperly followed Friedman's lead in adding to the lost profits figure all of the service and hardware needs of Grumman's MV customers that DG was capable of filling. Grumman notes that Friedman based his testimony on evidence that customers prefer to have a single vendor of service, but claims that this evidence deserves little weight because "customers that had gone to [Grumman] had already demonstrated their particular price/service sensitivity." Viewed in a light most favorable to the verdict, however, the record evidence adequately supports the inference that Friedman invited the jury to draw. For example, while MV equipment owners may have switched to Grumman in search of lower prices and better service, the evidence suggests that none of them had to give up a preference for single sourcing to do so. Indeed, the evidence suggests that Grumman's drawing power was due in part to its ability to be a single source of service, particularly for customers with multiple brands of computer equipment. Nor did Grumman attempt to rebut Friedman's view with evidence of MV equipment owners who sacrificed their preference for single sourcing in [[**79](#)] certain circumstances.⁴⁶ [[**80](#)] More [[***1405](#)] importantly, Friedman did not presume that customers

III.B.2., and has not provided any authority for the proposition that actual damages cannot be based on the loss of *lawful* monopoly profits. Third, Grumman suggests that the damage award was inflated because the jury was improperly forbidden from considering the extent to which the 1976 Settlement Agreement authorized Grumman's use of ADEX. However, as illustrated *supra*, Section III.A.3., Grumman did not present trialworthy evidence that the Settlement Agreement authorized the acquisition and use of ADEX in any meaningful sense.

⁴⁶ Such rebuttal evidence, if it existed, should have been easily within Grumman's reach. For example, the evidence suggests that purchasers of DG equipment generally used DG service in the initial warranty period. Thus, owners of DG equipment might periodically upgrade a portion of their equipment, and therefore there would be times when one owner will have some newly upgraded equipment still under warranty and some older equipment no longer under warranty. Grumman could readily have introduced evidence that some of these equipment owners ignored their single-vendor preference by turning to a TPM for service of equipment not under warranty. Similarly, it would not have been difficult for Grumman to discredit Friedman's opinion by showing that DG had a significant number of price-conscious service customers who regularly turned to other vendors when purchasing new equipment, or that customers who purchased DG service on a "time and materials" basis often used TPMs as well.

would be entirely insensitive to issues of price and quality. In calculating DG's lost profits, he reduced the figure by an estimate of the business DG would itself have lost to competition from TPMs.⁴⁷ Finally, we note that DG did not seek compensation for a loss in "goodwill" or "market recognition" that was difficult to ascertain, *cf. Business Trends, 887 F.2d at 404*, but rather for the loss of a reasonably verifiable number of customers with a limited and predictable set of service needs and a demonstrated tendency to satisfy those needs by turning to a single vendor. In short, the evidence does not suggest that the jury's award of actual damages falls outside the "wide range of arguable appropriateness." *Toucet v. Maritime Overseas Corp., 991 F.2d 5, 11 (1st Cir. 1993)* (quoting *Wagenmann v. Adams, 829 F.2d 196, 216 (1st Cir. 1987)*).

b. Infringer's Profits

HN37[] In addition to actual damages, a copyright plaintiff may also recover the infringer's nonduplicative profits, i.e., "any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." [17 U.S.C. § 504\(b\)](#). In the context of infringer's profits, the plaintiff must meet only a minimal burden of proof in order to trigger a rebuttable presumption that the defendant's revenues are entirely attributable to the infringement; the burden then shifts to the defendant to demonstrate what portion of its revenues represent profits, and what portion of its profits are not traceable to the infringement. See *id.*; *Frank Music, 772 F.2d at 514; Cream Records, Inc. v. Jos. Schlitz Brewing Co., 754 F.2d 826, 828 (9th Cir. 1985)*. Specifically, [Section 504\(b\)](#) provides: [**81]

HN38[] In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements [*1174] of profit attributable to factors other than the copyrighted work.⁴⁸

[**82] DG introduced evidence that, of Grumman's gross revenue from MV-related business during the period 1984 to 1990, \$ 5.4 million consisted of business eliminated from the calculation of DG's lost profits. Although no further proof was required, DG accepted Grumman's estimates of its profit margin, and concluded that Grumman's nonduplicative profits amounted to approximately \$ 1.6 million.⁴⁹ Anticipating Grumman's attempt to prove the need for apportionment, DG also argued that, without ADEX, Grumman would not have been in the MV service business on a national scale, and that therefore Grumman would not have earned the remainder of its MV-related profits. In other words, DG's theory was that because ADEX capability was generally essential to attract customers with MV computers, few such [***1406] customers would have chosen Grumman as a service vendor, causing Grumman to leave (or perhaps never enter) the national market for service of MV-related equipment. Thus,

⁴⁷ In estimating this "volume loss," Friedman assumed that, without ADEX, Grumman would not have been among the TPMs competing for MV-related business.

⁴⁸ Contrary to DG's unsupported assertions, **HN39**[] a defendant in a Massachusetts trade secrets action appears to have the same right to ask for apportionment along with the same burden of proof. Citing [17 U.S.C. § 504\(b\)](#) as persuasive authority, the Massachusetts Supreme Judicial Court has set forth the following rule for apportionment in trade secrets cases:

Once a plaintiff demonstrates that a defendant made a profit from the sale of products produced by improper use of a trade secret, the burden shifts to the defendant to demonstrate those costs properly to be offset against its profit and the portion of its profit attributable to factors other than the trade secret.

[USM Corp. v. Marson Fastener Corp., 392 Mass. 334, 467 N.E.2d 1271, 1276 \(Mass. 1984\)](#). See also [Jet Spray Cooler, Inc. v. Crampton, 377 Mass. 159, 385 N.E.2d 1349, 1358-59 n.14 \(Mass. 1979\)](#) (citing, *inter alia*, [Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 48 \(2d Cir. 1939\)](#), aff'd, [309 U.S. 390, 84 L. Ed. 825, 60 S. Ct. 681 \(1940\)](#)).

⁴⁹ This amount included DG's estimated "volume loss" and "excluded revenue." "Volume loss" represents the MV-related business that DG would have lost in competition with TPMs even if DG had been the only service vendor with ADEX capability. "Excluded revenue" represents the MV-related business that DG did not have the capacity or the desire to seek, such as service contracts for certain systems with at least one non-DG CPU or service contracts for certain non-DG peripheral equipment attached to DG CPUs.

according to DG, Grumman's nonduplicative profits were the indirect result of consumer choices distorted by Grumman's infringement.

[**83] It is unclear whether Grumman contested DG's theory on the merits, although Grumman did introduce some expert testimony that owners of MV equipment were relatively indifferent to the ADEX issue in their choice of service vendors. As amplified by its arguments on appeal, however, Grumman's primary strategy was to invite the jury to take Grumman's infringement as a given, and focus instead on why its customers were willing to pay for Grumman service. Grumman argued that factors other than its possession and use of ADEX contributed to its customers' willingness to pay, and that it was entitled to retain a corresponding share of the resulting profits. Grumman introduced some evidence tending to show that its customers attached high value to the price and quality of Grumman service, as well as Grumman's ability to service non-DG equipment in a mixed-equipment system.

Recognizing that DG's "but for" theory focused on a different aspect of consumer behavior than Grumman's "contributing factors" theory, Grumman argued below that the court's instructions should leave the jury free to adopt either line of reasoning. Grumman's suggested method of doing so was for the court to instruct the [**84] jury on the concept of apportionment of infringer's profits set forth in [Section 504\(b\)](#). The district court agreed that the jury could adopt the approach best suited to the circumstances, but refused to give an explicit instruction on apportionment.

Assuming for the moment that Grumman was entitled to invite the jury to adopt its analytical framework, we do not believe that the court's instruction "properly apprised" the jury of the validity of such an approach. [Joia v. Jo-Ja Serv. Corp.](#), 817 F.2d 908, 912 (1st Cir. 1987), cert. denied, 484 U.S. 1008 (1988). Although the district court instructed the jury to include among infringer's profits only those revenues "attributable to the infringement," [*1175] at no point did the court fully reveal or explain the relatively difficult statutory concept of "elements of profit attributable to factors other than the copyrighted work." [17 U.S.C. § 504\(b\)](#). As noted in the preceding section, the court did refer (at least in its instruction on actual damages) to "diverse factors" which might have influenced customers' choice of Grumman over DG, but the [**85] court did not inform the jury that there may have been many reasons for customers' willingness to pay for Grumman service apart from the fact that Grumman possessed and used ADEX. Cf. [Walker v. Forbes, Inc.](#), 28 F.3d 409, 1994 WL 287173, at * 7 (4th Cir. 1994) (praising district court's "rich and detailed instructions . . . explaining . . . the correct apportionment of profit attributable to the infringement, [and] faithfully explaining the rules and procedures set out in the statute").

It is unclear why, if the district court chose to reject Grumman's proposed instruction, it did not simply read to the jury the language of [Section 504\(b\)](#). [HN40](#) [↑] We may overlook its failure to do so only if there is no basis in law or fact for the application of Grumman's theory. See [Joia](#), 817 F.2d at 912 (holding that "all parties are entitled to an adequate jury instruction upon the controlling issues"); cf. [Allen v. Chance Mfg. Co.](#), 873 F.2d 465, 470 (1st Cir. 1989) (holding that remand on basis of instructional error is required only if error "may have unfairly affected the jury's conclusions"). For the reasons set forth [**86] below, we believe that Grumman's theory is firmly rooted in the law of copyright and the record of this case.

[HN41](#) [↑] The defendant's burden under the apportionment provision of [Section 504\(b\)](#) is primarily to demonstrate the absence of a causal link between the infringement and all or part of the profits claimed by the plaintiff. See [Walker](#), 1994 WL 287173, at * 3-4 (describing [Section 504\(b\)](#) as "a rule of causation"). Because the rebuttable presumption of causation represents a presumption as to both cause-in-fact and proximate cause, there are two avenues of attack available to a copyright defendant. First, the defendant can attempt to show that consumers would have purchased its product even without the infringing element. See, e.g., [id. at * 4](#) (holding that district court properly allowed the defendant to show that an unauthorized reproduction of a photograph in an issue of its magazine had no causal relation to "amounts of revenue . . . committed to the issue sight unseen").⁵⁰ Alternatively, the defendant may show that the existence and amount of its profits are not the natural and probable [***1407]

⁵⁰ Note, however, that [HN42](#) [↑] if the plaintiff cannot prove actual damages and the defendant shows that none of its gain is attributable to the infringement, the plaintiff would still be entitled to elect statutory damages. See [17 U.S.C. 504\(c\) \(1988\)](#); see generally 3 [Nimmer § 14.04](#), at 14-47 to 14-79.

consequences of the infringement alone, but are also the result of other factors [**87] which either add intrinsic value to the product or have independent promotional value. See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, [309 U.S. 390, 407-08, 84 L. Ed. 825, 60 S. Ct. 681 \(1940\)](#) (approving apportionment where profits of defendant's film were largely attributable not to the plaintiff's pirated story but rather to the "drawing power" of the star performers and the artistry of others involved in the creation of the film); *Abend v. MCA, Inc.*, [863 F.2d 1465, 1480 \(9th Cir. 1988\)](#) (remanding for apportionment where factors other than the underlying story -- particularly the talent and popularity of Alfred Hitchcock, Jimmy Stewart, and Grace Kelly -- "clearly contributed" to the success of the film "Rear Window"), aff'd on other grounds, [495 U.S. 207 \(1990\)](#); *Sygma Photo News, Inc. v. High Soc'y Magazine, Inc.*, [778 F.2d 89, 96 \(2d Cir. 1985\)](#) (apportioning profits from sales of "Celebrity Skin" magazine where promotional cover contained not only infringing photograph of Raquel [**88] Welch but also a list of other nude celebrity photographs contained within); *Cream Records*, [754 F.2d at 828-29](#) (upholding apportionment of profits from malt liquor sales apparently based on popularity of noninfringing product and promotional value of noninfringing elements of defendant's commercial); cf. *USM Corp.*, [467 N.E.2d at 1277](#) (trade secrets; recognizing that apportionment would have been proper if defendant had demonstrated that factors such as "management skill" or "capital investment" [*1176] had contributed to the success of its product). Grumman apparently wished to tread the second path, and it was unquestionably entitled to do so.

[**89] Grumman also suggests on appeal that the jury should have been instructed that it could not accept DG's theory on the apportionment issue because DG gave little or no weight to Grumman's contributions. But the only argument presented to the district court was that the court should *add* an instruction to inform the jury that it was *permitted* to apportion Grumman's profits. [HN43](#)[¹⁴] It is usually imprudent for a court of appeals to pass on an issue not presented to the district court in the first instance, and we decline to do so in these circumstances. See, e.g., *Mariani v. Doctors Assocs.*, [983 F.2d 5, 8 n.4 \(1st Cir. 1993\)](#) ("We have repeatedly warned that we will not entertain arguments made for the first time on appeal.") (citing *FDIC v. World Univ., Inc.*, [978 F.2d 10, 13 \(1st Cir. 1992\)](#)); *United States v. Zannino*, [895 F.2d 1, 17 \(1st Cir.\)](#) ("[A] litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.") (citations and internal quotation marks omitted), cert. denied, [494 U.S. 1082, 108 L. Ed. 2d 944, 110 S. Ct. 1814 \(1990\)](#). [**90]

We are compelled to add, however, that an instruction on apportionment would not rob DG's theory of all possible meaning. In the first place, DG was free to argue that Grumman's infringement was a "but for" cause of Grumman's nonduplicative profits, even if the court should have explained to the jury that Grumman could still satisfy its burden by demonstrating the absence of proximate causation. In addition, DG was entitled to argue that Grumman's infringement should be viewed as the sole or overriding cause of Grumman's profits. Cf. *Frank Music*, [772 F.2d at 518](#) (noting that "no one element was the sole or overriding reason" for the success of defendant's infringing "Hallelujah Hollywood" stage show).

[HN44](#)[¹⁵] Moreover, although apportionment primarily depends on questions of causation, it is ultimately a delicate exercise informed by considerations of fairness and public policy, as well as fact. The doctrine of apportionment was "established upon equitable principles" in the analogous context of patent infringement. *Sheldon*, [309 U.S. at 401](#). And, in adopting the principle of apportionment for copyright [**91] cases, the Court observed that "equity is concerned with making a *fair* apportionment so that neither party will have what justly belongs to the other." *Id. at 408* (emphasis added). See also 3 *Nimmer* § 14.03[C], at 14-42 (noting that Copyright Act of 1976 "expressly adopted" the apportionment principle announced in *Sheldon*). [HN45](#)[¹⁶] In fact, the burden-shifting rule in *Sheldon* (and *Section 504(b)*) is itself an equitable response to an infringer who has frustrated the task of apportionment by co-mingling profits. See *Sheldon*, [309 U.S. at 401](#) ("The defendant, being responsible for the blending of the lawful with the unlawful, had to abide the consequences, as in the case of one who has wrongfully produced a confusion of goods.") (referring to *Callaghan v. Myers*, [128 U.S. 617, 32 L. Ed. 547, 9 S. Ct. 177 \(1888\)](#)). Equitable factors may also affect the substance of the apportionment analysis. For example, where the plaintiff cannot prove actual damages and the defendant's profits are only from [**92] the sale of a noninfringing product, the only way to prevent unjust enrichment may be to place more weight on the profit-generating effect of an infringing sales tool used to promote that product. See, e.g., *Konor Enters. v. Eagle Publications, Inc.*, [878 F.2d 138, 140 \(4th Cir. 1989\)](#) (suggesting [***1408] that defendant may not be entitled to retain any of the profits from sale of advertising space

where it is "plausible . . . that all profits were a direct result" of infringing marketing information distributed to potential advertisers).

Similarly, the policies underlying the Copyright Act may play some role in the apportionment of profits. For example, *Sheldon* and its progeny suggest that [HN46](#)⁵¹ apportionment is almost always available in the context of infringing derivative works, perhaps in part because original expression added by the infringer is itself entitled to copyright protection. Furthermore, where the plaintiff is seeking to vindicate its right to exclude others rather than its right to collect a licensing fee, see [17 U.S.C. § 106 \(1988 & \[*1177\] Supp. IV 1992\)](#) (describing rights of copyright owner), it may [\[*93\]](#) be more appropriate to view the infringement as an "overriding" cause of the defendant's profits. In such cases, rigid isolation of the value of the infringement to the defendant (which would approximate a "reasonable" licensing fee) would effectively condone a license the plaintiff never wished to grant. Lastly, we note that an unjust enrichment theory aims to strip the defendant of its ill-gotten gains, see, e.g., 3 [Nimmer § 14.01\[A\]](#), at 14-6, encourage compliance with the Copyright Act, see, e.g., *Walker*, 1994 WL 287173, at * 2 (noting that an award of infringer's profits "makes the infringer realize that it is cheaper to buy than to steal"), and perhaps "compensate" a plaintiff unable to prove actual damages, see [Sheldon, 309 U.S. at 399](#) (describing the goal of an award of infringer's profits as "just compensation for the wrong"). Therefore, apportionment of infringer's profits may be particularly appropriate where a concurrent award of actual damages significantly serves all three purposes.⁵¹

[\[*94\]](#) In light of the discussion above, we hold that Grumman was entitled to an instruction on apportionment in order to allow the jury to determine whether and to what extent apportionment of its nonduplicative profits was reasonable under the circumstances of this case.

Whether a remand is necessary is a different question, but one readily resolved. Grumman clearly introduced evidence that would have permitted a jury to find that Grumman's customers were willing to pay for Grumman service for reasons beyond its possession and use of ADEX. Indeed, we believe that Grumman's evidence is sufficiently compelling that Grumman is entitled to some apportionment as a matter of law. Because the absence of an explicit instruction on apportionment "may have unfairly affected the jury's conclusions," [Allen, 873 F.2d at 470](#), we remand the case to the district court for an appropriate resolution of the issue of apportionment of Grumman's nonduplicative profits.⁵²

⁵¹ Our discussion of equitable and policy considerations is intended to aid courts in apportioning profits when the parties submit the issue of infringer's profits to the court, see [Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1175 \(9th Cir. 1977\)](#) (noting that parties may stipulate to bench trial on issue of infringer's profits), and to provide some rational explanation for the discordant aspects of the case law on apportionment. While a court may instruct the jury that damages should be "reasonable" (as the court in this case did without objection from either party), we do not hold that a court may ask the jury itself to weigh matters of equity and public policy.

⁵² In order to avoid undue confusion and unnecessary proceedings, we add the following procedural notes to assist the district court in resolving the issue of apportionment of Grumman's nonduplicative profits.

Cognizant of our authority to take whatever action "may be just under the circumstances," [28 U.S.C. § 2106](#), we believe that remittitur would provide the most equitable and efficient means of remedying the error. The factual record was highly developed at trial on the issue of Grumman's profits, leaving a trail adequate to allow the district court to approximate the effect of the erroneous instruction on the jury's verdict. See 6A James Wm. Moore, et al., *Moore's Federal Practice* P 59.08[7], at 59-207 (2d ed. 1994) (explaining that if "the [HN47](#)⁵³ effect of [an erroneous instruction] can be reasonably approximated to a definite portion of the amount of the verdict, the appellate court may condition its affirmance on the plaintiff remitting that amount of the verdict which is apparently traceable to the error below"). Moreover, Grumman requested remittitur as an alternative remedy in its [Rule 59](#) motion.

We are aware that the jury did not separately award actual damages and infringer's profits. Nevertheless, the verdict is relatively close to the amount DG requested and it is extremely unlikely that the jury would not have relied primarily on one or the other of the competing expert theories. DG requested \$ 28,003,000 in damages, consisting of \$ 26,364,000 in lost profits and \$ 1,639,000 in nonduplicative profits. The jury awarded DG a total of \$ 27,417,000 in damages -- \$ 586,000 less than the requested amount. As a result, DG appears to have won infringer's profits of at least \$ 1,053,000 (\$ 27,417,000 - \$ 26,364,000)

[***1409] [**95] [*1178] 6. Attorney's Fees

Because it appears that an award of attorney's fees has not been quantified, see [Grumman VII, 825 F. Supp. at 370](#) (ordering DG to resubmit its application for attorney's fees), the merits of such an award are not before this court. Nonetheless, Grumman mounts a procedural attack that does appear to be ripe for review. Grumman claims that (1) DG "elected" the state trade secrets remedy over any remedy available under the Copyright Act, and (2) since attorney's fees are only available under the Copyright Act, and not state trade secrets law, DG is not entitled to any attorney's fees. Grumman is wrong in both respects. DG did not simply elect state law remedies. DG proposed a judgment form, wholly adopted by the district court, that included (1) the compensatory damages awarded by the jury,⁵³ (2) state law statutory damages, (3) state law prejudgment interest, and (4) federal law attorney's fees. Nor [HN48](#) was DG required to forsake nonduplicative elements of the various federal and state law remedies. See [Foley v. City of Lowell, 948 F.2d 10, 17 \(1st Cir. 1991\)](#) (suggesting that, as long as the damages [**96] are "segregated into federal and state components," plaintiff need not choose one body of law under which all damages will be paid); cf. [Freeman v. Package Mach. Co., 865 F.2d 1331, 1343-45 \(1st Cir. 1988\)](#) (holding that plaintiff may not receive award based on federal and state law so as to receive double recovery for same element of relief); [Schroeder v. Lotito, 747 F.2d 801, 802 \(1st Cir. 1984\)](#) (per curiam) (approving judgment for state law accounting of profits and federal law attorney's fees). Because DG has not requested a double award of attorney's fees, there was no error in the award of attorney's fees under federal law.

B. Grumman's Antitrust Counterclaims

The district court granted DG's motions for summary judgment with respect to Grumman's tying claim under [Section 1](#) of the Sherman [**97] Act as well as its monopolization claim under [Section 2](#). We affirm both rulings, although on somewhat different grounds.

1. *Illegal Tying*

[HN49](#) [Section 1](#) of the Sherman Act prohibits a seller from "tying" the sale of one product to the purchase of a second product if the seller thereby avoids competition on the merits of the "tied" product. See [15 U.S.C. § 1](#) ("Every contract . . . in restraint of trade or commerce . . . is declared to be illegal."); [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9-18, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#); [Lee v. Life Ins. Co. of N. Am., 23 F.3d 14, 16 \(1st Cir. 1994\)](#); [Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794-97 \(1st Cir. 1988\)](#) (Breyer, J.); [Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 814-15 \(1st Cir.\), cert. denied, 488 U.S. 955, 102 L. Ed. 2d 381, 109 S. Ct. 392 \(1988\)](#). In addition to outlawing "positive" ties likely [**98] to restrain competition, [Section 1](#) also forbids "negative" ties -- arrangements conditioning the sale of one product on an agreement *not* to purchase a second product from competing suppliers. See [Eastman Kodak Co. v. Image Technical Servs., Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2079 \(1992\)](#) (citing [Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#)); [Lee, 23 F.3d at 16](#).

and at most \$ 1,639,000. While we do not mandate this particular analysis, we are confident that the district court, with its superior understanding of the voluminous record, will be able to estimate either the relevant figures or, if necessary, the "maximum effect" of the error on the jury's verdict. See *id.* P 59.09[7], at 59-207 to 59-208 ("Even when the effect of the error cannot be allocated to a distinct portion of the verdict, remittitur may still be used if the maximum effect of the error can be established.").

If DG were to refuse remittitur in favor of a new jury trial on the issue of apportionment of Grumman's nonduplicative profits, we hope that the parties will negotiate in good faith to settle the remanded portion of the case or at least agree to a more expeditious procedure. See, e.g., [Sid & Marty Krofft, 562 F.2d at 1175](#) (noting that right to jury trial extends to adjudication of claim for infringer's profits but that parties may stipulate to bench trial).

⁵³ The jury awarded the same amount of compensatory damages for both the federal copyright infringement claim and the state trade secrets claim.

HN50[] There are essentially four elements of a *per se*⁵⁴ tying claim: (1) the tying and tied products are actually two distinct products; (2) there is an agreement or condition, [*1179] express or implied, that establishes a tie; (3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers' choices with respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product. See, e.g., [Kodak, 112 S. Ct. at 2079-81](#); [Grappone, I***1410\] 858 F.2d at 794](#); [**99] see also [STI, 963 F.2d at 683](#).

Grumman claims that DG unlawfully restrained competition in the sale of MV service by tying access to ADEX (the tying product) to an equipment owner's promise to either purchase service from DG (a positive tie) or not purchase service from any other vendor (a negative tie). While a substantial amount of commerce is potentially involved, DG's motions for summary judgment claimed that there was no proof of any of the first three elements of a tying claim. The district court denied DG's first motion for summary judgment but then granted its renewed motion, stating in a sparse opinion that, [**100] as in *STI*, there was "no evidence which would warrant a finding of the existence of a tying agreement." [Grumman V, 834 F. Supp. at 485](#). See also [STI, 963 F.2d at 686](#) ("[STI's] evidence at bottom shows nothing more than a unilateral decision by Data General to license MV/ADEX to CMOs but not to others."). We agree with the district court's conclusion that there is insufficient evidence of a negative tying arrangement, but believe that the allegation of a positive tie falters at an earlier step.

a. Two Products

HN51[] To establish the existence of two separate products, Grumman must identify the products at issue in each tie and demonstrate that "there is 'sufficient demand for the purchase of [the tied product] separate from [the tying product] to identify a distinct product market in which it is efficient to offer [the tied product] separately from [the tying product].'" [STI, 963 F.2d at 684](#) (brackets in original) (quoting [Jefferson Parish, 466 U.S. at 21-22](#). See also [Jefferson Parish, 466 U.S. at 40](#) [**101] (O'Connor, J., concurring) ("When the economic advantages of joint packaging are substantial the package is not appropriately viewed as two products, and that should be the end of the tying inquiry."); [Lee, 23 F.3d at 16 n.6](#) (noting that there must be evidence of "sufficient consumer demand for each *individual* product, and not merely as part of an integrated product 'package'") (emphasis in original).

While Grumman has characterized the tying product in general terms as "access to ADEX," Grumman actually identifies two different tying products: ADEX service (a service) and ADEX software (a good). With respect to the positive tie, Grumman alleges that DG will not provide ADEX service (i.e., use of ADEX by a DG service technician) to equipment owners unless they also purchase DG support services. With respect to the negative tie, Grumman alleges that DG will not license ADEX software to equipment owners unless they agree not to purchase support services from a TPM.

Grumman has not introduced evidence that ADEX service is a product separate from other components of service. There is no evidence that any customer has purchased, or would wish [**102] to purchase, ADEX service separately from the purchase of other components of service. Nor is there evidence that it would be efficient for any entity to provide ADEX service separately from other components of service.⁵⁵

⁵⁴ Grumman does not argue at this stage that DG violated the "rule of reason" and proceeds only on a "*per se*" theory. See [Jefferson Parish, 466 U.S. at 29-31](#) (noting that in absence of *per se* liability, antitrust plaintiff must prove that defendant's conduct had an "actual adverse effect on competition").

⁵⁵ The Fourth Circuit came to a similar conclusion on a nearly identical record when it rejected STI's tying claim:

If "access to" MV/ADEX and repair services are considered to be the products in question, appellants have clearly failed to produce sufficient evidence that the products are in fact separate. On the record before us, demand for mere "access to" MV/ADEX, in contrast to demand for licenses to use MV/ADEX, is indistinguishable from demand for repair services. Appellants have introduced no evidence that there are customers who would purchase MV/ADEX-assisted diagnostic services separately from all other repair services for Data General equipment.

In contrast, the record does contain evidence that ADEX software is a product **[**103]** separate from support services. It is undisputed that CMO customers wish to license -- **[*1180]** and have licensed -- ADEX software without purchasing support services from DG or a TPM. There is also evidence that some of Grumman's customers would consider licensing ADEX from DG so that Grumman could continue to service their MV computers. In addition, the summary judgment record would support a finding that for many years DG provided diagnostics and other service "tools" to computer purchasers as part of a computer equipment package, regardless whether the owner performed self-maintenance or hired DG or a TPM to maintain the computers. In fact, there is evidence that through the early 1980s, DG provided service "tools" -- including diagnostic software other than ADEX -- directly to TPMs. Finally, there is some evidence that other computer manufacturers (IBM, Digital Equipment Corporation, and Wang) have licensed or sold diagnostics to those other than their service customers. Viewed in a light most favorable to Grumman, the record reveals a genuine dispute as to whether ADEX software and **[***1411]** support services for DG computers are distinct products for the purposes of a tying analysis.⁵⁶ Consequently, **[**104]** we may proceed to determine whether Grumman has introduced sufficient proof that DG has conditioned the licensing of ADEX to CMOs on the agreement of these customers not to purchase service from TPMs.

b. Tying Arrangement

HN52 Proof of a tying arrangement generally requires evidence that the supplier's sale of the tying product is conditioned upon the unwilling purchase of the tied product from the supplier or an unwilling promise not to purchase the tied product from any other supplier. See, e.g., Jefferson Parish, 466 U.S. at 12 ("The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different **[**105]** terms."); Wells Real Estate, 850 F.2d at 814 (**HN53**) Tying arrangements involve the use of leverage over the market for one product . . . to coerce purchases of a second product). In the absence of an explicit tying agreement, conditioning may be inferred from evidence indicating that the supplier has actually coerced the purchase or non-purchase of another product. See Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1500 (8th Cir. 1992), cert. denied, 122 L. Ed. 2d 356, 113 S. Ct. 1048 (1993); Advanced Computer Servs., Inc. v. MAI Sys. Corp., 845 F. Supp. 356, 368 (E.D.Va. 1994) (citing John H. Shenefield & Irwin M. Stelzer, *The Antitrust Laws: A Primer* 72 (1993) ("In the absence of an explicit agreement requiring the purchase as a condition of the sale, courts will accept proof suggesting any kind of coercion by the seller or unwillingness to take the second product by the buyer.")); see also Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407, 1418 (11th Cir. 1987) (**HN54**) It is well established **[**106]** that coercion may be established by showing that the facts and circumstances surrounding the transaction as a practical matter forced the buyer into purchasing the tied product."). In essence, whether the conditioning is explicit or implicit, we will not consider the anti-competitive effects of a tie to be unreasonable *per se* unless there is evidence that the supplier of the tying product has actually used its market power to impose the condition.

Grumman points to only one alleged negative tying arrangement, asserting that DG's Cooperative Maintenance Agreement ("CMO Agreement") contains an explicit tying condition. The CMO Agreement indeed states that DG designed the CMO program for "customers who perform their own maintenance" and that one qualifying criterion for CMO status is that the customer "maintain[] systems which were purchased either for itself or for resale to its customers [as an official DG distributor]." And, although the record suggests that CMOs may still purchase DG service (and presumably TPM service) **[*1181]** on a "time and materials" basis,⁵⁷ CMOs do not enter contracts

STI, 963 F.2d at 685 n.9.

⁵⁶ Again, the Fourth Circuit reached a similar conclusion for similar reasons. See STI, 963 F.2d at 684-85.

⁵⁷ Frederick Raley, Jr., a DG official, testified at his deposition that "self-maintaining" CMO customers would still be able to use DG service, except that "they wouldn't be a contract customer, they would be a time and materials customer." This portion of Raley's deposition was actually placed in the record by *Grumman* as part of an exhibit to an affidavit supporting Grumman's opposition to one of DG's motions for summary judgment.

with either DG or TPMs for ongoing support services. DG and Grumman both agree that CMOs cannot [**107] allow TPMs to use copies of ADEX licensed by a CMO.

Grumman's allegation of an illegal tie cannot go to a jury on a record so sparse. Before turning to the principal flaw in Grumman's case, we note that these facts lend only modest support to the accusation that CMOs have actually promised not to purchase support services from TPMs. The CMO Agreement does require that participants maintain their own computers, but nowhere does the agreement define self-maintenance status in detail or elaborate on the consequences to a CMO if it enters a service contract with a TPM. In fact, as we have [**108] noted, there is some evidence in the record that CMOs are free to purchase support services from others without adverse consequences, at least on a "time and materials" basis.

More importantly, there is virtually no evidence that any CMO has *unwillingly* chosen to maintain its own computers. Although there is some evidence that DG officials designed the CMO program in part to prevent loss of DG revenue to TPMs, there is no evidence that consumers became CMO customers for any reason other than their belief that the CMO program was a "product" [***1412] superior to TPM service. Indeed, while Grumman has argued tirelessly that DG service customers are forced to swallow overpriced and inferior support service, Grumman has offered no evidence that CMO customers are similarly disadvantaged. There is not a single affidavit in the record in which a CMO customer expresses either displeasure with the CMO program or an unfulfilled desire to switch to a TPM.⁵⁸ Nor is there any other type of evidence that DG equipment owners capable of maintaining their own equipment would be more satisfied as TPM customers than as CMO customers. Consequently, the evidence in the record would not allow a reasonable [**109] jury to find that the CMO program is "an inferior or overpriced product," *Amerinet*, 972 F.2d at 1501, protected from competition by DG's exploitation of its control over ADEX.

In conclusion, Grumman's allegation of a positive tie between ADEX service and DG support services fails in the absence of proof that these services are truly two distinct products. Grumman's allegation of a negative tie between ADEX software and non-purchase of TPM support services fails in the absence of proof that DG coerced consumers to accept such an arrangement. Accordingly, the district court did not err in granting DG's motion [**110] for summary judgment on Grumman's tying counterclaim.

2. Monopolization

In addition to alleging unlawful tying, Grumman accused DG of willfully maintaining its monopoly in the aftermarket for service of DG computers in violation of [Section 2](#) of the [HN55](#)⁵⁹ Sherman Act, [15 U.S.C. § 2](#), which prohibits the monopolization of "any part of the trade or commerce among the several States." To survive summary judgment on its willful maintenance claim, Grumman must demonstrate a genuine dispute about the existence of two elements: (1) DG's possession of monopoly power in the market⁶⁰ for support services of DG computers; and (2) DG's maintenance of that power through "exclusionary conduct." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (citing, *inter alia*, *United* [*1182] *States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)), cert. denied, 499 U.S. 931 (1991). The district court assumed the existence of monopoly power but granted summary judgment on the grounds [**111] that Grumman had not demonstrated the need for a trial on the element of exclusionary conduct. We follow suit.⁶⁰

⁵⁸ Likewise, there is no evidence in the record that former TPM customers have reluctantly terminated their relationship with Grumman in order to participate in the CMO program. Cf. *Kodak*, 112 S. Ct. at 2081 (noting that record contained evidence that "consumers have switched to Kodak service even though they preferred [TPM] service").

⁵⁹ DG does not seriously dispute Grumman's contention that the aftermarket for service of DG computers comprises the "relevant market" for purposes of antitrust analysis. Accordingly, and in view of our disposition of this case on other grounds, we need not consider this issue.

⁶⁰ We note, however, that the record does contain evidence of DG's monopoly power in the assumed service aftermarket for DG computers. In addition to DG's monopoly share (over 90%) of the service aftermarket, the record contains evidence of barriers to

HN56 [↑] "Exclusionary conduct" is defined as "conduct, other than competition [**112] on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power." *Town of Concord*, 915 F.2d at 21 (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983)) (Breyer, J.), and 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* P 626, at 83 (1978) (hereinafter "Areeda & Turner")). We label as improper that conduct which harms the competitive process and not conduct which simply harms competitors. *Id.* That process is harmed when conduct "obstructs the achievement of competition's basic goals -- lower prices, better products, and more efficient production methods." *Id. at 21-22*. Cf. *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (describing shift in the emphasis of "antitrust policy . . . from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency"), cert. denied, 480 U.S. 934, 94 L. Ed. 2d 765, 107 S. Ct. 1574 (1987). [**113] **HN57** [↑] In contrast, exclusionary conduct does not include behavior which poses no unreasonable threat to consumer welfare but is merely a manifestation of healthy competition, an absence of competition, or a natural monopoly. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966) (holding that *Section 2* punishes only "willful acquisition or maintenance [***1413] [of monopoly power] as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident").

Grumman's primary contention is that DG's unilateral refusal to license ADEX to anyone other than qualified self-maintainers constitutes exclusionary conduct.⁶¹ Grumman also attacks as exclusionary DG's refusal to provide other service tools directly to TPMs. We first review the principles governing the analysis of a monopolist's unilateral refusal to deal, and then discuss whether a unilateral refusal to license a copyrighted work might ever deserve to be condemned as exclusionary. **HN58** [↑] We hold below that the desire of an author to be the exclusive user of its original work is [**114] a presumptively legitimate business justification for the author's refusal to license to competitors. We hold further that Grumman has not presented sufficient proof to rebut this presumption and thereby avert summary judgment. In particular, we find no merit in Grumman's contention that DG acted in an exclusionary fashion in discontinuing its liberal policies allowing TPM access to diagnostic software. Finally, we conclude that no reasonable jury could find that DG's restrictions on TPM access to other service tools amount to exclusionary conduct.

a. Unilateral Refusals to Deal

HN59 [↑] Because a monopolization claim does not require proof of concerted activity, [**115] even the unilateral actions of a monopolist can constitute exclusionary conduct. See *15 U.S.C. § 2* (referring to "every person who shall monopolize . . . or combine or conspire with any other person . . . to monopolize") [*1183] (emphasis added); *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328, 332 (9th Cir. 1973) (observing that "*section 2* is not limited to concerted activity"). Thus, a monopolist's unilateral refusal to deal with its competitors (as long as the refusal harms the competitive process) may constitute prima facie evidence of exclusionary conduct in the context of a *Section 2* claim. See *Kodak*, 112 S. Ct. at 2091 n.32 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-05, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)). A monopolist may nevertheless rebut such evidence by establishing a valid business justification for its conduct. See *Kodak*, 112 S. Ct. at 2091 n. 32 (suggesting that monopolist may rebut an inference of exclusionary [**116] conduct by establishing "legitimate competitive reasons for the refusal"); *Aspen Skiing*, 472 U.S. at 608 (suggesting that sufficient evidence of harm to consumers and competitors triggers further inquiry as to whether the monopolist has "persuaded the jury that its [harmful] conduct was justified by [a] normal business purpose"). **HN60** [↑] In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might

entry (e.g., costs to TPMs of obtaining diagnostics and other service "tools"), market imperfections (e.g., high information costs for computer purchasers and high switching costs for DG equipment owners), and more importantly, supracompetitive service prices and price discrimination among DG service customers.

⁶¹ Grumman also seeks to portray the alleged positive and negative tying arrangements as exclusionary conduct violative of *Section 2*. We do not consider this argument because of our determination in the previous section that DG's ADEX policies cannot properly be described as arrangements conditioning the sale of one product on the purchase or non-purchase of another.

be legitimate competitive reasons for an otherwise exclusionary refusal to deal, while the desire to maintain a monopoly market share or thwart the entry of competitors would not. See [Kodak, 112 S. Ct. at 2091](#) (discussing the validity and sufficiency of various business justifications); [Aspen Skiing, 472 U.S. at 608-11](#) (same); see generally 7 Areeda & Turner P 1504, at 377-83; 9 Areeda & Turner PP 1713, 1716-17, at 148-61, 185-239. In essence, a unilateral refusal to deal is *prima facie* exclusionary if there [\[**117\]](#) is evidence of *harm* to the competitive process; a valid business justification requires proof of countervailing *benefits* to the competitive process.

HN61 [¶] Despite the theoretical possibility, there have been relatively few cases in which a unilateral refusal to deal has formed the basis of a successful [Section 2](#) claim. Several of the cases commonly cited for a supposed duty to deal were actually cases of joint conduct in which some competitors joined to frustrate others. See [Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 \(1945\)](#); [United States v. Terminal R.R. Ass'n, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 \(1912\)](#). Prior to *Aspen Skiing*, the case that probably came closest to condemning a true unilateral refusal to deal was [Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 \(1973\)](#), which condemned the refusal of a wholesale power supplier either to sell wholesale power to municipal systems or to "wheel power" when Otter Tail's retail franchises expired and local municipalities sought to supplant Otter Tail's local distributors. The case not only involved a capital-intensive public utility facility -- which could not effectively be duplicated and occupied a distinct separate market -- but the Supreme Court laid considerable emphasis on "supported" findings in the district court "that Otter Tail's refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position." [410 U.S. at 378](#). [\[***1414\]](#)

In *Aspen Skiing*, the Court criticized a monopolist's unilateral refusal to deal in a very different situation, casting serious doubt on the proposition that the Court has adopted any single rule or formula for determining when a unilateral refusal to deal is unlawful. In that case, an "all-Aspen" ski ticket -- valid at any mountain in Aspen -- had been developed and jointly marketed when the three (later four) ski areas in Aspen were owned by independent entities. [472 U.S. at 589](#). Some time after *Aspen Skiing* Company ("Ski Co.") came into control [\[**119\]](#) of three of the four ski areas, Ski Co. refused to continue a joint agreement with *Aspen Highlands Skiing Corp.* ("Highlands"), the owner of the fourth area. [Id. at 592-93](#). Although there was no "essential facility" involved, the Court found that it was exclusionary for Ski Co., as a monopolist, to refuse to continue a presumably efficient "pattern of distribution that had originated in a competitive market and had persisted for several years." [Id. at 603](#).

It is not entirely clear whether the Court in *Aspen Skiing* merely intended to create a [\[*1184\]](#) category of refusal-to-deal cases different from the essential facilities category or whether the Court was inviting the application of more general principles of antitrust analysis to unilateral refusals to deal. We follow the parties' lead in assuming that Grumman need not tailor its argument to a preexisting "category" of unilateral refusals to deal.

b. Unilateral Refusals to License

DG attempts to undermine Grumman's monopolization claim by proposing a powerful irrebuttable presumption: a unilateral refusal to [\[**120\]](#) license a copyright can never constitute exclusionary conduct. We agree that some type of presumption is in order, but reach that conclusion only after an exhaustive inquiry touching on the general character of presumptions, the role of market analysis in the copyright context, existing responses to the tension between the antitrust and patent laws, the nature of the rights extended by the copyright laws, and our duty to harmonize two conflicting statutes.

(1) The Propriety of a Presumption

We begin our analysis with two observations. First, DG's rule of law could be characterized as either an empirical assumption or a policy preference. For example, if we were convinced that refusals to license a copyright always have a net positive effect on the competitive process, we might adopt a presumption to this effect in order to preclude wasteful litigation about a known fact. On the other hand, if we were convinced that the rights enumerated in the Copyright Act should take precedence over the responsibilities set forth in the Sherman Act, regardless of the realities of the market, we might adopt a blanket rule of preference. DG's argument contains elements of both archetypal categories [\[**121\]](#) of presumptions.

Second, we note that the phrase "competitive process" may need some refinement in order to evaluate either an empirical assumption or a policy presumption concerning the desirability of unilateral refusals to license a copyright. **HN62** [↑] **Antitrust law** generally seeks to punish and prevent harm to consumers in particular markets, with a focus on relatively specific time periods. See, e.g., *Jefferson Parish, 466 U.S. at 18* (holding that "any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact"). Thus, in determining whether conduct is exclusionary in the context of a monopolization claim, we ordinarily focus on harm to the competitive process in the relevant market and time period. See *generally* 3 Areeda & Turner PP 517-28, at 346-88, PP 533-36, at 406-431. Confining the competitive process in this way assists courts in deciding particular disputes based primarily on case-specific adjudicative facts rather than generally-applicable "legislative" facts or assumptions. The [**122] use and protection of copyrights also affects the "competitive process," but it may not be appropriate to judge the effect of the use of a copyright by looking only at one market or one time period.

We now consider what appears to be an empirical proclamation from DG: "The refusal to make one's innovation available to rivals . . . is pro-competitive conduct." ⁶² As support, DG cites *Grinnell, 384 U.S. at 570-71*, in which the Court held that willful maintenance of monopoly does not include "growth or development as a consequence of a superior product." **HN63** [↑] It is not the superiority of a work that allows the author to exclude others, however, but rather the limited monopoly granted by copyright law. Moreover, one reason why the Copyright Act fosters investment and innovation is that it may allow the author to earn monopoly profits by [***1415] licensing the copyright to others or reserving the copyright for the author's exclusive use. See *Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984)* (explaining that the limited [**123] copyright monopoly "is intended to motivate the creative activity of authors and inventors by the provision of a special reward"). Thus, at least in a particular market and for a particular [*1185] period of time, the Copyright Act tolerates behavior that may harm both consumers and competitors. Cf. *SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1203 (2d Cir. 1981)* ("The primary purpose of the antitrust laws -- to preserve competition -- can be frustrated, albeit temporarily, by a holder's exercise of the patent's inherent exclusionary power during its term."), cert. denied, 455 U.S. 1016, 72 L. Ed. 2d 132, 102 S. Ct. 1708 (1982).

DG does not in fact argue that consumers are better off in the short term because of the inability of TPMs to license ADEX. Instead, [**124] DG suggests that allowing copyright owners to exclude others from the use of their works creates incentives which ultimately work to the benefit of consumers in the DG service aftermarket as well as to the benefit of consumers generally. In other words, DG seeks to justify any immediate harm to consumers by pointing to countervailing long-term benefits. Certainly, a monopolist's refusal to license others to use a commercially successful patented *idea* is likely to have more profound anti-competitive consequences than a refusal to allow others to duplicate the copyrighted *expression* of an unpatented idea (although such differences may become less pronounced if copyright law becomes increasingly protective of intellectual property such as computer software). But by no means is a monopolist's refusal to license a copyright entirely "pro-competitive" within the ordinary economic framework of the Sherman Act. Accordingly, it may be inappropriate to adopt an empirical assumption that simply ignores harm to the competitive process caused by a monopolist's unilateral refusal to license a copyright. Even if it is clear that exclusive use of a copyright can have anti-competitive consequences, [**125] some type of presumption may nevertheless be appropriate as a matter of either **antitrust law** or copyright law.

(2) **Antitrust Law and the Accommodation of Patent Rights**

HN64 [↑] **Antitrust law** is somewhat instructive. Although creation and protection of original works of authorship may be a national pastime, the Sherman Act does not explicitly exempt such activity from antitrust scrutiny and courts should be wary of creating implied exemptions. See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 421, 90 L. Ed. 2d 413, 106 S. Ct. 1922 (1986)* ("Exemptions from the antitrust laws are strictly construed and strongly disfavored."); cf. *Flood v. Kuhn, 407 U.S. 258, 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972)* (holding that

⁶² Elsewhere in its brief, DG adds that DG's "refusal to allow Grumman to use MV/ADEX is . . . the precise conduct that the antitrust and copyright laws are designed to encourage."

the longstanding judicially created exemption of professional baseball from the Sherman Act is an established "aberration" in which Congress has acquiesced). [HN65](#)⁶³ The Supreme Court has suggested that an otherwise reasonable yet anti-competitive use of a copyright should not "be deemed a *per se* violation of the Sherman Act," *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979), [**126] but a monopolistic refusal to license might still violate the rule of reason, see *Rural Tel. Serv. Co. v. Feist Publications, Inc.*, 957 F.2d 765, 767-69 (10th Cir.) (analyzing reasonableness of monopolist's unilateral refusal to license copyrighted telephone listings to a competing distributor of telephone directories), cert. denied, 121 L. Ed. 2d 429, 113 S. Ct. 490 (1992).⁶³ Should [*1186] an antitrust plaintiff be allowed to demonstrate the anti-competitive [***1416] effects of a monopolist's unilateral refusal to grant a copyright license? Would the monopolist then have to justify its refusal to license by introducing evidence that the protection of the copyright laws enabled the author to create a work which advances consumer welfare?

[**127] The courts appear to have partly settled an analogous conflict between the patent laws and the antitrust laws, treating the former as creating an implied limited exception to the latter. In *Simpson v. Union Oil Co.*, 377 U.S. 13, 24, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964), the Supreme Court stated that "the patent laws which give a 17-year monopoly on 'making, using, or selling the invention' are *in pari materia* with the antitrust laws and modify them *pro tanto*." Similarly, we have suggested that the exercise of patent rights is a "legitimate means" by which a firm may maintain its monopoly power. *Barry Wright*, 724 F.2d at 230. Other courts have specifically held that a monopolist's unilateral refusal to license a patent is ordinarily not properly viewed as exclusionary conduct. See *Miller Insituform*, 830 F.2d at 609 ("HN67") A patent holder who lawfully acquires a patent cannot be held liable under Section 2 of the Sherman Act for maintaining the monopoly power he lawfully acquired by refusing to license the patent to others."); *Westinghouse*, 648 F.2d at 647 [**128] (finding no antitrust violation because "Westinghouse has done no more than to license some of its patents and refuse to license others"); *SCM Corp.*, 645 F.2d at 1206 (holding that HN68⁶³ "where a patent has been lawfully acquired, subsequent conduct permissible under the patent laws cannot trigger any liability under the antitrust laws"); see also 3 Areeda & Turner P 704, at 114 ("The patent is itself a government grant of monopoly and is therefore an exception to usual antitrust rules."). This exception is inoperable if the patent was unlawfully "acquired." *SCM Corp.*, 645 F.2d at 1208-09 (analyzing legality of Xerox's acquisition of plain-paper copier patent); see generally 3 Areeda & Turner PP 705-707, at 117-45 (discussing effect of patent acquisition, internal development of patents, and improprieties in patent procurement on applicability of antitrust laws).

[HN69](#) The "patent exception" is largely a means of resolving conflicting rights and responsibilities, i.e., a policy presumption. See, e.g., *Miller Insituform*, 830 F.2d at 609 (declaring summarily that "there is no [**129] adverse effect on competition since, as a patent monopolist, [the patent holder] had [the] exclusive right to manufacture, use, and sell his invention.") (emphasis added). At the same time, the exception is grounded in an empirical assumption that exposing patent activity to wider antitrust scrutiny would weaken the incentives underlying the patent system, thereby depriving consumers of beneficial products. See, e.g., *SCM Corp.*, 645 F.2d at 1209

⁶³ [HN66](#) It is in any event well settled that concerted and contractual behavior that threatens competition is not immune from antitrust inquiry simply because it involves the exercise of copyright privileges. See, e.g., *Kodak*, 112 S. Ct. at 2089 n.29 ("The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'") (quoting *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611, 97 L. Ed. 1277, 73 S. Ct. 872 (1953) (tying case)); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 143, 92 L. Ed. 1260, 68 S. Ct. 915 (1948) (holding that horizontal conspiracy to engage in price-fixing in copyright licenses is illegal *per se*); *id. at 159* (holding that block-booking of motion pictures -- "a refusal to license one or more copyrights unless another copyright is accepted" -- is an illegal tying arrangement); *Straus v. American Publishers' Ass'n*, 231 U.S. 222, 234, 58 L. Ed. 192, 34 S. Ct. 84 (1913) ("No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade"); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984) (affirming finding of illegal tie between copyrighted software and computer hardware), cert. denied, 473 U.S. 908, 87 L. Ed. 2d 657, 105 S. Ct. 3534 (1985); cf. *Miller Insituform, Inc. v. Insituform of N. Am., Inc.*, 830 F.2d 606, 608-09 & n.4 (6th Cir. 1987) (describing ways in which patent holder may violate the antitrust laws), cert. denied, 484 U.S. 1064, 98 L. Ed. 2d 988, 108 S. Ct. 1023 (1988); *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 646-47 (9th Cir. 1981) (same).

(holding that imposition of antitrust liability for an arguably unreasonable refusal to license a lawfully acquired patent "would severely trample upon the incentives provided by our patent laws and thus undermine the entire patent system").

(3) Copyright Law

Copyright law provides further guidance. [HN70](#)[] The Copyright Act expressly grants to a copyright owner the exclusive right to distribute the protected work by "transfer of ownership, or by rental, lease, or lending." [17 U.S.C. § 106](#). Consequently, "the owner of the copyright, if [it] pleases, may refrain from vending or licensing and content [itself] with simply exercising the right to exclude others from using [**130] [its] property." [Fox Film Corp. v. Doyal, 286 U.S. 123, 127, 76 L. Ed. 1010, 52 S. Ct. 546 \(1932\)](#). See also [Stewart v. Abend, 495 U.S. 207, 229, 109 L. Ed. 2d 184, 110 S. Ct. 1750 \(1990\)](#). We may also venture to infer that, in passing the Copyright Act, Congress itself made an empirical assumption that allowing copyright holders to collect license fees and exclude others from using their works creates a system [[*1187](#)] of incentives that promotes consumer welfare in the long term by encouraging investment in the creation of desirable artistic and functional works of expression. See [Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 111 S. Ct. 1282, 1290, 113 L. Ed. 2d 358 \(1991\)](#) ("The primary objective of a copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'") (brackets in original) (quoting [U.S. Const. art. I, § 8, cl. 8](#)); [Sony Corp., 464 U.S. at 429](#) (discussing goals and [[**131](#)] incentives of copyright protection); [Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156, 45 L. Ed. 2d 84, 95 S. Ct. 2040 \(1975\)](#) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."). [HN71](#)[] We cannot require antitrust defendants to prove and reprove the merits of this legislative assumption in every case where a refusal to license a copyrighted work comes under attack. Nevertheless, although "nothing in the *copyright statutes* would prevent an author from hoarding all of his works during the term of the copyright," [Stewart, 495 U.S. at \[**1417\] 228-29](#) (emphasis added), the Copyright Act does not explicitly purport to limit the scope of the Sherman Act. And, if the Copyright Act is silent on the subject generally, the silence is particularly acute in cases where a monopolist harms consumers in the monopolized market by refusing to license a copyrighted work to competitors.

We acknowledge that Congress has not [[**132](#)] been entirely silent on the relationship between antitrust and intellectual property laws. Congress amended the patent laws in 1988 to provide that [HN72](#)[] "no patent owner otherwise entitled to relief for infringement . . . of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of [the patent owner's] refusal to license or use any rights to the patent." [35 U.S.C. § 271\(d\) \(1988\)](#). [HN73](#)[] [Section 271\(d\)](#) clearly prevents an infringer from using a patent misuse defense when the patent owner has unilaterally refused a license, and may even herald the prohibition of all antitrust claims and counterclaims premised on a refusal to license a patent. See Richard Calkins, *Patent Law: The Impact of the 1988 Patent Misuse Reform Act and Noerr-Pennington Doctrine on Misuse Defenses and Antitrust Counterclaims*, 38 Drake L. Rev. 192-97 (1988-89). Nevertheless, while [Section 271\(d\)](#) is indicative of congressional "policy" on the need for [**antitrust law**](#) to accommodate intellectual property law, Congress did not similarly amend the Copyright Act.

(4) Harmonizing the Sherman Act and the [[**133](#)] Copyright Act

[HN74](#)[] Since neither the Sherman Act nor the Copyright Act works a partial repeal of the other, and since implied repeals are disfavored, e.g., [Watt v. Alaska, 451 U.S. 259, 267, 68 L. Ed. 2d 80, 101 S. Ct. 1673 \(1981\)](#), we must harmonize the two as best we can, *id.*, mindful of the legislative and judicial approaches to similar conflicts created by the patent laws. We must not lose sight of the need to preserve the economic incentives fueled by the Copyright Act, but neither may we ignore the tension between the two very different policies embodied in the Copyright Act and the Sherman Act, both designed ultimately to improve the welfare of consumers in our free market system. Drawing on our discussion above, we hold that while exclusionary conduct can include a monopolist's unilateral

refusal to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers.⁶⁴

[134] c. DG's Refusal to License ADEX to non-CMOs**

Having arrived at the applicable legal standards, we may resolve Grumman's principal allegation of exclusionary conduct. Although there may be a genuine factual dispute about the effect on DG equipment owners of DG's refusal to license ADEX to TPMs, DG's desire to exercise its rights under [*1188] the Copyright Act is a presumptively valid business justification.

Apparently sensing the uphill nature of its allegation of an exclusionary refusal to license, Grumman seeks to overcome any obstacles primarily by characterizing DG's licensing policies as a monopolist's exclusionary withdrawal of assistance within the framework of *Aspen Skiing*. Citing *Aspen Skiing*, Grumman contends that DG's refusal to license ADEX to TPMs, in light of the fact that DG previously allowed TPMs to use DG diagnostics, is exclusionary conduct because "[a] monopolist that has helped a market develop may not withdraw its support without legitimate business justifications."

Assuming that such a claim can overcome the presumption that a refusal to license is not exclusionary, we nevertheless hold that *Aspen Skiing* cannot apply to the facts of this case. The reasoning [**135] of *Aspen Skiing* has little to do with the fact that defendant Ski Co. withdrew assistance upon which competitors may have relied when entering the market. Rather, the decision turns on a comparison of the behavior of firms in a competitive market (the Aspen ski market) with a monopolist's behavior once competition has been curtailed. The Court noted that the rich soil of competition had produced the all-mountain ticket in Aspen and other multimountain areas, justifying an "inference that such tickets satisfy consumer demand in free competitive markets." [472 U.S. at 603](#). See also [Olympia Equip., 797 F.2d at 377](#) (suggesting that the facts in *Aspen Skiing* indicate that "competition required some cooperation among competitors" in the Aspen ski market). Ski Co.'s decision to eliminate the ticket in later years was a sign that the [***1418] weeds of monopoly had begun to take hold, to the possible detriment of consumer welfare. [Aspen Skiing, 472 U.S. at 604](#). Finally, after canvassing evidence of consumer preferences concerning skiing options [**136] at Aspen, the Court concluded that Ski Co.'s new policies did in fact harm consumers. [Id. at 605-607](#). In short, instead of prescribing a categorical approach, *Aspen Skiing* ultimately calls for an inquiry that is relatively routine in antitrust analysis: namely, whether the monopolist's actions unjustifiably harm the competitive process by frustrating consumer preferences and erecting barriers to competition. Cf. [Olympia Equip., 797 F.2d at 379](#) ("If [Aspen Skiing] stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition.").

Grumman attempts to analogize this case to *Aspen Skiing* by focusing on the fact that DG once encouraged firms to enter the DG service aftermarket by allowing liberal access to service tools, but no longer does so. The analytical framework of *Aspen Skiing* cannot function in these circumstances, however, because we are unable to view DG's market practices in both competitive [**137] and noncompetitive conditions. While TPMs have made inroads in the market for service of DG computers, DG has always been a monopolist in that market, and competitive conditions have never prevailed. Therefore, it would not be "appropriate to infer" from DG's change of heart that its former policies "satisfy consumer demand in free competitive markets." [Aspen Skiing, 472 U.S. at 603](#).

Nor does it appear that Grumman would be able at trial to overcome the presumption on any other theory. There is no evidence that DG acquired its ADEX copyrights in any unlawful manner; indeed, the record suggests that DG developed all its software internally. Cf. 3 Areeda & Turner P 706, at 127-28 (arguing that although an internally developed patent may be as exclusionary as one acquired from outside a firm, labelling the former as exclusionary would "discourage progressiveness by monopolists"). And, while there is evidence that DG knew that developing a

⁶⁴ Wary of undermining the Sherman Act, however, [HN75](#) we do not hold that an antitrust plaintiff can never rebut this presumption, for there may be rare cases in which imposing antitrust liability is unlikely to frustrate the objectives of the Copyright Act.

"proprietary position" in the area of diagnostic software would help to maintain its monopoly in the aftermarket for service of DG computers, there is also evidence that DG set out [**138] to create a state-of-the-art diagnostic that would help to improve the quality of DG service. *Cf. id.* P 706, at 128-29 (suggesting that "nearly all commercial research rests on a mixture of motivations" [*1189] and that a search for an overriding "antisocial" motivation would be unilluminating). In fact, there is clearly some evidence that ADEX is a significant benefit to owners of DG's MV computers. ADEX is a better product than any other diagnostic for MV computers. The use of ADEX appears to have increased the efficiency and reduced the cost of service because technicians can locate problems more quickly and, through the use of the software's "remote assistance" capability, can arrive at customer sites having determined ahead of time what replacement parts are necessary. In addition to the possibility of lower prices occasioned by such gains in efficiency, ADEX also promises to lower prices through gains in effectiveness. For example, customers may save the cost of replacing expensive hardware components because the use of advanced diagnostics increases the possibility that technicians can locate a problem and repair the component.

d. DG's Other Restrictive Policies

Grumman's [**139] other allegations of exclusionary conduct are equally devoid of merit and require no extended analysis. It is essentially undisputed that DG will not provide spare parts, depot repair services, certain documentation, change order kits, or schematics to TPMs. But there is no evidence of any resulting harm to DG equipment owners. DG makes most of these items available directly to equipment owners. Equipment owners "may purchase . . . depot repair services, rev-ups [change order kits], and spare parts directly from DG, regardless of whether their computers are serviced by DG, TPMs, or themselves." [Grumman II, 761 F. Supp. at 189](#). We cannot presume that elimination of an intermediate seller of such items harms consumers; indeed, consumers are likely to benefit by not having to accept TPMs' mark-up of DG prices. Further, a direct sales policy does not act as a significant barrier to market entry by competitors offering lower prices for higher quality support services. TPM technicians may identify broken parts for the customer to send to DG's repair depot, use the change order kits to upgrade a customer's computer, and install spare parts the customer has ordered [**140] from DG.

Neither equipment owners nor TPMs may purchase schematics (blueprints of equipment that often contain manufacturing secrets), but Grumman has not introduced sufficient evidence that this policy constitutes exclusionary conduct. Grumman's theory [**1419] below was that DG's refusal to sell schematics to TPMs prevented TPMs from acquiring the information necessary to develop fully competitive substitutes for ADEX. [HN76](#)[
↑] Even a monopolist, however, "may normally keep its innovations secret from its rivals as long as it wishes." [Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 281 \(2d Cir. 1979\)](#), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980). DG's policy might be exclusionary if DG had sought to alter its equipment (and therefore the schematics describing that equipment) in order to prevent technological advances by TPMs. But, as the district court noted, "Grumman . . . makes no allegations that DG has in fact attempted to subvert competitors' efforts to develop and implement competing diagnostics." [Grumman II, 761 F. Supp. at 191](#).

In conclusion, [**141] Grumman has not produced evidence from which a jury could find that DG engaged in exclusionary conduct by unilaterally refusing to license ADEX or sell schematics to TPMs, or by only selling other service tools directly to equipment owners. Therefore, there was no error in the district court's entry of summary judgment on Grumman's monopolization claim.

IV.

CONCLUSION

For the foregoing reasons, we affirm the district court in every respect save for its failure to instruct the jury on its duty to consider Grumman's plea for apportionment of Grumman's nonduplicative profits.⁶⁵ We [***1190**] remand the case to the district court for the sole purpose of resolving that issue.

So ordered.

End of Document

⁶⁵ We have considered all of Grumman's other arguments, and find none of sufficient merit to alter our conclusions.

Bob Nicholson Appliance v. Maytag Co.

United States District Court for the Southern District of Indiana, New Albany Division

September 15, 1994, Decided ; September 15, 1994, Filed

CAUSE NO. NA 91-131-C

Reporter

883 F. Supp. 321 *; 1994 U.S. Dist. LEXIS 20208 **

BOB NICHOLSON APPLIANCE, INC., Plaintiff, vs. MAYTAG COMPANY, Defendant.

Core Terms

pricing, antitrust, appliances, predatory, anti trust law, competitors, consumers, summary judgment, summary judgment motion, fraudulent concealment, material fact, alleges, price discrimination, duty to disclose, Robinson-Patman Act, nonmoving, dealer

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

HN1 [down arrow] **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 13\(a\)](#).

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN2 [down arrow] **Entitlement as Matter of Law, Appropriateness**

Under Fed. R. Civ. P. 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. While the burden rests squarely on the party moving for summary judgment to show that there is an absence of evidence to support the nonmoving party's case, the nonmoving party responding to a properly made and supported summary judgment motion still must set forth facts showing that there is a genuine issue of material fact and that a reasonable jury could return a verdict in its favor.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN3 **Summary Judgment, Entitlement as Matter of Law**

For purposes of summary judgment, the moving party is entitled to a judgment as a matter of law if the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. If doubts remain, however, as to the existence of a material fact, then those doubts should be resolved in favor of the nonmoving party and summary judgment denied. Although the general rule is that a court must draw all inferences in favor of the nonmoving party, antitrust law limits the extent to which permissible inferences from ambiguous evidence may be drawn. If the record is clear that the antitrust claims cannot succeed judicial administration is served better by disposition prior to trial.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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 > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN4 **Clayton Act, Claims**

Section 4 of the Clayton Act, [15 U.S.C.S. § 15\(a\)](#), defines the class of persons who may maintain private damage actions under the antitrust laws, and requires that a plaintiff show "antitrust injury" before a court can consider other substantive violations of the Sherman or Robinson-Patman Acts.

Antitrust & Trade Law > ... > Private Actions > Standing > 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 > ... > Private Actions > Remedies > General Overview

[HN5](#) Standing, Clayton Act

The four elements a plaintiff must satisfy to bring an action for treble damages under § 4 of the Clayton Act, [15 U.S.C.S. § 15\(a\)](#), are: (1) a duty recognized by the antitrust laws; (2) a violation of the antitrust laws; (3) injury to an interest protected by the antitrust laws and attributable to the antitrust violation--that is antitrust injury; and (4) a direct link between the antitrust violation and the antitrust injury, that is to say, standing.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

[HN6](#) Regulated Practices, Price Fixing & Restraints of Trade

The "antitrust injury doctrine" requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[HN7](#) Robinson-Patman Act, Claims

In the context of the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#), plaintiff must show that the price discrimination it suffered may substantially lessen competition. The Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[HN8](#) Regulated Practices, Price Fixing & Restraints of Trade

"Predatory pricing" is defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN9[] Regulated Practices, Price Fixing & Restraints of Trade

Non-predatory pricing is competitive pricing that cannot inflict antitrust injury upon a competitor.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN10[] Regulated Practices, Price Fixing & Restraints of Trade

A violation of [15 U.S.C.S. § 13\(a\)](#) requires not only proof of price discrimination, but a potential impact substantially to lessen competition or create a monopoly in any line of commerce.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN11[] Regulated Practices, Price Fixing & Restraints of Trade

The antitrust injury requirement cannot be met by broad allegations of harm to the "market" as an abstract entity. Although all antitrust violations, under both the per se rule and rule-of-reason analysis, "distort" the market, not every loss stemming from a violation counts as antitrust injury.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN12[] Regulated Practices, Price Fixing & Restraints of Trade

When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper function of antitrust.

Governments > Fiduciaries

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[HN13](#) [blue document icon] Governments, Fiduciaries

A party asserting fraudulent concealment must prove: (1) the wrongdoer had a duty to disclose certain facts to another, (2) it knowingly failed to do so, and (3) the other justifiably relied upon such non-disclosure to his detriment. Fraudulent concealment can arise from either active efforts to conceal malpractice, or from a failure to disclose material information when a fiduciary or confidential relationship exists. To be affirmative acts of concealment, the actions must be calculated to mislead and hinder a plaintiff from obtaining information by the use of ordinary diligence, or to prevent inquiry or elude investigation.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

[HN14](#) [blue document icon] Nondisclosure, Elements

A prerequisite to a claim of fraudulent concealment is the existence of a duty to disclose the concealed information.

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

[HN15](#) [blue document icon] Consideration, Enforcement of Promises

In order to prove a claim of fraud, plaintiffs must show: 1) a material representation of past or existing facts; 2) which is false; 3) which was made with knowledge or reckless ignorance of its falsity; 4) which causes reliance to the detriment of the person relying on the representation.

Counsel: [\[**1\]](#) Attorney(s) for Plaintiff: James E. Fifer, Mark B. Geller, 220 East Main Street, P.O. Box 65, New Albany, Indiana 47151-0065.

Attorney(s) for Defendant: David W. Crumbo, Mary Ann Guenther, 120 West Spring Street, Suite 400, New Albany, Indiana 47150-3655, Kenneth J. Tuggle, BROWN TODD & HEYBURN, 3200 Providian Center, Louisville, Kentucky 40202-3363.

Judges: SARAH EVANS BARKER, CHIEF JUDGE, United States District Court, Southern District of Indiana

Opinion by: SARAH EVANS BARKER

Opinion

[*322] ENTRY

The Maytag Company ("Maytag") moves for summary judgment on Bob Nicholson [\[*323\]](#) Appliance, Inc.'s ("BNA") Second Amended Complaint. For the reasons stated below, we grant Maytag's motion for summary judgment as to all counts.

I. BACKGROUND

BNA, an Indiana corporation, sells home appliances at retail in New Albany, Indiana. Maytag, a Delaware corporation, manufactures and distributes home appliances. From 1979, up to November, 1990, BNA (and its predecessor, the sole proprietorship, Bob Nicholson Appliance) purchased home appliances from Maytag pursuant to several Retail Dealer Agreements ("RDA's). See Second Amended Complaint, Count I, P 3. In November, 1990, citing a decline in BNA's sales, Maytag cancelled [**2] its RDAs with BNA.

BNA claims that Maytag had quantity discount pricing programs (hereinafter "Super Value Program"), through which selected dealers had the opportunity to buy certain models of home appliances from Maytag at prices below what BNA would normally pay to buy the same quality appliances. BNA further maintains that it repeatedly told Maytag that it wanted to participate in the Super Value Program if it received the same pricing. See Second Amended Complaint, Count I, at P 10. According to BNA, Maytag repeatedly refused to provide any information about the Super Value Program and failed to give BNA any opportunity to participate even though BNA met the requisite criteria.

BNA's Second Amended Complaint alleges five counts: Count I alleges that Maytag violated [15 U.S.C. § 13](#)¹ (the Robinson-Patman Act) by engaging in price discrimination; Count II alleges that Maytag made fraudulent representations regarding the existence of and BNA's eligibility for the Super Value Program; Count III alleges that Maytag violated [15 U.S.C. § 1](#) (the Sherman Anti-Trust Act) by engaging in illegal tie-in arrangements; Count IV alleges that Maytag breached its retail dealer agreements [**3] with BNA.² BNA claims that it is entitled to various damages including lost profits and treble damages under [15 U.S.C. § 15](#) (Section 4 of the Clayton Act).³

[**4] II. DISCUSSION

A. Summary Judgment Standard

HN2[] Under [Rule 56\(c\) of the Federal Rules of Civil Procedure](#), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Fed. R. Civ. Proc. 56\(c\)](#). While the burden rests squarely on the party moving for summary judgment to show "that there is an absence of evidence to support the nonmoving party's case", [Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 \(1986\)](#), the nonmoving party responding to a properly made and supported summary judgment motion still must set forth facts showing that there is a genuine issue of material fact and that a reasonable jury could return a verdict in its favor. See [Wolf v. City of Fitchburg, 870 F.2d 1327, 1329 \(7th Cir. 1989\)](#); [Posey v. Skyline Corp., 702 F.2d 102, 105 \(7th Cir. 1983\)](#), cert. denied, 464 U.S. 960, 78 L. Ed. 2d 336, 104 S. Ct. 392 [***324**] (1983). "The **HN3[]** moving party is 'entitled to a judgment as a matter of law' [if] the nonmoving party has failed to make a sufficient showing [**5] on an essential element of her case with respect to

¹ **HN1[]** Section 2(a) of the Clayton Act, [15 U.S.C. § 13\(a\)](#), [38 Stat. 730](#), as amended by the Robinson-Patman Act provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

² Count V alleged that Smith's Appliance & Furniture Co. violated [15 U.S.C. § 13\(f\)](#) by knowingly receiving discriminatory pricing from Maytag. Count V was dismissed with prejudice on April 29, 1994, after the Smith and BNA settled.

³ Section 4 of the Clayton Act, [15 U.S.C. § 15\(a\)](#), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."

which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If doubts remain, however, as to the existence of a material fact, then those doubts should be resolved in favor of the nonmoving party and summary judgment denied. See *Wolf*, 870 F.2d at 1330.

Although the general rule is that a court must draw all inferences in favor of the nonmoving party, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 2077, 119 L. Ed. 2d 265 (1992), "antitrust law limits the extent to which permissible inferences from ambiguous evidence may be drawn." *Wigod v. Chicago Mercantile Exchange*, 981 F.2d 1510, 1514 (7th Cir. 1992). If the "record is clear that the antitrust claims cannot succeed. . . judicial administration is served better by disposition prior to trial." *Id. at 1514-15*.

B. Antitrust Injury

HN4 [↑] Section 4 of the Clayton Act, *15 U.S.C. § 15(a)*, "defines the class of persons who may maintain private damage actions under the antitrust laws," see *Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197, 1200 (7th Cir. 1986), and [**6] requires that a plaintiff show "antitrust injury" before a court can consider other substantive violations of the Sherman or Robinson-Patman Acts. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). In *Greater Rockford Energy & Technology v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993), cert. denied, 127 L. Ed. 2d 375, 114 S. Ct. 1054 (1994), the Seventh Circuit noted **HN5** [↑] four elements a plaintiff must satisfy to bring an action for treble damages under Section 4 of the Clayton Act: "(1) a duty recognized by the antitrust laws; (2) a violation of the antitrust laws; (3) injury to an interest protected by the antitrust laws and attributable to the antitrust violation--that is **antitrust injury**; and (4) a direct link between the antitrust violation and the antitrust injury, that is to say, **standing**." (emphasis in original). **HN6** [↑] The "antitrust injury doctrine" as elaborated in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990); *Cargill Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986), *Associated General Contractors, Inc. v. California State* [**7] *Council of Carpenters*, 459 U.S. 519, 534, 103 S. Ct. 897, 906, 74 L. Ed. 2d 723 (1983)⁴, and *Brunswick, supra*, "requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers." See *Stamatakis Industries, Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992) (quoting *Chicago Professional Sports Limited Partnership v. National Basketball Ass'n*, 961 F.2d 667, 670 (7th Cir. 1992)); see also *O.K. Sand and Gravel v. Martin Marietta Corp.*, 819 F. Supp. 771, 787 (S.D. Ind. 1992).

[**8] In the context of the Robinson-Patman Act, BNA must show that the price discrimination it suffered may substantially lessen competition. See *15 U.S.C. § 13(a); Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) (Robinson-Patman Act "condemns price discrimination only to the extent that it threatens to injure competition.").⁵ Neither the Supreme Court nor the [*325] Seventh Circuit has addressed what constitutes a "competitive injury" under the Robinson-Patman Act; and the other circuits courts are divided on this issue. Some circuits have found that a plaintiff satisfies the antitrust injury requirement for a Robinson-Patman violation where the plaintiff showed an injury to competitors, not just consumers. See *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 15533-35, 1539-41 & n. 17 (3d Cir. 1990) (secondary line Robinson-Patman plaintiff need show only injury to a competitor; proof of injury to competition unnecessary); *Hasbrouck v. Texaco, Inc.*, 842

⁴ In *Associated General Contractors*, the Supreme Court emphasized 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." Instead, 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 the further determination whether the plaintiff is a proper party to bring a private antitrust action." *459 U.S. at 535 n. 31, 103 S. Ct. at 907 n. 31*.

HN7 [↑]

⁵ Although the Supreme Court in *Brooke Group* required a showing of actual injury to competition in the market, the holding of the case is currently limited to the context of primary line competitors. It is unclear whether the Seventh Circuit would extend *Brooke Group*'s requirement of actual injury to competition to secondary line competitors. See *Greater Rockford Energy & Technology v. Shell Oil*, 998 F.2d 391, 400 n. 11 (7th Cir. 1993).

[F.2d 1034, 1040 \(9th Cir. 1987\)](#) (plaintiff need only show a substantial price discrimination between themselves and their competitors over a period of time); P. Areeda [**9] & H. Hovenkamp, *Antitrust Law* P340.5 (Supp. 1993). Others have required an injury to competition. See [Boise Cascade Corp. v. FTC, 267 U.S. App. D.C. 124, 837 F.2d 1127, 1138-39, 1143-48 \(D.C. Cir. 1988\)](#); [Richard Short Oil Co. v. Texaco, 799 F.2d 415 \(8th Cir. 1986\)](#) (lack of antitrust injury found where discriminating defendant was one of many sellers in the market).

In this case, BNA contends that its antitrust injury stems from Maytag's alleged fraudulent concealment of its Super Value Program. BNA claims that because it was not allowed to participate [**10] in the program, its sales and profits declined, prompting Maytag to cancel its RDA with BNA. BNA further maintains that Maytag's Super Value Program amounted to a conspiracy with Smith to utilize a predatory pricing scheme to eliminate BNA from the market as a purchaser of Maytag products. BNA concludes that the predatory pricing eliminated competition thereby causing antitrust injury. Finally, BNA points to the dramatic reduction of its sales of Maytag appliances starting from the date that Smith Furniture (BNA's competitor) enrolled in the Super Value Program.

The Court initially rejects BNA's contention that Maytag may have engaged in predatory pricing. In [Cargill, supra, 479 U.S. at 117-18, 107 S. Ct. at 493](#), the Supreme Court [HN8](#) defined "predatory pricing" as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." The Court further noted that:

[Predatory pricing] is a practice that harms both competitors *and* competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing [**11] is thus a practice 'inimical to the purposes of [the antitrust] laws,' [Brunswick, 429 U.S. at 488, 97 S. Ct. at 697](#), and one capable of inflicting antitrust injury. (emphasis in original).

Id. [HN9](#) By contrast, nonpredatory pricing is "competitive pricing that cannot inflict antitrust injury upon a competitor." [Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1420 \(7th Cir. 1989\)](#).

The Court finds that BNA has failed to raise any material facts which would support its allegation that Maytag engaged in predatory pricing by not giving BNA the reduced Super Value Program prices. First, BNA has cited no evidence showing that Maytag cut its prices to some of its dealers for the sole purpose of eliminating competition or increasing its overall market share. Second, a predatory pricing scheme would not make sense in the context of a supplier-dealer relationship because both Maytag and BNA have a mutual interest in maximizing the amount of overall sales of Maytag appliances. Third, BNA has failed to show that Maytag had any prospect of obtaining the sort of monopolistic power that would make predatory pricing feasible. If Maytag's intent was to drive BNA out [**12] of the market and then radically increase its price on Maytag appliances through the remaining Maytag distributors, it is very likely that consumers would shift to comparable products rather than absorb the price increases. See [Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 594, 106 S. Ct. 1348, 1358, 89 L. Ed. 2d 538 \(1986\)](#) (noting that predatory pricing conspiracies are especially unlikely to occur where the prospects of attaining monopoly power are slight because a company must obtain enough market power to set higher than competitive prices and then sustain those prices long enough to offset earlier losses). Indeed, BNA presents no evidence suggesting that Maytag was close to obtaining monopoly [*326] power in the relevant appliance market. The Court grants Maytag's motion for summary judgment on BNA's Sherman Act claim (Count III) because no evidence suggests that Maytag engaged in predatory pricing and thus, no antitrust injury exists.

The more difficult question is whether BNA's Robinson-Patman Act claim survives the antitrust injury threshold requirement. BNA contends that it met the requirement by showing that competition was hurt because it lost sales to a competitor--Smith's [**13] Furniture and Appliance--through allegedly discriminatory pricing. We have already rejected BNA's contention that it was driven from the market through predatory pricing. The key question is whether one can show competitive injury under the Robinson-Patman Act by showing that a secondary line competitor was

injured. As we have noted above, some circuit courts have found injury where competitors were injured. See *Feeeser, Hasbrouck*⁶, *supra*.

However, we are persuaded that the Seventh Circuit would extend the reasoning of *Brooke Group* to secondary line competitors and require actual injury to competition. See e.g., *H.L. Hayden of N.Y. v. Siemens Medical Systems, 879 F.2d 1005, 1021 n. 12 (2d Cir. 1989)* ("[HN10] A] violation of 15 U.S.C. § 13(a) (1982) requires not only proof of price discrimination, [**14] but a potential impact substantially to lessen competition or create a monopoly in any line of commerce."); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 586 n. 2 (2d Cir. 1987)*. Our analysis is consistent with numerous decisions from this circuit emphasizing that the historic purpose of the antitrust laws has been to protect competition, not competitors. See e.g., *Stamatakis Industries, supra, 965 F.2d at 471*, ("Entertaining claims of excessive competition would undermine the functions of the antitrust laws."); *Chicago Professional Sports Ltd. Partnership v. Nat'l Basketball Ass'n, 961 F.2d 667 (7th Cir. 1992)* ("Judicial relief from the real injuries caused by rivalry would harm the consumers the antitrust laws are supposed to protect.").

Applying the above standard to this case, the Court finds that BNA has failed to present any evidence of any reduction in output of Maytag appliances or increase in price to the ultimate consumers of the Maytag products. The mere fact that BNA may have had to pay more for Maytag appliances does not mean that competition as a whole suffered. See *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340* [**15] n. 8, 110 S. Ct. 1884, 1892 n. 8, 109 L. Ed. 2d 333 (1990) ("The [HN11] antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity. Although all antitrust violations, under both the *per se* rule and rule-of-reason analysis, 'distort' the market, not every loss stemming from a violation counts as antitrust injury.") BNA's pleadings raise arguments relating to injuries from increased competition, not the lack thereof; and these are not the concern of the antitrust laws. Finally, were an anticompetitive effect of Maytag's pricing practice really to result in less competition, BNA would not be the most appropriate party to assert consumer interests because its interests are not necessarily aligned with consumer interests. The Seventh Circuit has recognized that "when [HN12] the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper function of antitrust." *Ball Memorial Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1334 (7th Cir. 1986)*. Forcing Maytag to allow BNA to participate in a preferential pricing program may improve BNA's market position but will yield relatively few [**16] positive results for consumers.⁷

[*327] The Court finds that BNA has failed to demonstrate "antitrust injury," and accordingly, grants summary judgment in favor of Maytag on BNA's antitrust claims--Counts I and III.

C. Fraudulent Concealment and Fraud

HN13 A party asserting fraudulent concealment must prove: [**17] "(1) the wrongdoer had a duty to disclose certain facts to another, (2) it knowingly failed to do so, and (3) the other justifiably relied upon such non-disclosure to his detriment." *DeVoe Chevrolet-Cadillac v. Cartwright, 526 N.E.2d 1237, 1240* (Ind. App. 4 Dist. 1988). In *Keesling v. Baker & Daniels, 571 N.E.2d 562, 565* (Ind. App. 1 Dist. 1991), the court of appeals noted, "Fraudulent concealment can arise from either active efforts to conceal malpractice, or from a failure to disclose material information when a fiduciary or confidential relationship exists. . . . To be affirmative acts of concealment, the actions must be calculated to mislead and hinder a plaintiff from obtaining information by the use of ordinary diligence, or to prevent inquiry or elude investigation." *571 N.E.2d at 565*.

⁶The *Hasbrouck* case is distinguishable because the retail gasoline market was very price-sensitive so that a small difference in retail prices generated significant swings in customers and sales.

⁷Even were this Court to adopt the Ninth Circuit's "injury to competitors" test and conclude that the antitrust injury requirement has been met by BNA, BNA's evidence is insufficient to create an issue for the jury on the causation issue--whether Smith Furniture's participation in the Super Value Program had a substantial effect on BNA's ability to capture a sizeable market. BNA offers no evidence refuting other relevant factors such as two recessions in the Louisville market, additional competition from Sears Brand Central and Circuit City, changes in the distribution procedures in the appliance industry, and increases by Whirlpool and G.E. in their market shares. See Bane depo. at 22-25, 105-106, 149-150.

The key issue is whether Maytag had a duty to disclose its Super Value Program to BNA. BNA contends that Maytag's duty of disclosure was implicit in the RDA and in any case, stemmed from its position of trust. Moreover, it argues that employees of Maytag repeatedly told Mr. Bane, the founder of BNA, that Maytag did not offer a Super Value Program. Although there are certainly disputed [**18] issues of fact regarding the alleged misrepresentations, the Court finds that BNA has failed to raise material facts showing that Maytag had a duty to disclose information about the Super Value Program to BNA. It is well-known that Indiana does not recognize an implied good faith and fair dealing in contracts. See *Hamlin v. Steward*, 622 N.E.2d 535, 540 (Ind. App. 1 Dist. 1993). Nor do the cases in BNA's brief suggest that a duty to disclose certain facts exists between a manufacturer and dealer. See *Lift-a Loft Corp. v. Rodes-Roper-Love Ins. Agency, Inc.*, 975 F.2d 1305, 1311 (7th Cir. 1992).⁸ Because "[HN14[↑]] a] prerequisite to a claim of fraudulent concealment is the existence of a duty to disclose the concealed information," see *Jackson v. Blanchard*, 601 N.E.2d 411, 418 (Ind. App. 4 Dist. 1992), and because BNA has failed to demonstrate that such a duty existed for Maytag, we grant Maytag's motion for summary judgment as to the fraudulent concealment and fraud claims.

[**19] D. Breach of Contract

BNA failed to contest Maytag's argument regarding the breach of contract claim in its motion opposing summary judgment. Because BNA presents no material facts suggesting any obligation of Maytag to continue to supply BNA with refrigerators, we grant Maytag's motion for summary judgment as to this claim as well.

CONCLUSION

The Court grants Maytag's motion for summary judgment as to all counts of BNA's Second Amended Complaint.

It is so ORDERED this 15th day of September, 1994.

SARAH EVANS BARKER, CHIEF JUDGE

United States District Court

Southern District of Indiana

End of Document

⁸ Nor would BNA state a claim under common-law fraud. *HN15[↑]* In order to prove a claim of fraud, Plaintiffs must show: 1) a material representation of past or existing facts; 2) which is false; 3) which was made with knowledge or reckless ignorance of its falsity; 4) which causes reliance to the detriment of the person relying on the representation. See *Knauf Fiber Glass, GmbH v. Stein*, 615 N.E.2d 115, 123 (Ind. App. 5 Dist. 1993). At a minimum, BNA has failed to show that it relied to its detriment on any alleged misrepresentation made by Maytag.



General Devices v. Bacon

Court of Appeals of Texas, Fifth District, Dallas

September 15, 1994, Issued

No. 05-90-01298-CV

Reporter

888 S.W.2d 497 *; 1994 Tex. App. LEXIS 3104 **

GENERAL DEVICES, INC., Appellant v. ROGER L. BACON & ALLAN P. SHANNON, Appellees

Subsequent History: Writ denied by, 04/27/1995

Prior History: [**1] On Appeal from the 134th Judicial District Court. Dallas County, Texas. Trial Court Cause No. 87-09787-G.

Original Opinion of December 10, 1991, Reported at: [1991 Tex. App. LEXIS 3283](#).

[Bacon v. General Devices, 830 S.W.2d 106, 1992 Tex. LEXIS 63 \(Tex., June 3, 1992\)](#)

Disposition: AFFIRMED in part, REVERSED and RENDERED in part, REVERSED and REMANDED in part

Core Terms

covenant, compete, trial court, summary judgment motion, antitrust, summary judgment, lost profits, unenforceable, tortious interference, instructed verdict, matter of law, interfered, contracts, employees, shoppers, Travel, calculated, promisee, damages

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Torts > ... > Contracts > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Contracts > General Overview

HN1[] Types of Contracts, Covenants

An unenforceable covenant not to compete cannot form the basis of an action for tortious interference. However, mere unenforceability of a contract is not a defense to an action for tortious interference with a contract's performance.

Torts > ... > Contracts > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Contracts > General Overview

HN2 [] **Intentional Interference, Defenses**

That a contract is terminable at will is not a defense to an action for tortious interference. Until a contract is terminated, it is valid and subsisting, and third persons are not free to tortiously interfere with the contract.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN3 [] **Appeals, Standards of Review**

An appellate court reviews a trial court's grant of an instructed verdict on an evidentiary basis and determines whether there is any probative evidence to raise a material question of fact. The appellate court reviews the evidence in the light most favorable to the nonmoving party and disregards all contrary evidence and inferences. The appellate court gives the losing party the benefit of all reasonable inferences that arise from contrary evidence. If there is any conflicting evidence of probative value, the appellate court must reverse and remand the issue for a jury's determination.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

HN4 [] **Measurement of Damages, Foreseeable Damages**

Recovery for lost profits does not require that the loss be susceptible of exact calculation. However, the amount of the loss must be shown by competent evidence and with reasonable certainty. What constitutes reasonably certain evidence of lost profits is a fact intensive determination. At a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Torts > ... > Types of Losses > Lost Income > General Overview

HN5 [] **Measurement of Damages, Foreseeable Damages**

Evidence of lost income, standing alone, is not evidence of lost profits. The record must show how the lost profits were calculated. Recovery of lost profits must be predicated on one complete calculation. Pieces of several different methods of calculating lost profits are insufficient.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

HN6 [] **Trials, Judgment as Matter of Law**

To withstand a no evidence-directed verdict challenge, a party must show either a history of profitability or the actual existence of future contracts from which lost profits can be calculated with reasonable certainty. Texas cases permit recovery for lost profits in reliance upon routinely kept business records so long as the evaluation of the business's decreased profitability is based upon objective facts, figures, and data.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN7 Entitlement as Matter of Law, Appropriateness

Summary judgment is proper if the record shows there is no genuine issue of any material fact and that the movant is entitled to judgment as a matter of law. *Tex. R. Civ. P. 166a(c)*. The movant bears the burden of showing there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. In deciding whether a disputed material fact issue exists, an appellate court accepts the evidence favorable to the nonmovant as true. The appellate court indulges in every reasonable inference and resolves any doubts in the nonmovant's favor. Summary judgment is proper when the controversy involves an unambiguous document.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN8 Types of Contracts, Covenants

If a court can give a definite legal meaning or interpretation to a written instrument, it is not ambiguous. Courts construe unambiguous contracts as a matter of law and enforce unambiguous contracts as written. An instrument is ambiguous if it is reasonably susceptible to more than one meaning. If a covenant not to compete is susceptible to two meanings, the construction that validates it prevails.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Civil Procedure > Remedies > Damages > Monetary Damages

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN9 Types of Contracts, Covenants

An agreement not to compete is reasonable if: (1) it is ancillary to a valid transaction or relationship; (2) it is necessary to protect the promisee's legitimate interest; and (3) neither hardship to the promisor nor public injury outweighs the covenant's legitimate benefits to the promisee. A covenant not to compete must be appropriately

limited as to time, territory, and type of activity. A restrictive covenant must stand or fall as written for an award of money damages.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Interpretation > Severability

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN10 [blue icon] **Types of Contracts, Covenants**

Although at common law courts did not redraft a contract to make it reasonable or enforceable, courts may sever an invalid covenant not to compete from lawful portions of the contract.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN11 [blue icon] **Types of Contracts, Covenants**

Unless an agreement not to compete is reasonable, it is a restraint of trade. Whether a covenant not to compete is a reasonable restraint of trade is a question of law for the court. Not every contract in restraint of trade is prohibited. An agreement may be unreasonable as between the parties yet not be a restraint of trade. A breach of an unreasonable restraint-of-trade covenant will not support damages.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN12 [blue icon] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

See 1989 Tex. Gen. Laws 4852-53, amended by 1993 Tex. Gen. Laws 4201-02.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN13 [blue icon] **Regulated Practices, Price Fixing & Restraints of Trade**

An unreasonable non-compete agreement between parties does not necessarily violate antitrust laws. **Antitrust law** violations require an adverse effect on the relevant market.

Counsel: For Appellant: Robert B. Gilbreath and D. Bradley Dickinson, Dallas.

For Appellees: Bill Atkins, Arlington.

Judges: Before Justices Rowe,¹ Kinkeade, and Maloney. Opinion by Justice Maloney

Opinion by: FRANCES MALONEY

Opinion

[*500] OPINION ON REMAND

Opinion by Justice Maloney

The Texas Supreme Court vacated our earlier opinion and judgment and remanded this case² [**2] for our review in light of its opinion in *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830 (Tex. 1991). We have again reviewed the record and the supreme court's opinion in *Travel Masters*.³ We affirm in part. We reverse and remand in part. We reverse and render in part.

FACTUAL BACKGROUND

General Devices, Inc. (GDI) is a "job shop" that furnishes highly skilled temporary personnel to high-tech companies. GDI employed Roger L. Bacon and Allan P. Shannon. GDI and its employees execute employment agreements. All employment agreements contain covenants not to compete.

GDI placed Bacon, Shannon and twelve other engineers with LTV Aerospace & Defense and Vought Corporation. In 1987, Bacon, Shannon, and the other twelve LTV job shoppers left GDI's employment. Some evidence in the record indicates that Bacon and Shannon induced or encouraged the twelve other employees to leave GDI.

PROCEDURAL BACKGROUND

GDI sued Bacon and Shannon alleging that they: (1) breached the covenants not to compete in their employment contracts; (2) tortiously interfered with GDI's contractual relationships with twelve of its employees; and (3) tortiously interfered with [**3] GDI's contractual relationship with LTV. Bacon and Shannon answered and sought a declaratory judgment that the covenants not to compete in their and all other employees' contracts were unenforceable. Bacon and Shannon also counterclaimed, alleging a cause of action under the Texas Free Enterprise and Antitrust Act of 1983. See *TEX. BUS. & COM. CODE ANN. §§ 15.01-52* (Vernon 1987 & Supp. 1994).

GDI moved for summary judgment alleging that (1) the covenants not to compete were enforceable and (2) Bacon and Shannon had no viable claims under the Texas Free Enterprise and Antitrust Act. Bacon and Shannon responded to GDI's motion for summary judgment and moved for partial summary judgment alleging that (1) the covenants not to compete were unenforceable and (2) GDI had violated the Texas Free Enterprise and Antitrust Act of 1983. The trial court granted GDI's motion for summary judgment and denied Bacon and Shannon's motion for

¹ The Honorable Gordon Rowe, Justice, participated in this case on original submission. He did not participate in this case on remand.

² *General Devices v. Bacon*, 836 S.W.2d 179 (Tex. App.--Dallas 1991), *opinion and judgment vacated and remanded per curiam*, *Bacon v. General Devices, Inc.*, 830 S.W.2d 106 (Tex. 1992).

³ We considered the potential impact of *Travel Masters* on this case when it was before us on motion for rehearing. We concluded that *Travel Masters* did not affect our original opinion's validity.

partial summary judgment. The trial court found that the covenants not to compete were valid and enforceable, and Bacon and Shannon had no viable counterclaims.

The case went to trial on GDI's remaining claims. At the close of GDI's case-in-chief, the trial **[**4]** court directed a verdict for Bacon and Shannon holding that GDI presented insufficient evidence on damages.

GDI appealed, asserting that the trial court erred in directing a verdict against it. Bacon and Shannon cross-appealed, asserting that the trial court erred in denying their motion and granting GDI's motion for summary judgment. They argue the covenants not to compete were unenforceable and consequently GDI's claims of tortious interference were without merit.

TORTIOUS INTERFERENCE UNDER TRAVEL MASTERS

GDI claimed Bacon and Shannon interfered with the *employment contracts between GDI and the twelve employees*. GDI also **[*501]** claimed that Bacon interfered with the *contractual relationship between GDI and LTV* by coercing LTV into allowing GDI's fourteen employees to change job shops while still working for LTV. It did not allege below or argue on appeal that Bacon and Shannon interfered with the covenant not to compete.

In contrast, Star Tours attempted to enforce the covenant not to compete against a former employee and her travel agency, Travel Masters. See [Travel Masters, 827 S.W.2d at 832](#). The jury found that Star Tours's former employee's father **[**5]** and Travel Masters willfully and intentionally induced Star Tour's former employee to breach the covenant not to compete. *Id.* The *Travel Masters* court held that the covenant not to compete was unenforceable because it was not ancillary to an otherwise enforceable agreement. [Id. at 833](#).

HN1 An unenforceable covenant not to compete cannot "form the basis of an action for tortious interference." See *id.* However, "mere unenforceability of a contract is not a defense to an action for tortious interference with [a contract's] performance." [Juliette Fowler Homes, Inc. v. Welch Assocs., Inc., 793 S.W.2d 660, 664-65 \(Tex. 1990\)](#).

HN2 That a contract is terminable at will is not a defense to an action for tortious interference. [Sterner v. Marathon Oil Co., 767 S.W.2d 686, 689 \(Tex. 1989\)](#). Until a contract is terminated, it is valid and subsisting, and third persons are not free to tortiously interfere with the contract. *Id.*

Bacon and Shannon argued that an unenforceable covenant not to compete is a defense to tortious interference claims. Because GDI never asserted that Bacon and Shannon tortiously interfered with the covenant not to compete, the covenant's invalidity **[**6]** is not a defense.

The trial court did not err in denying Bacon and Shannon's motion for summary judgment on GDI's tortious interference claims.

INSTRUCTED VERDICT

GDI complains the trial court erred in granting Bacon and Shannon's motion for instructed verdict. The trial court granted the instructed verdict because GDI "failed to present sufficient evidence of damages to submit to the jury." GDI maintains its damage evidence was sufficient to submit the case to the jury.

1. Standard of Review

HN3 When we review the trial court's grant of an instructed verdict on an evidentiary basis, we determine whether there is any probative evidence to raise a material question of fact. [Collora v. Navarro, 574 S.W.2d 65, 68 \(Tex. 1978\)](#). We review the evidence in the light most favorable to the nonmoving party and disregard all contrary evidence and inferences. *Id.* We give the losing party the benefit of all reasonable inferences that arise from contrary evidence. See [White v. Southwestern Bell Tel. Co., 651 S.W.2d 260, 262 \(Tex. 1983\)](#). If there is any conflicting evidence of probative value, we must reverse and remand the issue for the jury's determination. *Id.*

[**7] 2. Lost Profits

HN4 [↑] "Recovery for lost profits does not require that the loss be susceptible of exact calculation." [Szczepanik v. First S. Trust Co.](#), [883 S.W.2d 648, 37 Tex. Sup. J. 860, 861](#) (June 2, 1994); [Holt Atherton Indus., Inc. v. Heine](#), [835 S.W.2d 80, 84 \(Tex. 1992\)](#). However, the amount of the loss must be shown by competent evidence and with reasonable certainty. [Heine](#), [835 S.W.2d at 84](#); [D/FW Commercial Roofing Co. v. Mehra](#), [854 S.W.2d 182, 187](#) (Tex. App.--Dallas 1993, no writ). "What constitutes reasonably certain evidence of lost profits is a fact intensive determination. At a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained." [Heine](#), [835 S.W.2d at 84](#).

HN5 [↑] Evidence of lost income, standing alone, is no evidence of lost profits. *Id.* The record must show how the lost profits were calculated. *Id.*; see [Frank B. Hall & Co. v. Beach, Inc.](#), [733 S.W.2d 251, 259](#) (Tex. App.-- [**502] Corpus Christi 1987, writ ref'd n.r.e.); [Village Square, Ltd. v. Barton](#), [660 S.W.2d 556, 559-60](#) (Tex. App.--San Antonio 1983, writ ref'd n.r.e.). "Recovery [**8] of lost profits must be predicated on one complete calculation." [Szczepanik](#), [37 Tex. Sup. J. at 861](#); [Heine](#), [835 S.W.2d at 85](#). "Pieces of several different methods of calculating lost profits" are insufficient. *Id. at 85-86*. **HN6** [↑] To withstand a "no evidence-directed verdict" challenge:

A party must show either a history of profitability or the actual existence of future contracts from which lost profits can be calculated with reasonable certainty. Texas cases permit recovery for lost profits in reliance upon routinely kept business records so long as the evaluation of the business's decreased profitability is based upon objective facts, figures, and data.

[Mehra](#), [854 S.W.2d at 187](#).

3. Application of Law to Facts

GDI presented evidence of the monies: (1) GDI received from LTV for its job shoppers and (2) GDI paid to its job shoppers during the year before Bacon and Shannon's actions. Both GDI executives testified that, if Bacon and Shannon had not encouraged the other employees to leave, GDI's relationship with LTV and the job shoppers would have continued. Viewing this evidence in the light most favorable to GDI and considering all reasonable inferences [**9] from that evidence, there was sufficient evidence for the jury to determine that Bacon's and Shannon's actions damaged GDI. The evidence presented a fact question for the jury. The trial court erred in granting an instructed verdict against GDI.

We sustain GDI's first point of error.

BACON AND SHANNON'S MOTION FOR SUMMARY JUDGMENT

In their sole cross-point of error, Bacon and Shannon maintain that the trial court erred in not granting their motion and in granting GDI's motion for summary judgment.

1. Standard of Review

HN7 [↑] Summary judgment is proper if the record shows there is no genuine issue of any material fact and that the movant is entitled to judgment as a matter of law. See [TEX. R. CIV. P. 166a\(c\)](#). The movant bears the burden of showing there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. In deciding whether a disputed material fact issue exists, we accept the evidence favorable to the nonmovant as true. We indulge in every reasonable inference and resolve any doubts in the nonmovant's favor. [Nixon v. Mr. Property Management Co.](#), [690 S.W.2d 546, 548-49 \(1985\)](#). Summary judgment is proper when the controversy [**10] involves an unambiguous document. See [Moody v. Moody Nat'l Bank](#), [522 S.W.2d 710, 715](#) (Tex.Civ.App.--Houston [14th Dist.] 1975, writ ref'd n.r.e.).

2. Rules of Construction

HN8 [↑] If we can give a definite legal meaning or interpretation to a written instrument, it is not ambiguous. We construe unambiguous contracts as a matter of law. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). We enforce unambiguous contracts as written. *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 517, 243 S.W.2d 154, 157 (1951).

An instrument is ambiguous if it is reasonably susceptible to more than one meaning. *R & P Enters. v. LaGuarda, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 519 (Tex. 1980). If a covenant not to compete is susceptible to two meanings, the construction that validates it prevails. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979).

3. Covenants Not to Compete

a. Common Law

HN9 [↑] An agreement not to compete is reasonable if: (1) it is ancillary to a valid transaction or relationship; (2) it is necessary to protect the promisee's legitimate interest; and (3) neither hardship to the promisor nor public injury outweighs the covenant's legitimate benefits [**11] to the promisee. *DeSantis v. Wackenhet Corp.*, 793 S.W.2d 670, 681-82 (Tex. 1990), cert. denied, 498 U.S. 1048, [*503] 111 S. Ct. 755, 112 L. Ed. 2d 775, (1991). A covenant not to compete must be appropriately limited as to "time, territory, and type of activity." *DeSantis*, 793 S.W.2d at 682. A restrictive covenant must stand or fall as written for an award of money damages. *Frankiewicz v. National Comp Assocs.*, 633 S.W.2d 505, 507 (Tex. 1982).

HN10 [↑] At common law, courts did not redraft a contract to make it reasonable or enforceable. *Id.* But, we may sever an invalid covenant not to compete from lawful portions of the contract. *Murco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 606 n.9 (Tex. App.--Dallas 1990, no writ).

HN11 [↑] Unless an agreement not to compete is reasonable, it is a restraint of trade. *Martin v. Credit Protection Ass'n. Inc.*, 793 S.W.2d 667, 668-69 (Tex. 1990). Whether a covenant not to compete is a reasonable restraint of trade is a question of law for the court. *Id. at 668*; *DeSantis*, 793 S.W.2d at 681. Not every contract in restraint of trade is prohibited. *DeSantis*, 793 S.W.2d at 687. An agreement may be unreasonable as between [**12] the parties yet not be a restraint of trade. *Id. at 688*. A breach of an unreasonable restraint-of-trade covenant will not support damages. See *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 314, 340 S.W.2d 950, 953 (1960).

b. Statutes

At the time of trial, the Texas Business and Commerce Code provided:⁴

HN12 [↑] [A] covenant not to compete is enforceable to the extent that it:

(1) is ancillary to an otherwise enforceable agreement . . . ; and

(2) contains reasonable limitations as to *time, geographical area, and scope of activity* to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Act of June 16, 1989, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852-53, amended by Act of June 19, 1993, 73d Leg., R.S., ch. 966, § 1, 1993 Tex. Gen. Laws 4201-02 (emphasis added). If the covenant:

⁴ Since the trial court decided this case, the legislature has amended the Texas Business and Commerce Code regarding reformation of covenants not to compete. See *TEX. BUS. & COM. CODE ANN. §§ 15.50-51* (Vernon Supp. 1994). However, as the trial court finally adjudicated the enforceability of the covenants before the effective date of the amendments, the amendments do not apply. *TEX. BUS. & COM. CODE ANN. § 15.52* (Vernon Supp. 1994).

does not meet the criteria set out in [Subdivision \(2\) of Section 15.50](#) the court, at the request of the promisee, shall reform the covenant to the extent necessary . . . and enforce the covenant as reformed, except that the court *may not award* **[**13]** the promisee damages for a breach of the covenant before its reformation and the relief granted shall be limited to injunctive relief.

Act of June 16, 1989, 71st Leg., R.S., ch 1193, § 1, 1989 Tex. Gen. Laws 4852 (amended 1993) (emphasis added).

4. Application of Law to Facts

a. Covenant Not To Compete

Bacon's and Shannon's employment agreements are identical. The agreements identify GDI as "COMPANY," Bacon or Shannon as "EMPLOYEE," and Vought Corporation (in Shannon's agreement) and LTV Aerospace & Defense (in Bacon's agreement) as "Client." Paragraph **[**14]** 8(a) contains the covenant not to compete. It reads as follows:

Without written approval from COMPANY, EMPLOYEE shall not accept direct or other [sic] subcontract employment either at this or other facilities of CLIENT, or from any firm with which COMPANY has an existing contract, during and for a period of thirty (30) days *beyond the period of association between COMPANY and CLIENT or any firm of aforesaid*.

(Emphasis added.) Neither party argues the covenant is ambiguous, but they disagree on its meaning. GDI asserts that the covenant only limits Bacon and Shannon for thirty days after their relationship with GDI ends. Bacon and Shannon argue that the covenant limits their employment until thirty days after GDI's relationship with its clients ends.

[*504] The covenant is not ambiguous. Only one interpretation is possible. The phrase "beyond the period of association between COMPANY and CLIENT" refers to the business relationship between GDI and its clients--not GDI and its job shoppers.

The covenant prohibits Bacon and Shannon from accepting employment from GDI's clients for thirty days after GDI and its *clients'* association ends. The relationship **[**15]** between GDI and its clients could exist indefinitely. The covenant does not define any geographic area where the job shoppers could accept employment during this time. Because it is not sufficiently limited as to time and territory, the covenant is not reasonable. We find the covenants not to compete unenforceable as a matter of law.

The trial court erred when it ruled "Paragraph 8(a) in General Device's Employment Contract *is reasonable as a matter of law and enforceable*." Consequently, the trial court erred in granting GDI's motion for summary judgment and denying that portion of Bacon and Shannon's motion for summary judgment based on the covenant's enforceability.

b. Antitrust Violations

Bacon and Shannon argue that if the covenant is unreasonable, it violates antitrust laws. We disagree. [HN13](#) An unreasonable agreement between the parties does not necessarily violate the antitrust laws. [Antitrust law](#) violations require an adverse effect on the relevant market.

Bacon and Shannon offered no summary judgment evidence of the relevant market or any effect on that market. The trial court did not err in denying Bacon and Shannon's motion for summary judgment on their antitrust **[**16]** claims. We affirm the trial court's denial of Bacon and Shannon's motion for summary judgment.

However, GDI moved for summary judgment on Bacon and Shannon's antitrust claim. Its motion alleged that the covenant not to compete was reasonable. The trial court granted GDI's motion for summary judgment because the covenant not to compete was reasonable and enforceable. We have found the covenant not to compete was neither reasonable nor enforceable. The trial court erred in granting GDI's motion for summary judgment on the antitrust claims.

CONCLUSION

We affirm the trial court's denial of summary judgment on Bacon and Shannon's antitrust and tortious interference claims. We reverse the instructed verdict granted against GDI. We reverse the trial court's summary judgment for GDI which held the covenant not to compete reasonable and enforceable as a matter of law. We reverse the trial court's denial of summary judgment on Bacon and Shannon's unenforceability of the covenant not to compete. We render judgment that the covenants are unreasonable and unenforceable. We reverse the trial court's summary judgment for GDI on Bacon and Shannon's claim of antitrust.

We remand this cause **[**17]** for further proceedings consistent with this opinion.

FRANCES MALONEY

JUSTICE

End of Document



Pine Ridge Recycling v. Butts County

United States District Court for the Middle District of Georgia, Macon Division

September 15, 1994, Decided ; September 15, 1994, Filed, Entered

C.A. 93-426-2-MAC (WDO)

Reporter

864 F. Supp. 1338 *; 1994 U.S. Dist. LEXIS 13210 **

PINE RIDGE RECYCLING, INC., et al., v. BUTTS COUNTY, GA, et al., Defendants.

Core Terms

Ridge, landfill, disposal, solid waste, injunction, Region, site, customers, transfer station, geographic, monopolize, municipal, preliminary injunction, Antitrust, prices, monopoly power, per ton, defendants', ordinances, vertical, Zoning

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

[HN1](#) [down arrow] **Federal & State Interrelationships, Abstention**

Abstention is not required where the court has not been asked to determine the constitutionality of a state statute.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

[HN2](#) [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

A preliminary injunction under [Fed. R. Civ. P. 65](#) is an extraordinary remedy which should be granted only if the moving party clearly establishes: (1) a substantial likelihood that he will ultimately prevail on the merits; (2) a showing that he will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to him outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[**HN3**](#) [] **Injunctions, Grounds for Injunctions**

The preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly carries the burden of persuasion as to the four prerequisites.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

[**HN4**](#) [] **Injunctions, Grounds for Injunctions**

Plaintiffs need only show a likelihood of success on one of their alternative theories of recovery in order to obtain injunctive relief.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

[**HN5**](#) [] **Relevant Market, Geographic Market Definition**

A foremost issue in an antitrust action is defining the relevant product and geographic markets. Only after the markets are defined, can the court assess defendants' power within the relevant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN6**](#) [] **Regulated Practices, Market Definition**

The product market is defined as the business in which defendants are engaged unless a reasonably interchangeable substitute product is available to the consumers.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN7**](#) [] **Regulated Practices, Market Definition**

A geographic market is essentially an economic concept in which the courts should examine supplier-customer relations.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN8**](#) [] **Regulated Practices, Market Definition**

The geographic market analysis includes consideration of where buyers seek supplies and sellers seek purchasers and an examination of transportation and other transaction costs.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[**HN9**](#) [down] **Regulated Practices, Market Definition**

The geographic market has been described as the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[**HN10**](#) [down] **Antitrust & Trade Law, Sherman Act**

Section 2 of the Sherman Act, [15 U.S.C.S. § 2](#), provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be guilty of a felony.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

[**HN11**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

A monopolization claim requires proof of two elements: (1) defendants' possession of monopoly power; and (2) defendants' willful acquisition and maintenance of that power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

[**HN12**](#) [down] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power can be shown by an ability to raise prices profitably or exclude competition.

Counsel: [\[**1\]](#) For PINE RIDGE RECYCLING, INC., plaintiff: Mr. Stephen E. O'Day, Mr. Clark G. Sullivan, Atlanta, GA. Mr. George E. Butler, II, Atlanta, GA.

For BUTTS COUNTY, GA, THE BUTTS COUNTY BOARD OF COMMISSIONERS, THE SOLID WASTE MANAGEMENT AUTHORITY OF BUTTS COUNTY, GEORGIA, RUSS CRUMBLEY, Individually and as a Member of the Butts County Board of Commissioners, JIMMY HARDY, Individually and as a Member of the Butts County Board of Commissioners, FREDERICK J. HEAD, Individually and as a Member of the Butts County Board of Commissioners, EDDIE L. TRAVIS, Individually and as a Member of the Butts County Board of Commissioners, R. WESLEY HALEY, Individually and as member of the Butts County Board of Commissioners and The Solid Waste Management Authority of Butts County, Georgia, BILL JONES, Individually and as Members of The Solid Waste Management Authority of Butts County, Georgia, HARVEY NORRIS, Individually and as Members of The Solid Waste Management Authority of Butts County, Georgia, SAM THURMAN, Individually and as Members of The Solid Waste Management Authority of Butts County, Georgia, ROXILU K. BOHRER, Individually and as Members of The Solid Waste Management Authority of Butts County, [\[**2\]](#) Georgia, JERRY GOODSON, Individually and as Members of The Solid Waste Management Authority of Butts County, Georgia, LIZ CARMICHAEL JONES, Individually and as Members of The Solid Waste Management Authority of Butts County, Georgia, GARY GRIZZELL, Individually and as Manager of The Solid Waste Management Authority of Butts County, Georgia,

defendants: Mr. Joseph R. Cullens, Mr. Jack N. Sibley, Mr. H. Lang Young, II, Atlanta GA. For ALL DEFENDANTS: Mr. Nickolas P. Chilivis, Atlanta, GA.

Judges: OWENS, JR.

Opinion by: WILBUR OWENS, JR.

Opinion

[*1340] ORDER

This action seeks to prevent Butts County, Georgia, its Board of Commissioners ("Board"), the Butts County Solid Waste Management Authority ("Authority"), and their individual members from opposing or otherwise interfering with the establishment of Pine Ridge's municipal solid waste landfill ("MSWLF"). Plaintiffs Pine Ridge Recycling, Inc. ("Pine Ridge") and Stephen Dale have moved for preliminary injunctive relief based on violations of the Sherman Antitrust Act ("Sherman Act"), [15 U.S.C. §§ 1, et seq.](#), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), [18 U.S.C. §§ 1961/31 et seq.](#), and the [*Commerce Clause of the United States Constitution, U.S. Const. Art. 1, § 8, cl. 3*](#). The court held a hearing on the motion on January 27, 1994, and requested further briefing after limited discovery. Defendants strenuously oppose the motion. After careful consideration of the arguments of counsel, the relevant case law, and the record as a whole, the court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. The Butts County Board of Commissioners is a governing authority in the State of Georgia, governing pursuant to authority granted by the Georgia Constitution and state statute.
2. The Butts County Solid Waste Management Authority was created pursuant to [O.C.G.A. § 12-8-53\(a\)](#) and operates a MSWLF in Butts County, Georgia ("the Butts landfill").
3. A MSWLF is a sanitary landfill which accepts any non-hazardous solid waste.
4. Effective in the early 1990s, federal regulations, known as "Subtitle D," tightened the requirements on MSWLFs.
¹ The Authority's current MSWLF does not comply with "Subtitle D", but the county intends to build and operate a conforming MSWLF before the expiration of the expansion permit.
- [**4] 5. In 1993, the Authority applied for and received a vertical expansion permit from the Georgia Environmental Protection Division ("EPD") to continue receiving waste at its existing landfill until July 1, 1998. The vertical expansion permit allows the Authority to dispose of an unlimited amount of solid waste until July 1998.
6. Landfills in several neighboring counties have closed recently because of the Subtitle D regulations. (Kamerschen Supp. Aff. App. B.)
7. Due to these closures, the Butts landfill has been able to increase its intake of waste by 148% since obtaining its vertical expansion permit. (Wiltzee Aff. Exh. A.)
8. Since November 1991, revenues at the Butts landfill have risen from \$ 0.00 to \$ 680,000 per year. During that same period, defendants' share of the solid waste disposal market in Butts County has risen from 12.3% to 96%.

¹ Subtitle D refers to a subtitle of the Federal Resource Conservation and Recovery Act ("RCRA") [42 U.S.C. §§ 6941, et seq.](#), and its implementing regulations. 40 C.F.R. Part 258.

Defendants share of the Spalding and Henry County markets have increased from 0% to 95% and from 0% to 48%, respectively.² (Wiltzee Aff. Exh. A.)

[**5] 9. Defendants generally charge \$ 18.00 per ton to dispose of residential waste originating outside Butts County and \$ 20.50 per ton for most commercial waste. (Grizzell Depo., pp. 10-25.) Defendants earn a profit [^{*}1341] of 121% on disposal of commercial waste. (Kamerschen Depo., p. 132.)

10. Defendants plan to use the profits from the current landfill to build a Subtitle D landfill before the vertical expansion permit expires on July 1, 1998.

11. The Butts landfill is managed by defendant Gary Grizzell who is employed by the Authority.

12. Pine Ridge was incorporated for the purpose of developing and operating MSWLFs within Georgia.

13. Pine Ridge has purchased a 201 acre site in southwest Butts County on the border of Spalding County for approximately \$ 290,000 and plans to construct a "Subtitle D" MSWLF thereon ("the Pine Ridge site"). (Dale Depo. II, p. 77; Exh P-88, P-89.)

14. In addition to purchasing the land, Pine Ridge has invested over \$ 1,000,000 in planning and developing the Pine Ridge landfill. (Dale Aff. P 9.)

15. Pine Ridge has the financial capability to complete the landfill. (Dale Aff. P 10.)

16. Once permitted, Pine Ridge can be in operation in approximately 12 months. [**6] (Wiltzee Aff. Exh B.) The principals of Pine Ridge plan to focus on Butts, Henry, and Spalding Counties as principal market areas, but will accept waste from a range of 30 miles or more. (Dale Depo. I, p. 10; Transcript of 1/27/94 hrg., p. 124.)

17. Pine Ridge has agreed to accept Spalding County's waste for \$ 20.00 per ton, and expects to operate profitably by charging \$ 20.00 per ton to waste haulers. (Dale Depo. I, p. 13-14, 111.)

18. Pine Ridge has not received a permit from Georgia EPD and can not begin construction of its proposed facility until a permit is issued.

19. Georgia EPD has completed its review of Pine Ridge's permit application and will issue a permit contingent upon the following: (1) a letter from Butts County to EPD that the site is consistent with Butts County's solid waste management plan; (2) a letter from Butts County to EPD that the site complies with local land use and zoning ordinances; and (3) defendants must hold a public hearing required by O.C.G.A. 12-8-24(e)(2). (Dale Aff., Exh. A.)

20. Georgia statute requires cities and counties to develop solid waste disposal plans assuring adequate disposal capacity over the next ten years. O.C.G.A. § 12-8-31.1.

[**7] 21. Butts County has developed a solid waste disposal plan, but denies that the Pine Ridge site is consistent with the plan. This issue was recently addressed by the Superior Court of Butts County which granted summary judgment to Pine Ridge. *Pine Ridge Recycling, Inc. v. Butts County, et al.*, Civ Action No. 92-659 (Butts Sup. Ct.) ("Butts II").

22. Defendants argue that addition of the Pine ridge facility will increase the amount of waste received at disposal facilities in contravention of O.C.G.A. § 12-8-21(c) and 12-8-39.1 which require counties to have a program for reduction of the amount of municipal solid waste received at such facilities by 25%.

² The figures for Spalding County exclude waste disposed of at the Southern States transfer station as discussed in paragraphs 20-24 the conclusions of law.

23. The Georgia Court of Appeals affirmed the trial court's mandamus requiring Butts County to verify to EPD that the Pine Ridge site is consistent with the Butts Waste Plan. [Butts County, et al. v. Pine Ridge Recycling, Inc., 213 Ga. App. 510, 445 S.E.2d 294 \(Ga. Ct. App. 1994\)](#).

24. On April 23, 1992, the Butts County Board of Zoning Appeals granted Pine Ridge's application for a Special Exception to the Butts County Zoning Ordinance allowing construction of a MSWLF. (Dale Aff., P 8.)

[**8] 25. The Special Exception is being challenged in two state suits, *Pine Ridge Recycling, Inc. v. Butts County, et al.*, Civ Action No. 92-285 (Butts Sup. Ct.) ("Butts I") and *Crossland v. Butts County Zoning Board of Appeals*, Civ Action No. 92-279 (Butts Sup. Ct.) ("Crossland").

II. CONCLUSIONS OF LAW

A. Abstention

1. This case presents issues of federal law, predominantly **antitrust law** and violations of the **Commerce Clause**. The legal issues presented do not mirror those presented [*1342] in the various state court cases involving these parties.

2. The court has not been asked to overrule current state court judgments. [Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 \(1923\)](#).

3. **HN1** Abstention is not required because this court has not been asked to determine the constitutionality of a state statute. [Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 \(1941\)](#).

4. The court declines to abstain from exercising jurisdiction in this matter.

B. Preliminary Injunction

5. **HN2** A preliminary injunction under [**9] [Rule 65](#) is an extraordinary remedy which should be granted only if the moving party clearly establishes: (1) a substantial likelihood that he will ultimately prevail on the merits; (2) a showing that he will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to him outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. [Lucero v. Operation Rescue, 954 F.2d 624, 627 \(11th Cir. 1992\); Tally-Ho, Inc. v. Coast Community College, 889 F.2d 1018, 1022 \(11th Cir. 1989\); Johnson v. U.S. Dep't of Agriculture, 734 F.2d 774, 781 \(11th Cir. 1984\).](#)

6. **HN3** "The preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant 'clearly carries the burden of persuasion' as to the four prerequisites." [United States v. Jefferson County, 720 F.2d 1511, 1519 \(11th Cir. 1983\)](#) (quoting *Canal Authority v. Callaway*, 489 F.2d 567 (5th Cir. 1974)).

7. Plaintiffs have sufficiently [**10] demonstrated the last three requirements for a preliminary injunction.

8. First, Pine Ridge will suffer irreparable harm the longer it is delayed from obtaining a permit, in that they will be precluded from entering disposal contracts with surrounding counties. See [GSW, Inc. v. Long County, 999 F.2d 1508, 1519 \(11th Cir. 1993\)](#).

9. Because state law requires counties to have a plan assuring adequate solid waste disposal over the next ten years, counties will be entering into long term disposal contracts with landfills. The longer Pine Ridge is delayed from becoming operational, the less chance it will have to contract with counties which are committed to long term contracts with other landfills.

10. Moreover, Pine Ridge incurs substantial monetary loss with each day that it is delayed in obtaining an EPD permit. In light of the Local Government Antitrust Immunity Act ("LGAIA"), [15 U.S.C. § 35\(a\)](#), plaintiffs can not recover damages from the county defendants. Hence, any money damages can not be regained.

11. Second, the court finds that the harm to plaintiffs absent an injunction substantially outweighs any potential [\[**11\]](#) harm to defendants from imposition of the injunction.

12. Absent an injunction, Pine Ridge can not obtain an EPD permit or begin construction of the landfill. This delay, in turn, causes a substantial monetary loss and prevents Pine Ridge from entering into contracts with waste generators and counties for solid waste disposal. Any injunctive relief granted will be tailored so as to limit harm to Butts County and its current customers.

13. Third, an injunction will have no detrimental effect on the public. The public interest is served by having safe and low-cost solid waste disposal facilities. An injunction will allow for competition in the solid waste disposal market and will likely lower prices in that market.

14. On the question of whether plaintiffs have adequately demonstrated a substantial likelihood of success on the merits, [HN4](#)[↑] plaintiffs need only show a likelihood of success on one of their alternative theories of recovery in order to obtain injunctive relief.

15. Plaintiffs' main claims are based on the Sherman Antitrust Act and allege a monopoly, an attempted monopoly, a conspiracy to monopolize, and restraint of trade. Plaintiffs also allege that defendants have violated [\[**12\]](#) the [Commerce Clause](#). (Complaint PP 123-146, 163-168.)

[*1343] C. Antitrust Claims

1. Product Market

16. [HN5](#)[↑] A foremost issue in an antitrust action is defining the relevant product and geographic markets. Only after the markets are defined, can the court assess defendants' power within the relevant market. [Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1572 \(11th Cir. 1991\)](#).

17. [HN6](#)[↑] The product market is defined as the business in which defendants are engaged unless a reasonably interchangeable substitute product is available to the consumers. [United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 1005, 100 L. Ed. 1264 \(1956\)](#).

18. Defendants are engaged in the service of disposal of municipal solid waste at a landfill. Their customers are generators and haulers of municipal solid waste.

19. The parties dispute whether disposal of municipal solid waste at a transfer station is a part of the product market. Seemingly, customers would be indifferent whether their waste was disposed at a landfill or processed through a transfer station. However, in this region, [\[**13\]](#) the cost charged by a transfer station is prohibitive which places the transfer station outside the product market.

20. The Southern States transfer station in Griffin, Georgia, charges a minimum of \$ 4.50 and up to \$ 10.00 more per ton to dispose of waste than do defendants.

21. The contract between Southern States and the City of Griffin, Georgia, was agreed to before the Butts landfill obtained its vertical expansion permit. The Butts Authority could not bid on the contract and, thus, they were not in a competitive position with regard to this contract.

22. Disposal at the Southern States transfer station can not be seen as reasonably interchangeable with disposal at a MSWLF because of its increased cost.

23. Therefore, the waste disposed at the Southern States transfer station is captive waste and is not a part of the product market.

24. The product market is municipal solid waste disposed of at a sanitary landfill.

2. Geographic Market

25. **HN7** A geographic market is essentially an economic concept in which the courts should examine "supplier-customer relations." *United States v. Philadelphia National Bank*, 374 U.S. 321, 357, 83 S. Ct. 1715, 1738, 10 L. Ed. 2d 915 (1963). **[**14]**

26. **HN8** The analysis includes consideration of where buyers seek supplies and sellers seek purchasers and an examination of transportation and other transaction costs. *Id. at 358, 83 S. Ct. at 1738*.

27. **HN9** The geographic market has been described as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Id. at 359, 83 S. Ct. at 1739* (emphasis omitted) (*quoting Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S. Ct. 623, 627, 5 L. Ed. 2d 580 (1961)).

28. Butts County's MSWLF disposes of solid waste generated in a three-county area, that of Butts, Henry, and Spalding Counties ("the Butts Region").

29. Because of the limited suppliers of disposal services and the disparity of prices,³ defendants' customers have little alternative to using the Butts landfill.

[15]** 30. Competition is also chilled because the Butts facility is the closest landfill to **[*1344]** much of the Butts region, and transportation costs for the waste are prohibitive.

31. Although defendants charge significantly less than their nearest competition, in Dekalb and Taylor counties, they remain able to operate at a profit of 121% and could raise their prices considerably without losing customers to competitors. Kamerschen Depo., p. 132.

32. The relevant geographic market for analyzing whether the Butts landfill is in a position of monopoly power is the three-county region of Henry, Spalding, and Butts counties ("the Butts Region"). The Butts landfill services that area and its customers have no practicable alternative to disposing their waste at the Butts landfill.

33. Another indication that the Butts Region is the appropriate geographic market is that "sellers within the area are making price decisions protected from the need to take account of sellers outside the area." *New York Citizens Committee v. Manhattan Cable TV*, 651 F. Supp. 802, 807 (S.D.N.Y. 1986).

34. The relevant market is the disposal of municipal solid waste generated in the Butts Region **[**16]** at a sanitary landfill.

3. Elements of Monopolization Claim

³ The nearby landfills charge the following rates:

1. The Southern States Transfer Station in Griffin, Georgia, receives waste under contract from Spalding County and charges between \$ 25.06 and \$ 30.50 per ton. Plaintiff's Findings of Fact, PP 46, 61.

2. The BFI Hickory Ridge landfill in south Dekalb County receives waste from northern Henry County and charges \$ 28.00 per ton. Kamerschen Supp. Aff. Doc 1.

3. The Waste Management Live Oak landfill in south Dekalb County receives waste from north Henry County at a rate of \$ 23.00 to \$ 31.50 per ton. Kamerschen Supp. Aff. Doc 2.

4. The Butts County landfill charges between \$ 18.00 and \$ 20.50 per ton and accepts waste from Henry, Spalding, and Butts Counties. Kamerschen Depo., p. 132.

864 F. Supp. 1338, *1344L 1994 U.S. Dist. LEXIS 13210, **16

35. [HN10](#) [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 guilty of a felony

36. The operation of the Butts County Landfill has an effect on interstate commerce. [Construction Aggregate Transport, Inc. v. Florida Rock Indus., Inc.](#), [710 F.2d 752, 767 \(11th Cir. 1983\)](#).

37. [HN11](#) A monopolization claim requires proof of two elements:

- (1) defendants' possession of monopoly power; and
- (2) defendants' willful acquisition and maintenance of that power.

[Eastman Kodak Co. v. Image Technology Services, U.S.](#), [112 S. Ct. 2072, 2089, 119 L. Ed. 2d 265 \(1992\)](#).

38. [HN12](#) Monopoly power can be shown by an ability to raise prices profitably or exclude competition. [United States v. E.I. du Pont de Nemours & Co.](#), [351 U.S. 377, 391, 76 S. Ct. 994, 1005, 100 L. Ed. 1264 \(1956\)](#). [\[**17\]](#)

Plaintiffs have proffered impressive evidence that defendants have the ability to raise prices by 10% or more within the Butts Region without losing customers because the customers in that region have no competitive alternative to doing business with the Butts County landfill.

39. The Butts landfill has the power to raise prices by 5-10% in the geographic market which strongly indicates monopoly power. DOJ/FTC [Merger Guidelines](#), p. S-3.

40. Due to significant transportation costs, neighboring landfills could not respond competitively to an increase in price by defendants. (Kamerschen Aff., P 26.)

41. Monopoly power is also demonstrated by the increased market share and the increasingly highly concentrated structure of the market. (Kamerschen Aff., P 27.)

III. CONCLUSION

The court finds that plaintiffs have demonstrated a likelihood of prevailing on the monopolization claim and, therefore, a preliminary injunction shall issue.⁴

[[**18] IV. INJUNCTION

WHEREFORE, based upon the above findings of fact and conclusions of law, the following injunction is hereby issued:

- (1) Defendants are enjoined from taking any action to further interfere, delay or obstruct the EPD permitting process for Pine Ridge's landfill in Butts County;
- (2) Defendants are enjoined from casting any further doubt, through verbal or written [\[*1345\]](#) communications, on the viability or chances for success of Pine Ridge's application for an EPD permit;
- (3) Defendants are enjoined from entering any contract for disposal of solid waste which exceeds 6 months in length or which contemplates disposal of solid waste after 6 months from the date of its signing;

⁴ Having found a substantial likelihood that plaintiffs will prevail on the monopolization claim, the court will not address the merits of the other antitrust claims or the [Commerce Clause](#) claims.

864 F. Supp. 1338, *1345L 1994 U.S. Dist. LEXIS 13210, **18

- (4) Defendants are required to conduct a public hearing in accordance with [O.C.G.A. § 12-8-24\(e\)\(2\)](#);
- (5) Defendants are further required to inform Georgia EPD by letter or other suitable means that
 - (a) the Pine Ridge site is consistent with the Butts County Solid Waste Plan; and
 - (b) that the Pine Ridge site complies with local zoning ordinances.

The preliminary injunction heretofore ordered shall issue upon plaintiffs giving security in the amount of \$ 50,000.00 to the clerk of this court for the payment [**19] of such costs and damages as may be incurred or suffered by any party.

In order to afford defendants an opportunity to discuss the specifics of the local land uses ordinances, defendants are directed to SHOW CAUSE in writing filed within 10 days from and after this date why they should not also be required to certify to Georgia EPD that the Pine Ridge site is consistent with local land use ordinances.

SO ORDERED, this 15 day of September, 1994.

WILBUR D. OWENS, JR.,

UNITED STATES DISTRICT JUDGE

End of Document



O.K. Sand & Gravel v. Martin Marietta Technologies

United States Court of Appeals for the Seventh Circuit

April 4, 1994, Argued ; September 16, 1994, Decided

Nos. 93-1380, 93-1408, 93-2003

Reporter

36 F.3d 565 *; 1994 U.S. App. LEXIS 25654 **; 1994-2 Trade Cas. (CCH) P70,719; 30 Fed. R. Serv. 3d (Callaghan) 20

O.K. SAND & GRAVEL, INCORPORATED, Plaintiff-Appellant, Cross-Appellee, v. MARTIN MARIETTA TECHNOLOGIES, INCORPORATED, Defendant-Appellee, Cross-Appellant.

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 90 C 1051. Sarah Evans Barker, Chief Judge.

Core Terms

Sand, district court, Aggregates, terminated, instructions, antitrust, constructive fraud, affirmative defense, argues, damages, statute of limitations, breach of fiduciary duty, products, prices, two-year, summary judgment, proven, breach of contract claim, sand and gravel, anti trust law, competitor, conversion, occurring, objected, percent, dealer, laches, costs, conversion claim, verdict form

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Governments > Fiduciaries

[**HN1**](#) **Consideration, Detrimental Reliance**

Indiana courts have recognized that a fiduciary relationship giving rise to a duty to disclose information relieves a party of an affirmative duty to detect wrong-doing.

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

[**HN2**](#) **Jury Instructions, Objections**

Fed. R. Civ. P. 51 provides no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

[HN3](#) Jury Trials, Jury Instructions

Submitting instructions is not sufficient to preserve an error in failing to give those instructions; the party who wants the instruction given must object to the refusal to give the instruction.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

[HN4](#) Jury Trials, Jury Instructions

Appellate courts must look to the instructions as a whole, in a common sense manner inquiring whether the correct message was conveyed to the jury reasonably well.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Governments > Legislation > Statute of Limitations > General Overview

[HN5](#) Defenses, Demurrsers & Objections, Affirmative Defenses

A continuing violation theory is where activity occurring outside the limitations period can be considered for liability purposes if it is part of an on-going violation.

Torts > Intentional Torts > Conversion > General Overview

[HN6](#) Intentional Torts, Conversion

Under Indiana law where the initial possession is lawful, civil conversion occurs only after an unqualified demand for return. A demand will be excused if the defendant came into possession of the property unlawfully or if it would be futile.

Criminal Law & Procedure > Trials > Motions for Acquittal

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

[**HN7**](#) Trials, Motions for Acquittal

Criminal conversion occurs when a person exercises unlawful or unauthorized control of goods, and does not include a demand requirement. Ind. Code § 35C4-3 (1988).

[Civil Procedure > Judicial Officers > Judges > Discretionary Powers](#)

[Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview](#)

[**HN8**](#) Judges, Discretionary Powers

The award of costs is firmly committed to the district court's discretion, and the court may award costs to whichever party prevails in the substantial part of the litigation.

[Civil Procedure > Appeals > Standards of Review > De Novo Review](#)

[Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review](#)

[**HN9**](#) Standards of Review, De Novo Review

The review of a grant of summary judgment is de novo.

[Antitrust & Trade Law > Clayton Act > Claims](#)

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[**HN10**](#) Clayton Act, Claims

In order to maintain an antitrust action under § 4 of the Clayton Act, a party must show more than an injury linked to a violation of the antitrust laws. It 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.

[Antitrust & Trade Law > Sherman Act > Remedies > Damages](#)

[Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act](#)

[Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[**HN11**](#) Remedies, Damages

A competitor may not recover damages for any conspiracy to charge higher than competitive prices. Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioner's competitors, respondents stand to gain from any conspiracy to raise the market price.

36 F.3d 565, *565LÁ994 U.S. App. LEXIS 25654, **1

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN12](#) Price Discrimination, Competitive Injuries

To establish an antitrust injury, a plaintiff must show not only that the injury is of the type intended to be protected by the antitrust laws, but that the violation was the cause-in-fact of the injury: that but for the violation, the injury would not have occurred.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN13](#) Private Actions, Remedies

The causation element of an antitrust injury stems, of course, from the requirement that a plaintiff show that its injury flows from that which makes the defendants' acts unlawful. The plaintiff must establish, with a fair degree of certainty, that the violation was a material element of, and substantial factor in producing, the injury.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

[HN14](#) Antitrust & Trade Law, Sherman Act

An antitrust plaintiff opposing a motion for summary judgment must present evidence that tends to exclude the possibility that the defendant's conduct was as consistent with competition as with illegal conduct.

Counsel: For O.K. SAND & GRAVEL, INCORPORATED, Plaintiff - Appellant (93-1380, 93-2003): G. Thomas Blankenship, BLANKENSHIP & ROBBINS, Indianapolis, IN. For O.K. SAND & GRAVEL, INCORPORATED, Plaintiff - Appellee (93-1408): G. Thomas Blankenship, BLANKENSHIP & ROBBINS, Indianapolis, IN. R. James George, Robert Roller, GRAVES, DOUGHERTY, HEARON & MOODY, Austin, TX.

For MARTIN MARIETTA TECHNOLOGIES, INCORPORATED, Defendant - Appellee: Donald E. Knebel, Lynn C. Tyler, BARNES & THORNBURG, Indianapolis, IN.

Judges: Before CUDAHY, EASTERBROOK and KANNE, Circuit Judges.

Opinion by: CUDAHY

Opinion

[*566] CUDAHY, *Circuit Judge.*

Martin Marietta and O.K. Sand & Gravel own competing sand and gravel companies in Indianapolis.¹ O.K. Sand operates out of a plant on the south side of Indianapolis; Martin Marietta has plants on both the north and south sides. In 1984, Martin Marietta was running out of sand. At the same time, O.K. Sand needed financial and marketing assistance, so the two companies entered into an agreement whereby Martin Marietta would be O.K. Sand's exclusive sales agent. ^{**2} According to the agreement, effective in April 1984, Martin Marietta would sell O.K. Sand's aggregates at the prices on an O.K. Sand-approved Price List, and could discount these prices 10 percent for gravel and 20 percent for fill material. O.K. Sand would invoice Martin Marietta monthly for 85 percent of the O.K. Sand sales; the remaining 15 percent was Martin Marietta's commission.²

O.K. Sand claimed that Martin Marietta sold sand below the Price List and authorized ^{**3} discounts. According to O.K. Sand, Martin Marietta sold customers a package of O.K. Sand aggregate and Martin Marietta limestone; by deflating the price of the O.K. Sand aggregate, Martin Marietta could inflate the price of its limestone. O.K. Sand also claimed that Martin Marietta bought O.K. Sand's aggregate at a low price and re-sold it as its own at a higher price, and that Martin Marietta transferred O.K. Sand's aggregates to the Martin Marietta plant on the north side and sold from there.

Martin Marietta claims that in 1986, O.K. Sand gave it permission to establish the List Prices and to discount below the 20 percent. Moreover, Martin Marietta argued that O.K. Sand should have figured out that Martin Marietta was selling too low. The companies had a very crude information flow system whereby Martin Marietta sent O.K. Sand a monthly lump sum accompanied by a cryptic "Invoice Register." The Invoice Register did not specify the tonnage sold of any particular product, but only reported the gross tonnage each customer purchased and the total amount Martin Marietta had received. Martin Marietta claims that O.K. Sand could have calculated the average price for ton of each sale, and ^{**4} thus would have known that ^{*567} Martin Marietta sometimes sold below discount. O.K. Sand intermittently tried to make sense of the documents, but claims that getting more specific information from Martin Marietta was like pulling teeth (although O.K. Sand did not pursue the matter vigorously after its initial attempts).

O.K. canceled the sales contract in January 1989, complaining that Martin Marietta had sold products at unauthorized prices. Three months later, O.K. Sand entered into a new agency agreement with another sand and gravel company, American Aggregates. Under the agreement, American Aggregates allowed O.K. to mine its reserves and agreed to send O.K. Sand's products, rather than American Aggregates' sand, to its off-site customers. American Aggregates continued to supply its own sand to its on-site customers. Martin Marietta eventually arranged a contract as a dealer for Waverly Sand and Gravel, located outside of Indianapolis.

In April 1990, O.K. Sand filed a complaint against Martin Marietta alleging breach of contract, fraud, conversion and breach of fiduciary duty. The district court dismissed O.K. Sand's conversion claim for failure to state a claim. On Martin Marietta's ^{**5} motion for summary judgment, the district court found that a two-year statute of limitations applied to the breach of fiduciary duty claims (although a ten-year limitation applied to the breach of contract claims), but that a genuine issue of fact remained regarding fraudulent concealment, which would toll the running of the statute. The district court denied Martin Marietta's motion for summary judgment on the other claims.

Martin Marietta also filed a counterclaim alleging that O.K. Sand had failed to pay certain commissions, and that O.K. Sand's sales agreement with American Aggregates violated [§§ 1 and 2](#) of the Sherman Act and § 3 of the Clayton Act, [15 U.S.C. §§ 1, 2 & 14](#). O.K. Sand moved for summary judgment, claiming that Martin Marietta lacked standing to bring the Sherman Act claims, and had failed to allege an antitrust injury. The district court granted summary judgment to O.K. Sand.

¹ O.K. Sand is an Indiana corporation with its principal place of business in Indiana. Martin Marietta is a Delaware corporation with its principal place of business in Maryland. We have jurisdiction pursuant to [28 U.S.C. § 1332](#).

² The facts of the case are thoroughly discussed in the district court's published opinion, *O.K. Sand & Gravel, Inc. v. Martin Marietta Corp.*, 819 F. Supp. 771 (S.D. Ind. 1992). We assume familiarity with these facts, and only summarize them here as necessary.

The case went to trial on both parties' breach of contract claims, and O.K. Sand's criminal conversion, breach of fiduciary duty, and constructive fraud claims. The district court granted a directed verdict on O.K. Sand's criminal conversion and punitive damages [**6] claims.

The jury filled out a special verdict form on each of O.K. Sand's claims. The form required the jury first to answer whether O.K. Sand had proven its claims. If the jury answered "yes," the form instructed it to consider whether Martin Marietta had proven its affirmative defenses of waiver, estoppel or laches. If the jury found that O.K. Sand had proven its claim and that Martin Marietta had not proven any affirmative defenses, the form instructed the jury to assess damages. On each claim, the jury found against O.K. Sand at the first step, finding that Martin Marietta did not breach its contract, breach a fiduciary duty, or commit constructive fraud; the jury thus did not answer any of the questions about Martin Marietta's affirmative defenses or damages. The jury also found against Martin Marietta on its breach of contract counterclaim. Costs were assessed against O.K. Sand.

I.

A. INSTRUCTIONS ON FIDUCIARY DUTY

After receiving instructions on the basic elements of a constructive fraud and breach of fiduciary duty claim,³ the jury was instructed on the scope of the duty for the breach of agency claim:

Martin Marietta fulfilled any duty to disclose facts if it (1) [**7] provided to O.K. Sand information which O.K. Sand could have used to determine such facts . . . or (2) provided information which would have reasonably led O.K. Sand to make an inquiry to obtain or learn such facts.

[*568] Instr. 24. On the constructive fraud claim, the jury was instructed that O.K. Sand's reliance had to be reasonable and that:

O.K. Sand must have exercised common sense and used ordinary care, prudence and diligence in guarding against constructive fraud and discovering the truth.

Instr. 30.

O.K. Sand claims that these instructions erroneously placed upon O.K. [**8] Sand a duty of inquiry to discover Martin Marietta's wrongful conduct. While a duty to inquire may arise in an ordinary fraud case, O.K. Sand contends that there is no duty to inquire in a fiduciary relationship. [HN1](#) Indiana courts have recognized that a fiduciary relationship giving rise to a duty to disclose information relieves a party of an affirmative duty to detect wrong-doing. *Dotlich v. Dotlich*, 475 N.E.2d 331 (Ind.App. 1985); *Given v. Cappas*, 486 N.E.2d 583, 592 (Ind.App. 1985); see also *DeRance, Inc. v. Paine Webber, Inc.*, 872 F.2d 1312, 1321 (7th Cir. 1989) (Wisconsin law).

But O.K. Sand never objected to these instructions. At the instructions conference, O.K. Sand tendered its own instruction on the duty of inquiry in a fiduciary relationship. Tr. 1/13/93, at VIII-44. O.K. Sand explained that the tendered instruction was intended to supplement, not modify, the existing instructions. *Id.* The district court ruled that the substance of O.K. Sand's tendered instruction was already covered by Instruction 24. *Id.* at 45-46. O.K. Sand did not object to the court's refusal to accept [**9] its instruction, nor to any other instruction on the matter. *Id.*

[Federal Rule of Civil Procedure 51](#) provides: "No [HN2](#) party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." While filing an instruction may at times be seen as an objection to contrary instructions, see *Hebron v. Touhy*, 18 F.3d 421, 424 (7th Cir. 1994); *Exxon Corp. v. Exxene Corp.*, 696 F.2d 544, 549 (7th Cir. 1982), O.K. Sand specifically described its proposed instruction as a supplement to, rather than a substitute for, the instructions given. O.K. Sand also failed to object when the district court rejected its proffered instruction, and thus cannot now argue that the district court erred. Nor can O.K. Sand appeal to a plain

³The jury was instructed that the elements of the breach of agency duty claim were the existence of a particular duty; breach; damages; and proximate causation. Instr. 22. The jury was instructed that the elements of the constructive fraud were a duty between the parties by virtue of the relationship of the parties; silence or representations that were deceptive and violative of that duty; justifiable reliance; and damages. Instr. 27.

error doctrine, since it does not apply to civil cases (except, of course, with respect to jurisdiction). [Maul v. Constan](#), 928 F.2d 784, 787 (7th Cir. 1991). "Submitting HN3¹⁵ instructions is not sufficient to preserve an error in failing [**10] to give those instructions; the party who wants the instruction given must object to the refusal to give the instruction." [Salazar v. City of Chicago](#), 940 F.2d 233, 242 (7th Cir. 1991).

O.K. Sand argues that the district court "cut off" its explanations or objections. Although the transcript indicates that the instruction conference was rather free-flowing, it does not support O.K. Sand's argument that it did not have an opportunity to object. The discussion of the issue at the conference ended:

COURT: . . . I think the substance of your tendered instruction is covered in the existing instructions . . . and I'll not put it in again. That's my ruling. Okay, Mr. Lawrence; anything else?

MR. LAWRENCE: That's all. Thank you. I would just make the--well--that's all.

Tr. at VIII-46.

Moreover, after the jury had been instructed, the district court asked the parties whether they had any further objections:

COURT: Do you have any other changes you wish to put, or any objections that you haven't previously had?

MR. LAWRENCE: Just for the record, I don't have any objection to the changes that have been suggested in conference. We renew objections [**11] regarding punitive damages and other claims dealt with in chambers.

Tr. at VIII-171.

Clearly, O.K. Sand had the last word, and the word was not "object." Having failed to make "a clear statement of the specific grounds for objection," [Smith v. Great Am. Restaurants, Inc.](#), 969 F.2d 430, 436 & n.1 (7th Cir. 1992), O.K. Sand has waived its claim of error.

[*569] B. LACHES

O.K. Sand also claims that the district court misstated the law in its instruction on Martin Marietta's affirmative defense of laches. The jury was instructed that laches would be a defense if, in part, O.K. Sand "knew or should have known" of its claims against Martin Marietta during the period of delay. Instr. 31. O.K. Sand objects to the language "should have known," arguing that Indiana law imposes no such requirement. O.K. Sand properly objected to this instruction on these grounds during the instructions conference, but was overruled. Tr. at VIII 36-39.

But any error was harmless, because the verdict form indicates that the jury never reached the question of laches. As noted above, the verdict form tells us that the jury concluded that O.K. Sand had failed to prove its case, and [**12] that it did not reach the issue of affirmative defenses.

O.K. Sand argues that other jury instructions misled the jury to believe that it could consider the affirmative defenses as part of the first question of whether O.K. Sand had proven its claim. The first instruction on each claim stated that O.K. Sand could recover if it had established its claims *and* Martin Marietta had not proven any affirmative defenses. For example, on the breach of contract claim the jury was instructed of the elements of breach of contract and then instructed:

If you find that these propositions have been established by a preponderance of the evidence and that the defendant had not proved any of its affirmative defenses by a preponderance of the evidence, then you should find in favor of the plaintiff on its breach of contract claim.

If, on the other hand, you find that the plaintiff has not established all these elements by a preponderance of the evidence, or that the defendant has proved an affirmative defense by a preponderance of the evidence, then you should find in favor of the defendant on the plaintiff's breach of contract claim.

Instr. 17. A similar instruction was given on constructive [**13] fraud and breach of fiduciary duty. Instr. 22, 27. O.K. Sand argues that following these instructions, a jury might believe that it could read back affirmative defenses into the principal claim. But the instructions, when taken as a whole, were clear. Instructions 17, 22 and 27 were correct statements of the law in this respect--O.K. Sand would win if it proved its case and Martin Marietta disproved its

defenses. Cf. *Wilk v. American Medical Ass'n*, 719 F.2d 207, 218 (7th Cir. 1983), cert. denied, 467 U.S. 1210, 81 L. Ed. 2d 355, 104 S. Ct. 2398, 104 S. Ct. 2399 (1984) HN4 [↑] ("we must look to the instructions as a whole, in a common sense manner . . . inquiring whether the correct message was conveyed to the jury reasonably well").

The verdict form plainly spelled out the method of reasoning the jury was to follow: it was to consider first the elements of the claim, and then consider affirmative defenses. At bottom, O.K. Sand argues that the jury did not follow the instructions on the jury form, and that it considered affirmative defenses but did not fill out the appropriate box so indicating. But [**14] we presume that jurors understand and follow their instructions, *Bruton v. United States*, 391 U.S. 123, 135-36, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968); O.K. Sand gives us no reason to believe that the verdict form is an inaccurate statement of the jury's decisions.

C. STATUTE OF LIMITATIONS

O.K. Sand contends that the district court erroneously instructed the jury about the statute of limitations on the constructive fraud and breach of fiduciary duty claims. The jury was instructed that a two-year statute of limitations applied; O.K. Sand argues that the statute of limitations was six years.

Martin Marietta argues that while O.K. Sand objected to a two-year statute of limitations on constructive fraud, it did not object to a two-year limitations on breach of fiduciary duty, and thus has not preserved the latter error for appeal. O.K. Sand claims that it did object by arguing that constructive fraud and breach of fiduciary duty were the same. At the instructions conference, O.K. Sand's counsel began, "the statute of limitations for fraud is six years, and [I] think it would be inappropriate to have it [*570] included in the 1988 [**15] cutoff." Tr. at VIII-8. In response to the court's observation that constructive fraud was essentially the same as breach of fiduciary duty, which was subject to a two-year limitation, O.K. Sand claimed that "there is a difference between breach of fiduciary duty and constructive fraud," and that breach of fiduciary duty is akin to a lesser included offense of constructive fraud. *Id.* The remainder of the argument was incoherent at best, and cannot even generously be construed as an objection to the application of a two-year limitations period.⁴ *Id.* at VIII-9. O.K. Sand had no response when the district court ruled that a two-year limitation applied to both claims. At best, O.K. Sand has only preserved its argument that the two-year limitation was erroneous with respect to constructive fraud.

[**16] The jury instruction read in relevant part:

Martin Marietta's fourth affirmative defense is the statute of limitations defense. Martin Marietta claims that O.K. Sand's breach of agency duty and constructive fraud claims are partially barred or limited by what is known in the law as the statute of limitations. A statute of limitations is the time allowed by a statute for a plaintiff to bring

⁴The argument that O.K. Sand claims embodied its objection to application of a two-year statute of limitations to breach of duty went as follows:

In other words, my argument, if you will, your Honor, is that breach of fiduciary duty is a lesser, if you will, lesser included offense, and that breach of duty included actions that would not constitute constructive fraud, and constructive fraud must show the additional action taken for the benefit of the principal. And so that would be the difference, and therefore would-- That's the reason we would argue that there be two separate counts. It goes--The reason that it has a meaning to us, and the consequences of it is that we would also be asking the court to reconsider its instruction on commissions. The court has--I think correctly--has included commissions, our entitlement to ask the jury to find commissions, return of commissions for that breach of fiduciary duty.

Case law also--I will be happy the give the court case law and Storey on Equity and three other treatises that establish that fraud as well, and breach of duty is again a lesser included, that even more serious constructive fraud gives rise to a cause of action for the damages, if you will, to return commissions as well, so we would be seeking return of the commissions on the fraud count as well.

You say the damages, we would be seeking the same damage in both places under two separate theories. We understand that we can't recover the damages twice; we must elect a remedy after the jury comes back, That's the basis for both causes of action.

a lawsuit. You are instructed that the statute of limitations in a breach of agency claim and a constructive fraud claim is two years. You are further instructed that O.K. Sand filed this action on April 24, 1990. Accordingly, if you find that the statute of limitations applies to O.K. Sand's claims for breach of agency duty and constructive fraud, then damages for those claims can only be based on activities that occurred on or after April 24, 1988 and O.K. Sand cannot recover damages based on the activities of Martin Marietta occurring before that date.⁵

Instr. 35. (emphasis supplied).

[**17] Martin Marietta argues that the jury never reached the affirmative defense of the statute of limitations. O.K. Sand argues, as it did on the laches defense, that the jury may not have considered the statute of limitations as an affirmative defense, but could have woven it into the decision on liability. Moreover, argues O.K. Sand, the instruction had a particularly prejudicial effect on the finding that O.K. Sand had not proven its claims, because the instruction precluded the jury from considering as evidence of liability any conduct occurring before April 1988, by which time most of the alleged wrongful acts had occurred.

But the court's instruction clearly was a limitation on *damages*; it did not preclude the jury from considering evidence about Martin Marietta's pre-1988 conduct in determining liability. [HN5](#)[↑] O.K. Sand's claim that Martin Marietta had breached its duties from 1984 until 1989 was essentially an allegation of a continuing violation, a theory whereby activity occurring outside the limitations period [*571] can be considered for liability purposes if it is part of an on-going violation. See, e.g., [Chambers v. TransAir](#), 17 F.3d 998, 1002 (7th Cir. 1994). [**18] The instruction the court gave was appropriate in such circumstances: it did not in any way limit the jury's consideration of evidence, but only stated that "damages . . . can only be based on activities that occurred on or after April 24, 1988 and O.K. Sand cannot recover damages based on the activities of Martin Marietta occurring before that date." Since the jury found no liability and never reached the question of damages, whether the district court accurately informed them of a limitation on damages is irrelevant.⁶

D. CONVERSION

O.K. Sand based its conversion claim on Martin Marietta's alleged transfers of O.K. Sand's products to its north side facility [**19] and reductions in the price of O.K. Sand's products to boost sales of its own products. The district court dismissed the civil conversion claim on the grounds that O.K. Sand had failed to make a demand for return of the sand. [HN6](#)[↑] Under Indiana law, "where the initial possession is lawful, [civil] conversion occurs only after an unqualified demand for return." [Coffel v. Perry](#), 452 N.E.2d 1066, 1069 (Ind.App. 1983). A demand will be excused if the defendant came into possession of the property unlawfully, [French v. Hickman Moving & Storage](#), 400 N.E.2d 1384, 1388 (Ind.App. 1980), or if it would be futile. [Merchants Natl. Bank & Trust Co. v. H.L.C. Enterprises, Inc.](#), 441 N.E.2d 509, 514 (Ind. App. 1982). The district court concluded that O.K. Sand had not alleged that Martin Marietta possessed the sand unlawfully, and thus was not excused from the demand requirement. Indeed, O.K. Sand's entire complaint was based on the theory that Martin Marietta, as O.K. Sand's sales agent, had lawful control of O.K. Sand's products. On appeal, O.K. Sand argues only that demand should have been excused because Martin [**20] Marietta allegedly engaged in self-dealing; however, O.K. Sand provides no evidence that Indiana courts would agree to carve out this exception to the demand requirement, so we refuse to do so here.

After the close of evidence at trial, the district court entered a directed verdict in favor of Martin Marietta on O.K. Sand's criminal conversion claim. [HN7](#)[↑] Criminal conversion occurs when a person exercises unlawful or unauthorized control of goods, and does not include a demand requirement. Ind. Code § 35C4-3 (1988). The district court concluded that O.K. Sand had failed to put forth any evidence of "unlawful control." On appeal, O.K. Sand admits that at all times Martin Marietta had lawful control of the products, but argues that Martin Marietta should be

⁵ The remainder of the instruction concerned O.K. Sand's equitable argument that the statute of limitations did not apply because Martin Marietta had fraudulently concealed the facts giving rise to a cause of action.

⁶ O.K. Sand also claimed that the district court erred when it entered a directed verdict against O.K. Sand on its claim for punitive damages. O.K. Sand admits that the issue would only be relevant if we reversed the jury's findings of liability. Since we affirm the district court with respect to liability, we do not need to consider this question of damages.

liable anyway since it breached its fiduciary duties. Again, O.K. Sand offers no support for this reading of the statute, and we will affirm the district court's directed verdict on the criminal conversion claim.

E. COSTS

The district court awarded Martin Marietta \$ 37,874.38 in costs as the prevailing party. [F.R.C.P. 54\(d\)](#). O.K. Sand argues that since Martin Marietta did not prevail at trial on its breach of contract claim, or at summary [\[*21\]](#) judgment on its antitrust claim, it cannot be considered the "prevailing party." [HN8](#)[↑] The award of costs is firmly committed to the district court's discretion, [Landau & Cleary Ltd. v. Hribar Trucking, Inc., 807 F.2d 91, 94 \(7th Cir. 1986\)](#), and the court may award costs to whichever party prevails in "the substantial part of the litigation." [Northbrook Excess and Surplus Ins. Co. v. Procter & Gamble, 924 F.2d 633, 641 \(7th Cir. 1991\)](#). Throughout the litigation the parties kept revising their damages estimates, so it is no surprise that each argues on appeal that it sought (and lost) only a paltry sum, while its opponent lost a small fortune. The district court concluded that O.K. Sand had asserted numerous claims worth about \$ 2.2 million, and thus "far outweighed the number and value of the claims asserted by the defendant." Although it is true that Martin Marietta [\[*572\]](#) lost on its \$ 50,000 breach of contract counterclaim, it successfully avoided a potentially multimillion dollar judgment on several claims. We cannot conclude that the district court abused its discretion when it determined that Martin Marietta had "substantially" [\[*22\]](#) prevailed in the litigation. The award of costs is affirmed.

II.

Martin Marietta cross-appeals the summary judgment in favor of O.K. Sand on Martin Marietta's antitrust counterclaims. Count One of the counterclaim alleged that O.K. Sand had terminated its agreement with Martin Marietta and entered into an agreement with American Aggregates in order to increase the price of sand and gravel, "adversely affecting the ability of Martin Marietta to compete in that market," in violation of [§ 1](#) of the Sherman Act, [15 U.S.C. § 1](#). Count One also alleged that O.K. Sand's agreement with American Aggregates precluded American Aggregates from competing with O.K. Sand, and thus "foreclosed competition in a substantial portion of commerce, in violation of § 3 of the Clayton Act, [15 U.S.C. § 14](#)." Count Two alleged that the O.K. Sand-American Aggregates agreement violated [§ 2](#) of the Sherman Act, since O.K. Sand intended to monopolize the southern Indianapolis sand and gravel market. Martin Marietta sought damages under § 4 of the Clayton Act for commissions it would have earned on sales of O.K. Sand's products had it not been terminated [\[*23\]](#) as an agent.

Martin Marietta had put forth three theories of damages: that it suffered lost profits as an agent terminated pursuant to O.K. Sand's price-fixing conspiracy with American Aggregates; that as a competitor it was injured by higher prices and a foreclosure of competition; and that it was an injured former consumer-for-resale. The district court held that Martin Marietta had introduced no evidence to support its first theory that it was terminated because of O.K. Sand's agreement with American Aggregates, and thus lacked standing to bring this claim. The district court also held that under neither of the remaining two theories had Martin Marietta alleged an antitrust injury.

It is not entirely clear whether Martin Marietta is pursuing on appeal all of the theories of recovery it alleged before the district court. At oral argument, Martin Marietta claimed, in nearly the same breath, that this case involves a boycott, a refusal to deal, a terminated distributorship and an injured competitor. Martin Marietta later seemed to abandon the boycott and injured seller theories, advocating instead a theory that its termination as a dealer evolved into a "refusal to deal on terms that [\[*24\]](#) allowed us to be an effective market player." Perhaps the only way to make sense of Martin Marietta's apparent confusion is to consider each theory in turn. [HN9](#)[↑] We, of course, review the grant of summary judgment *de novo*.

Martin Marietta's complaint alleged that it was injured as a competitor when O.K. Sand and American Aggregates increased sand and gravel prices in the market. But to the extent that Martin Marietta was also a seller in the market, increased prices caused it no injury, let alone antitrust injury.⁷ [HN10](#)[↑] In order to maintain an antitrust

⁷ The district court held that Martin Marietta lacked standing to bring this claim, although we affirm on the ground that Martin Marietta has failed to allege an antitrust injury. For discussion of the relationship between antitrust standing and antitrust injury, see [Greater Rockford Energy and Technology v. Shell Oil, 998 F.2d 391, 394-96 & n.7 \(7th Cir. 1993\)](#), cert. denied, [127 L. Ed.](#)

action under § 4 of the Clayton Act, Martin Marietta must show more than an injury linked to a violation of the antitrust laws. It 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." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977); see *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 540, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); [**25] *Local Beauty Supply*, 787 F.2d at 1201. Clearly, price increases [*573] could not be considered an antitrust injury to competitors. [HN11](#) [↑] A competitor may not "recover damages for any conspiracy . . . to charge higher than competitive prices Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioner's competitors, respondents stand to gain from any conspiracy to raise the market price." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 582, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (citations omitted); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990). This holds true for cases brought under both §§ 1 and 2 of the Act. *Atlantic Richfield*, 495 U.S. at 339-41. Thus Martin Marietta's argument that the O.K. Sand-American Aggregates agreement resulted in a 75 percent market share that would allow them to engage in predatory pricing (in violation of § 2) still requires Martin Marietta [**26] to prove that it suffered an antitrust injury as a result of O.K. Sand's alleged § 2 violation. See also *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1418 (7th Cir. 1989). Since Martin Marietta has failed to show that it has suffered the type of injury the antitrust laws seek to prevent, it has not shown an antitrust injury on this theory.

[**27] If, on the other hand, Martin Marietta were arguing that it was injured as a consumer, higher prices or restrictions in output due to an unlawful combination would be the "type" of injury the antitrust laws intend to prevent. *Nelson v. Monroe Regional Medical Ctr.*, 925 F.2d 1555, 1564 (7th Cir.), cert. dismissed, 112 S. Ct. 285 (1991). Thus Martin Marietta characterizes O.K. Sand's termination of a dealership as a refusal to deal, attempting to bring its case within the purview of *Nelson*. In *Nelson*, we held that consumers denied health care as a result of a hospital merger had alleged an antitrust injury. *Id. at 1564-65*. Martin Marietta likens its termination as a dealer to the *Nelson* consumers' "termination" as patients, arguing that this case involves "O.K. Sand's termination of its Sales Agency Agreement with Martin Marietta and subsequent refusal to deal with Martin Marietta as an agent." Reply Br. 4/5/94 at 2. Martin Marietta also argues at one point that O.K. Sand would not sell to Martin Marietta at all—or, in effect, that O.K. Sand was engaging in a boycott. But the [**28] boycott argument is frivolous, since Martin Marietta admits that it never attempted to purchase O.K. Sand's products at the retail price. Likewise, Martin Marietta presented no evidence that, as a consumer, it paid a monopoly or above-the-market price for O.K. Sand or American Aggregates's products, and thus has not shown that it suffered any injury at all. As Martin Marietta's own description of its case ("a refusal to deal as an agent") makes clear, the *Nelson* analogy is inapt, as Martin Marietta's only legitimate claim is that it is a terminated dealer.

Martin Marietta's claims that it was terminated as a dealer because O.K. Sand and American Aggregates entered into an illegal agreement to price-fix and monopolize the market. Even if Martin Marietta could prove that its injury is the type of injury the antitrust laws were intended to prevent, see *Local Beauty Supply*, 787 F.2d at 1201 (terminated dealer suffers no antitrust injury when terminated for undercutting maximum price maintenance scheme), Martin Marietta's claim would fail. [HN12](#) [↑] To establish an antitrust injury, a plaintiff must show not only that the injury is of the type intended to be [**29] protected by the antitrust laws, but that the violation was "the cause-in-fact of the injury: that 'but for' the violation, the injury would not have occurred." See *Greater Rockford Energy & Technology v. Shell Oil*, 998 F.2d 391, 394-96 (7th Cir. 1993) (citations omitted). Martin Marietta failed to adduce evidence that the alleged antitrust violations (either to price-fix or gain a monopoly) were the but-for cause of Martin Marietta's termination. *Greater Rockford*, 998 F.2d at 395. [HN13](#) [↑] The causation element of an antitrust injury stems, of course, from the requirement that a plaintiff show that its injury "flows from that which makes the defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. "The plaintiff must establish, with a fair degree of certainty, that the violation was a material element of, and substantial factor in producing, the injury." *Greater Rockford*, 998 F.2d at 401. Martin Marietta points to [*574] evidence that O.K. Sand was satisfied with Martin Marietta's performance as a sales agent as sufficient proof of causation. Since [**30] O.K. Sand had no other reason to

terminate their agreement, argues Martin Marietta, O.K. Sand must have terminated it in order to enter into an illegal combination with American Aggregates.

This, however, certainly does not show that the termination *caused* the illegal combination. At best, the termination merely removed an obstacle to the formation of the combination. Martin Marietta makes the illogical argument that, since its termination was a necessary prerequisite to O.K. Sand's entering into an agreement with American Aggregates, the agreement caused the termination. But the termination, as we have noted, was merely a step in a sequence. In any event, other factors can easily explain why O.K. Sand terminated Martin Marietta four months before entering into a new agreement with American Aggregates. See *Greater Rockford*, 998 F.2d at 402, and cases cited therein. Martin Marietta has "failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing their alleged injuries. Hence, the plaintiffs did not suffer an antitrust injury." *Id.*; cf. *Indiana Grocery*, 864 F.2d at 1412 [*31] ("an HN14[↑] antitrust plaintiff opposing a motion for summary judgment must present evidence that tends to exclude the possibility that the defendant's conduct was as consistent with competition as with illegal conduct").

III.

The decisions of the district court are AFFIRMED.

End of Document

Sullivan v. NFL

United States Court of Appeals for the First Circuit

September 16, 1994, Decided

No. 94-1031

Reporter

34 F.3d 1091 *; 1994 U.S. App. LEXIS 25613 **; 1994-2 Trade Cas. (CCH) P70,720

WILLIAM H. SULLIVAN II, Plaintiff - Appellee, v. NATIONAL FOOTBALL LEAGUE, & MEMBERS OF THE NATIONAL FOOTBALL LEAGUE, Defendants - Appellants.

Subsequent History: [\[**1\]](#) The Name of this Case has been Amended by the Court September 29, 1994. As Amended on Denial of Rehearing October 26, 1994, Reported at: 1994 U.S. App. LEXIS 38394. Certiorari Denied February 27, 1995, Reported at: [1995 U.S. LEXIS 1685](#).

Prior History: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Edward F. Harrington, U.S. District Judge.

Core Terms

teams, public ownership, ownership, ownership interest, league, relevant market, cases, stock, public offering, rule of reason, benefits, involvement, antitrust, effects, district court, stock sale, franchises, offering, compete, matter of law, output, restraint of trade, Sherman Act, anticompetitive, instructions, football, prices, sports, procompetitive, restricting

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

[**HN1**](#) [blue icon] **Standards of Review, De Novo Review**

The United States Court of Appeals for the First Circuit reviews lower courts' decisions de novo, using the same stringent decisional standards that controlled a district court.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

[**HN2**](#) [blue icon] **Monopolies & Monopolization, Actual Monopolization**

Anticompetitive effects, more commonly referred to as "injury to competition" or "harm to the competitive process," are usually measured by a reduction in output and an increase in prices in the relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN3 **Monopolies & Monopolization, Actual Monopolization**

An action harms the competitive process when it obstructs the achievement of competition's basic goals lower prices, better products, and more efficient production methods.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Criminal Law & Procedure > ... > Reviewability > Waiver > Admission of Evidence

HN4 **Reviewability of Lower Court Decisions, Preservation for Review**

Matters averted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived on appeal. The court will not consider arguments which could have been, but were not, advanced below.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN5 **Monopolies & Monopolization, Actual Monopolization**

Overall consumer preferences in setting output and prices is more important than higher prices and lower output, *per se*, in determining whether there has been an injury to competition.

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**

One basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

[**HN7**](#) Regulated Industries, Sports

Under certain circumstances, an antitrust plaintiff must make a demand on the defendant to allow the plaintiff to take some action or obtain some benefit, which the defendant's challenged practice is allegedly preventing the plaintiff from taking or obtaining, in order to prove that the practice caused injury in fact to the plaintiff. Such a requirement only applies, however, where the plaintiff cannot otherwise prove that the illegal practice exists or that the practice is preventing the plaintiff from competing in the relevant market; in such cases, a refused demand is the only reliable evidence of causation.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Evidence > ... > Testimony > Expert Witnesses > General Overview

[**HN8**](#) Relief From Judgments, Motions for New Trials

When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Civil Procedure > Judicial Officers > Judges > General Overview

[**HN9**](#) Jury Trials, Jury Instructions

As long as a judge's instruction properly apprises the jury of the applicable law, failure to give the exact instruction requested does not prejudice the objecting party. A party, however, is entitled to have its legal theories on controlling issues, which are supported by the law and by the evidence, presented to the jury. An error in the jury instructions will warrant the reversal of the judgment and a new trial only if, upon review of the record as a whole, the error is determined to be prejudicial.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Evidence > Relevance > Relevant Evidence

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

[**HN10**](#) Monopolies & Monopolization, Actual Monopolization

The true test of legality in connection with alleged monopolies 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 > Trade Practices & Unfair Competition > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN11[] Regulated Practices, Trade Practices & Unfair Competition

Courts should generally give a measure of latitude to antitrust defendants in their efforts to explain the pro-competitive justifications for their policies and practices; however, courts should also maintain some vigilance by excluding justifications that are so unrelated to the challenged practice that they amount to a collateral attempt to salvage a practice that is decidedly in restraint of trade.

Counsel: John Vanderstar, with whom Sonya D. Winner, Ethan M. Posner, Covington & Burling, Jeremiah T. O'Sullivan, Sarah Chapin Columbia, Choate, Hall & Stewart, Joseph W. Cotchett, and Cotchett, Illston & Pitre were on brief for appellants.

Joseph L. Alioto and Frederick P. Furth, with whom Angela M. Alioto, Law Offices of Joseph L. Alioto, Alan R. Hoffman, Lynch, Brewer, Hoffman & Sands, Bruce J. Wecker, Michael P. Lehmann and Furth, Fahrner & Mason, were on brief for appellees.

Judges: Before Torruella, Circuit Judge, Coffin, Senior Circuit Judge, and Stahl, Circuit Judge.

Opinion by: TORRUELLA

Opinion

[*1095] TORRUELLA, *Circuit Judge*. The National Football League and twenty-one organizations owning NFL franchises (referred to collectively as the "NFL") appeal the judgment entered against them after a jury found that the NFL violated the antitrust laws by restricting owners of member football clubs from selling shares in their teams to the public. Plaintiff-appellee, William H. Sullivan, former owner of the New England Patriots [*2] football team (the "Patriots"), was awarded a total of \$ 51 million in damages for the losses Sullivan incurred when he had to sell the Patriots to a private buyer after the NFL prevented him from offering 49% of the team to the public in the form of publicly traded stock. Because several prejudicial errors were committed during the trial, we vacate the judgment and remand for a new trial.

I. BACKGROUND

Under Article 3.5 of the NFL's constitution and by-laws, three-quarters of the NFL club owners must approve all transfers of ownership interests in an NFL team, other than transfers within a family. In conjunction with this rule is an uncodified policy against the sale of ownership interests in an NFL club to the public through offerings of publicly traded stock. The members, however, retain full authority to approve any given transfer by a three-quarters vote according to Article 3.5.

Sullivan owned the Patriots from the team's inception in 1959 until October of 1988. When Sullivan formed the Patriots, he and his partner sold non-voting shares of the team to the public beginning in 1960. At that time, the Patriots were in the old American Football League ("AFL"), which was separate [*3] from the NFL, and which had no policy against public ownership of teams. In 1966, the AFL and the old NFL merged into a single league. Under the terms of the merger, the new NFL would adopt the old NFL's policy against public ownership. The Patriots, however, were allowed to retain their level of public ownership as a special exception to the rule under a grandfather clause.

In 1976, Sullivan sought to acquire the publicly held shares of the Patriots through a merger of the club into a new Sullivan-owned company. Stockholders approved the transfer and the transaction was subsequently consummated, although some shareholders subsequently brought suit, challenging the sufficiency of the purchase price. After

protracted litigation, the shareholders obtained a judgment requiring Sullivan to pay them a higher price for their shares. The Patriots then became a fully privately owned club.

Sullivan and his son, Chuck Sullivan, who owned the stadium where the Patriots played, began to experience financial difficulties and increasing debt burdens in the mid-1980s. The Sullivans decided that they needed to raise capital to alleviate their financial problems. After the Boston Celtics professional [**4] basketball franchise made a public offering of 40% of the team in December of 1986, the Sullivans decided to pursue a similar deal with the Patriots in order to raise cash to cover some of their debts.

On October 19, 1987, the Sullivans met with Stephens, Inc., a small investment banking firm in Little Rock, Arkansas. They discussed a debt financing deal whereby Stephens would loan the Sullivans \$ 80 million dollars, with half going to the Patriots and the other half to Chuck Sullivan's company which owned the Patriots' stadium. The Patriots' portion of the loan would be repaid out of the proceeds of the sale of 49% of the Patriots through the offering of public stock. Stephens agreed to look into the possibility of arranging the deal, but informed the Sullivans that they would first have to get NFL approval. Sullivan ultimately never obtained NFL approval and the deal with Stephens never progressed beyond some preliminary discussions.

At a meeting of the NFL owners on October 27, 1987, Sullivan raised his stock sale [*1096] idea with the other owners and asked for a modification of the NFL's policy against public ownership to allow for certain controlled sales of minority interests in NFL [**5] clubs. Alternatively, Sullivan requested a waiver from the public ownership policy for his contemplated public offering of the Patriots. Sullivan's request was eventually tabled at this meeting. Discussions continued among the owners and, at one point, Sullivan counted 17 of the 21 owners needed for approval as being in favor of allowing him to make his public offering (seven owners were still undecided). Pete Rozelle, NFL Commissioner at the time, told Sullivans that he was not in favor of Sullivan's proposals and that league approval was "very dubious." Sullivan ultimately never asked for a vote on amending the ownership policy or on waiving the policy for the Patriots, and the NFL never held such a vote. Sullivan claims that he did not ask for a vote because it would have been futile.

In October of 1988, Sullivan sold the Patriots for approximately \$ 83.7 million to KMS Patriots L.P. ("KMS"), a limited partnership owned by Victor Kiam and Francis Murray. Sullivan alleges that, absent the NFL's public ownership policy, he would have been able to retain a majority share of a rapidly appreciating asset with a high potential for future profits. Instead, Sullivan asserts, he was forced [**6] to sell the Patriots at a depressed price to private buyers.

On May 16, 1991, Sullivan sued the NFL claiming that, among other things, the NFL had violated the Sherman Antitrust Act, [15 U.S.C. §§ 1-2](#), by preventing him from selling 49% of the Patriots to the public in an equity offering. Sullivan alleged that, as a result, he was forced to sell the entire team to a private buyer at a fire sale price in order to pay off existing debts. Prior to trial, the district court dismissed Sullivan's claim under § 2 of the Sherman Act along with various state law claims. After a trial on Sullivan's claim under [§ 1](#) of the Sherman Act, the jury rendered a verdict for Sullivan in the amount of \$ 38 million, which the judge later reduced through remittitur to \$ 17 million. Pursuant to [15 U.S.C. § 15](#), which provides for treble damages for antitrust violations, the court entered a final judgment for Sullivan of \$ 51 million. II. ANALYSIS

The NFL has raised a number of issues on appeal concerning the application of [§ 1](#) of the Sherman Act to the facts of this case, which, according to the NFL, entitle it to judgment as a matter [**7] of law. We address these issues first to see if the present case should be dismissed, and we ultimately conclude that it should not. We next address the NFL's allegations of trial error and we find that several of them require that we overturn the verdict in this case and order a new trial.

The first set of issues involves the district court's denial of the NFL's motions for judgment as a matter of law under [Fed. R. Civ. P. 50](#). [HN1](#) We review the court's decision *de novo*, using the same stringent decisional standards that controlled the district court. [Gallagher v. Wilton Enterprises, Inc.](#), 962 F.2d 120, 125 (1st Cir. 1992); [Hendricks & Assocs., Inc. v. Daewoo Corp.](#), 923 F.2d 209, 214 (1st Cir. 1991). Under these standards, judgment for the NFL can only be ordered if the evidence, viewed in the light most favorable to Sullivan, points so strongly and

overwhelmingly in favor of the NFL, that a reasonable jury could not have arrived at a verdict for Sullivan. [Gallagher, 962 F.2d at 124-25](#); [Hendricks, 923 F.2d at 214](#).

III. ISSUES ALLEGEDLY REQUIRING JUDGMENT [**8] FOR THE NFL

A. Lack of Antitrust Injury

To establish an antitrust violation under [§ 1](#) of the Sherman Act, Sullivan must prove that the NFL's public ownership policy is "in restraint of trade." [Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 526 \(1st Cir. 1989\)](#). Under [antitrust law](#)'s "rule of reason," the NFL's policy is in restraint of trade if the anticompetitive effects of the policy outweigh the policy's legitimate business justifications. [Id. at 526-27](#) (citing [Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 \(1988\)](#)). [HN2](#)[ Anticompetitive effects, more commonly referred [[*1097](#)] to as "injury to competition" or "harm to the competitive process," are usually measured by a *reduction in output* and an *increase in prices* in the relevant market. [National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104-07, 82 L. Ed. 2d 70, 104 S. Ct. 2948 \(1984\)](#) ("Restrictions on price and output are [[**9](#)] the paradigmatic examples of restraints of trade") (hereinafter "NCAA"); [Chicago Professional Sports Ltd. Partnership v. National Basketball Association, 961 F.2d 667, 670 \(7th Cir.\), cert. denied, 121 L. Ed. 2d 334, 113 S. Ct. 409 \(1992\)](#). Injury to competition has also been described more generally in terms of *decreased efficiency* in the marketplace which negatively impacts consumers. [Town of Concord v. Boston Edison Co., 915 F.2d 17, 21-22 \(1st Cir. 1990\)](#), cert. denied, 499 U.S. 931, 113 L. Ed. 2d 268, 111 S. Ct. 1337 (1991); [Interface Group, Inc. v. Massachusetts Port Auth., 816 F.2d 9, 10 \(1st Cir. 1987\)](#). Thus, [HN3](#)[ an action harms the competitive process "when it obstructs the achievement of competition's basic goals -- lower prices, better products, and more efficient production methods." [Town of Concord, 915 F.2d at 22](#).

The jury determined in this case, via a special verdict form, that the relevant market is the "nationwide market [[**10](#)] for the sale and purchase of ownership interests in the National Football League member clubs, in general, and in the New England Patriots, in particular." The jury went on to find that the NFL's policy had an "actual harmful effect" on competition in this market.

The NFL argues on appeal that Sullivan has not established the existence of any injury to competition, and thus has not established a restraint of trade that can be attributed to the NFL's ownership policy. The league's attack is two-fold, asserting (1) that NFL clubs do not compete with each other for the sale of ownership interests in their teams so there exists no competition to be injured in the first place; and (2) Sullivan did not present sufficient evidence of injury to competition from which a reasonable jury could conclude that the NFL's policy restrains trade. Although we agree with the NFL that conceptualizing the harm to competition in this case is rather difficult, precedent and deference to the jury verdict ultimately require us to reject the NFL's challenge to the finding of injury to competition.

Critically, the NFL does *not* challenge on appeal the jury's initial finding of the relevant market and no [[**11](#)] corresponding challenge was raised at trial.¹ As a result, the NFL faces an uphill battle in its attack on the presence of an injury to competition. Given the existence of a relevant market for ownership interests in NFL teams, it is reasonable to presume that a policy restricting the buying and selling of such ownership interests injures competition in that market. The NFL nevertheless maintains that NFL teams do not compete against each other for the sale of their ownership interests, even if we accept that a market exists for such ownership interests.

¹ The NFL argues in passing that certain expert testimony related to the relevant market issue was inherently unreasonable and thus could not support the jury's relevant market finding. We do not consider this passing argument to be sufficient to raise the relevant market issue on appeal as [HN4](#)[ matters averted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived on appeal. [United States v. Innamorati, 996 F.2d 456, 468 \(1st Cir. 1993\)](#). More importantly, the NFL did not challenge the relevant market issue in either its directed verdict motion or in its motion for judgment as a matter of law. We will not consider arguments which could have been, but were not, advanced below. [Domegan v. Fair, 859 F.2d 1059, 1065 \(1st Cir. 1988\)](#).

[12] 1. No Competition Subject to Injury as Matter of Law**

The NFL correctly points out that member clubs must cooperate in a variety of ways, and may do so lawfully, in order to make the football league a success. See *United States Football League v. National Football League*, 842 F.2d 1335, 1372 (2d Cir. 1988); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1391-92 (9th Cir.), cert. denied, 469 U.S. 990 (1984) (hereinafter "L.A. Coliseum"); *North American Soccer League v. National Football League*, 670 F.2d 1249, 1251 (2d Cir.), cert. denied, 459 U.S. 1074, 103 S. Ct. 499, 74, [*1098] L. Ed. 2d 639 (1982) (hereinafter "NASL"). On the other hand, it is well established that NFL clubs also compete with each other, both on and off the field, for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia. *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 786-87 (3d Cir. 1983), [**13] cert. denied, 467 U.S. 1215, 81 L. Ed. 2d 364, 104 S. Ct. 2657 (1984); *L.A. Coliseum*, 726 F.2d at 1390, 1393, 1395, 1397. The question of whether competition exists between NFL teams for sale of their ownership interests, such that the NFL's ownership policy injures this competition, is ultimately a question of fact. The NFL would have us find, however, that, as a matter of law, NFL teams do not compete against each other for the sale of their ownership interests. We decline to make such a finding.

The NFL relies on a series of cases which allegedly stand for the "well established" rule that a professional sports league's restrictions on who may join the league or acquire an interest in a member club do not give rise to a claim under the antitrust laws. *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 783 F.2d 1347 (9th Cir.), cert. denied, 479 U.S. 932, 93 L. Ed. 2d 357, 107 S. Ct. 405 (1986); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986); [**14] *Mid-South Grizzlies*, 720 F.2d at 772; *Levin v. National Basketball Ass'n*, 385 F. Supp. 149 (S.D.N.Y. 1974). These cases, all involving a professional sport's league's refusal to approve individual transfers of team ownership or the creation of new teams, do not stand for the broad proposition that no NFL ownership policy can injure competition. See, e.g., NASL, 670 F.2d at 1259-61 (finding that the NFL's policy against cross-ownership of NFL teams and franchises in competing sports leagues, which also effectively barred certain owners who owned other sports franchises from purchasing NFL teams, injured competition between the NFL and competing sports leagues and thus violated § 1 of the Sherman Act).

None of the cases cited by the NFL considered the particular relevant market that was found by the jury in this case or a league policy against public ownership. *Seattle Totems* and *Mid-South Grizzlies* considered potential *inter-league* competition when a sports league rejected plaintiffs' applications for new league franchises. *Seattle Totems*, 783 F.2d at 1349-50; [**15] *Mid-South Grizzlies*, 720 F.2d at 785-86. Those decisions found no injury to competition because the plaintiffs were not competing with the defendant sports leagues, but rather, were seeking to join those leagues. *Seattle Totems*, 783 F.2d at 1350; *Mid-South Grizzlies*, 720 F.2d at 785-86. *Mid-South Grizzlies* left open the possibility that potential *intra-league* competition between NFL football clubs could be harmed by the NFL's action, but found that the plaintiff in that case had not presented sufficient evidence of harm to such competition. *Mid-South Grizzlies*, 720 F.2d at 786-87.

The *Fishman* and *Levin* cases concerned the National Basketball Association's ("N.B.A.") rejection of plaintiffs' attempts to buy an existing team. *Fishman*, 807 F.2d at 525-31; *Levin*, 385 F. Supp. at 150-51. Those cases also based their finding that there was no injury to competition on the fact that the plaintiffs were seeking to join with, rather than compete against, the N.B.A. *Fishman*, 807 F.2d at 544; [**16] *Levin*, 385 F. Supp. at 152. Neither case considered whether competition between teams for investment capital was injured. As pointed out in *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D.Pa. 1993), *Fishman* explicitly recognized the potential for competition in the market for ownership of teams, although the plaintiff had failed to raise the issue, and *Levin* simply presumed, incorrectly, that there could never be any competition among league members. *Piazza*, 831 F. Supp. at 430-31 & n.16 (citing *Fishman*, 807 F.2d at 532 n.9; and *Levin*, 385 F. Supp. at 152).

The important distinction to make between the cases cited by the NFL and the present case is that here Sullivan alleges that the NFL's policy against public ownership generally restricts competition between clubs for the sale of their ownership interests, whereas in the aforementioned cases, a league's refusal to approve a given sale transaction or a new team merely prevented particular outsiders from joining the league, but did not [*1099] limit

competition between [**17] the teams themselves. To put it another way, the NFL's public ownership policy allegedly does not merely prevent the replacement of one club owner with another -- an action having little evident effect on competition -- it compromises the entire process by which competition for club ownership occurs.²

[**18] We take a moment to briefly address a related argument raised by the NFL to the effect that NFL clubs are unable to conspire with each other under [§ 1](#) of the Sherman Act because they function as a single enterprise in relation to the league's public ownership policy. The NFL asserts that the Supreme Court's holding in [*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 \(1984\)](#), controls the facts of this case and overturns prior caselaw holding that NFL clubs do not constitute a single enterprise but rather, are separate entities which were capable of conspiring with each other under [§ 1](#). See [*L.A. Coliseum*, 726 F.2d at 1387-90](#); [NASL](#), 670 F.2d at 1256-58.

We do not agree that *Copperweld*, which found a corporation and its wholly owned subsidiary to be a single enterprise for purposes of [§ 1](#), [*Copperweld*, 467 U.S. at 771](#), applies to the facts of this case or affects the prior precedent concerning the NFL. See [*McNeil v. National Football League*, 790 F. Supp. 871, 879-80 \(D.Minn. 1992\)](#) [**19] (holding that *Copperweld* did not apply to the NFL and its member clubs and finding the clubs to be separate entities capable of conspiring together under [§ 1](#)). *Copperweld's* holding turned on the fact that the subsidiary of a corporation, although legally distinct from the corporation itself, "pursued the common interests of the whole rather than interests separate from those of the corporation itself." [*Copperweld*, 467 U.S. at 770](#). As emphasized in [*City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc.*, 838 F.2d 268 \(8th Cir. 1988\)](#), upon which the NFL relies for the application of *Copperweld* to this case, the critical inquiry is whether the alleged antitrust conspirators have a "unity of interests" or whether, instead, "any of the defendants has pursued interests diverse from those of the cooperative itself." [*Id. at 274-77*](#) (defining "diverse" as "interests which tend to show that any two of the defendants are, or have been, actual or potential competitors"). As we have already noted, NFL member clubs compete in several ways off the field, which [**20] itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under [§ 1](#).

Ultimately, the NFL's *Copperweld* challenge is subsumed under the question of whether or not the evidence can support a finding that NFL teams compete against each other for the sale of their ownership interests. Proof of such competition defeats both the NFL's challenge to the existence of an injury to competition and the NFL's *Copperweld* argument as well. Insufficient proof of such competition would require a judgment in favor of the NFL anyway, regardless of the implications under *Copperweld*. As we discuss below, the jury's finding that there exists competition between teams for the sale of ownership interests was based on sufficient evidence.

2. Insufficient Evidence of Harm to Competition

The NFL contends that Sullivan did not present sufficient evidence concerning: (1) the existence of competition between NFL clubs for the sale of ownership interests, or (2) a decrease in output, an increase in prices, a detrimental effect on efficiency or other incidents of harm to competition in the relevant market, from which a reasonable jury could conclude that [**21] the NFL's policy injured competition. Although we agree that [*1100] the evidence of all these factors is rather thin, we disagree that the evidence is too thin to support a jury verdict in Sullivan's favor.

With respect to evidence of the existence of competition for the sale of ownership interests, one of Sullivan's experts, Professor Roger Noll, testified that "one of the ways in which the NFL exercises monopoly power in the market for the franchises and ownership is by excluding certain people from owning all or part -- any type part of an

² This same argument distinguishes cases cited by the NFL for the proposition that a franchisor's disapproval of a proposed sale of a franchise does not give rise to an antitrust injury. See [*Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 \(5th Cir. 1975\)](#), cert. denied, 424 U.S. 943, 47 L. Ed. 2d 349, 96 S. Ct. 1412 (1976); [*McDaniel v. General Motors Corp.*, 480 F. Supp. 666 \(E.D.N.Y. 1979\)](#). Individual decisions to block the sale of a franchise do not implicate the harm to competition that is caused by a policy restricting all sales of a certain type of ownership interest. Only the broad-based policy has the potential to compromise the entire competitive process for the buying and selling of a good in a relevant market.

NFL franchise." Dr. Noll explained that this "enables a group of owners, in this case, you only need eight owners, to exclude from the League and from competing with them, people who might be more effective competitors than they are." The record also contains statements from several NFL owners which could reasonably be interpreted as expressions of concern about their ability to compete with other teams in the market for investment capital in general, and for the sale of ownership interests in particular. For example, Arthur Rooney II of the Pittsburgh Steelers stated in a letter that he did not "believe that the individually or family owned teams will [**22] be able to compete with the consolidated groups." Ralph Wilson of the Buffalo Bills stated that big corporations should not own teams because it gives them an "unfair competitive advantage" over other teams since corporations will funnel money into the team and make it "more competitive" than the other franchises. Former NFL Commissioner Pete Rozelle admitted that similar sentiments had been expressed by NFL members.

Although it is not precisely clear that the "competition" about which Noll, Rooney, and Wilson were discussing is the same competition at issue here -- that is competition for the sale of ownership interests -- a jury could reasonably interpret these statements as expressing a belief that the competition exists between teams for the sale of ownership interests. The statements of the two NFL owners imply that greater access to capital for all teams will put increased pressure on some teams to compete with others for that capital, and all the statements reveal that the ownership rules, particularly the rule against public ownership, is the main obstacle preventing such access. The fact that ownership by "consolidated groups" is not necessarily the same as public ownership [**23] does not affect the conclusion that teams face competitive pressure in selling their ownership interests generally to whoever might buy them. We also note that evidence of actual, present competition is not necessary as long as the evidence shows that the potential for competition exists. See [L. A. Coliseum, 726 F.2d at 1394](#) (discussing significance of *potential* competition, especially where challenged policy limits such competition so that it is not evident in practice). It would be difficult indeed to provide direct evidence of competition when the NFL effectively prohibits it.

The NFL focusses on the fact that Professor Noll testified that many of the purchasers of Patriots' stock would be New England sports fans and others in the New England area. The NFL points out that other NFL teams would not compete with the Patriots for the sale of stock to their own fans. This argument slightly distorts Professor Noll's testimony. Professor Noll stated that local souvenir buyers would be one portion of the market for Patriots stock. Professor Noll also testified several times that other investors would buy Patriots stock as well, for investment purposes. [**24] Noll's point was that the souvenir buyers would serve to bid up the price of the stock above what the price would normally be if the Patriots were a regular company. His testimony did not preclude a finding that NFL teams compete against each other for investment capital via the sale of ownership interests.

The record also contains sufficient evidence of the normal incidents of injury to competition from the NFL's policy -- reduced output, increased prices, and reduced efficiency -- to support the jury's verdict. As Dr. Noll pointed out in his testimony, the NFL's policy "excludes individuals . . . who might want to own a share of stock in a professional football team." Several NFL officials themselves admitted that the policy restricts the market for investment capital among NFL teams. There is thus little dispute that the NFL's ownership policy reduces the available output of ownership interests.

[*1101] The NFL is correct that, in one sense, the overall pool of potential output is fixed because there are only 28 NFL teams and, although their value may fluctuate, the quantity of their ownership interests cannot. However, the NFL's public ownership policy completely wipes out a certain type [**25] of ownership interest -- public ownership of stock. By restricting output in one *form* of ownership, the NFL is thereby reducing the output of ownership interests overall. In other words, the NFL is literally restricting the output of a product -- a share in an NFL team.

There was considerable testimony concerning the price effects of the NFL policy. Both of Sullivan's experts testified that the policy depressed the price of ownership interests in NFL teams because NFL franchises would normally command a premium on the public market relative to their value in the private market, which is all that the league currently permits. Professor Noll testified that fan loyalty would push up the price of ownership interests if sales to the public were allowed. Even former Commissioner Pete Rozelle acknowledged that "it was pointed out, with justification, it has been over the years, that [the ownership policy] does restrict your market and, very likely, the

price you could get for one of our franchises if you wanted to sell it, because you are eliminating a very broad market . . . And they have said that there is a depression on the price they could get for their franchise."

The NFL points [**26] out that the alleged effect of its ownership policy is to *reduce* prices of NFL team ownership interests, rather than to raise prices which is normally the measure of an injury to competition. E.g., [Town of Concord, 915 F.2d at 22](#). We acknowledge that it is not clear whether, absent some sort of dumping or predatory pricing, see, e.g., [Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 527 \(1st Cir. 1989\)](#), a decrease in prices can indicate injury to competition in a relevant market. The Supreme Court has emphasized, however, that [HN5](#) overall consumer preferences in setting output and prices is more important than higher prices and lower output, *per se*, in determining whether there has been an injury to competition. *NCAA*, 468 U.S. at 107. In this case, regardless of the exact price effects of the NFL's policy, the overall market effects of the policy are plainly unresponsive to consumer demand for ownership interests in NFL teams. Dr. Noll testified that fans are interested in buying shares in NFL teams and that the NFL's policy deprives [**27] fans of this product. Moreover, evidence was presented concerning the public offering of the Boston Celtics professional basketball team which demonstrated, according to some of the testimony, fan interest in buying ownership of professional sports teams. Thus, a jury could conclude that the NFL's policy injured competition by making the relevant market "unresponsive to consumer preference." *Id.*³

[**28] As for overall efficiency of production in the relevant market,⁴ Sullivan's experts testified that the NFL's policy hindered efficiency gains, and that allowing public ownership would make for better football teams. Professor Noll stated that the NFL's public ownership policy prevented individuals who [*1102] might be "more efficient and much better at running a professional football team" from owning teams. Dr. Noll also stated that publicly owned NFL teams would be better managed, and produce higher quality entertainment for the fans. Noll testified that the ownership rule excluded certain types of management structures which would likely be more efficient in running the teams, resulting in higher franchise values. One NFL owner, Lamar Hunt, acknowledged that increased access to capital can improve a team's operations and performance. A memorandum prepared by an NFL staff member stated that changes to the NFL's public ownership policy could contribute to each NFL team's own financial strength and viability, which in turn would benefit the entire NFL because the league has a strong interest in having strong, viable teams.

[**29] The NFL presented a large amount of evidence to the contrary and now claims on appeal that Sullivan's position was based on nothing more than sheer speculation. We have reviewed the record, however, and we cannot say that the evidence was so overwhelming that no reasonable jury could find against the NFL and in favor of Sullivan. We therefore refuse to enter judgment in favor of the NFL as a matter of law.

B. Ancillary Benefits

The NFL next argues that even if its public ownership policy injures competition in a relevant market, it should be upheld as *ancillary* to the legitimate joint activity that is "NFL football" and thus not violative of the Sherman Act. We

³ The NFL maintains that price and output are not affected because its ownership policy does not limit the number of games or teams, does not raise ticket prices or the prices of game telecasts and does not affect the normal consumer of the NFL's product in any other way. Such facts might be relevant to an inquiry of whether the NFL's policy harms overall efficiency, see *infra* note [4], but it is not relevant to whether the policy affects output and prices *in the relevant market* for ownership interests. Just because consumers of "NFL football" are not affected by output controls and price increases does not mean that consumers of a product in the relevant market are not so affected. In this case, two types of consumers are denied products by the NFL policy: consumers who want to buy stock of the Patriots or other teams, and consumers like Sullivan who want to "purchase" investment capital in the market for public financing.

⁴ Although the product at issue in the relevant market is "ownership interests," efficiency in production of that product can be measured by the value of the ownership interest. That is, an improved product produced more efficiently will be reflected in the value of the output in question (regardless of the price). In this case, the value of the product depends on the success of the Patriots' football team, the overall efficiency of its operations, and the success of the NFL in general.

take no issue with the proposition that certain joint ventures enable separate business entities to combine their skills and resources in pursuit of a common goal that cannot be effectively pursued by the venturers acting alone. See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979). We also do not dispute that a "restraint" that is ancillary to the functioning of such a joint [**30] activity -- i.e. one that is required to make the joint activity more efficient -- does not necessarily violate the antitrust laws. *Broadcast Music*, 441 U.S. at 23-25; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 253 U.S. App. D.C. 142, 792 F.2d 210, at 223-24 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033, 93 L. Ed. 2d 834, 107 S. Ct. 880 (1987); see also *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295-96, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985). We further accept, for purposes of this appeal, that rules controlling who may join a joint venture can be ancillary to a legitimate joint activity and that the NFL's own policy against *public* ownership constitutes one example of such an ancillary rule. Finally, we accept the NFL's claim that its public ownership policy contributes to the ability of the NFL to function as an effective sports league, and that the NFL's functioning would be impaired [**31] if publicly owned teams were permitted, because the short-term dividend interests of a club's shareholder would often conflict with the long-term interests of the league as a whole. That is, the policy avoids a detrimental conflict of interests between team shareholders and the league.

We disagree, however, that these factors are sufficient to establish as a matter of law that the NFL's ownership policy does not unreasonably restrain trade in violation of § 1 of the Sherman Act. The holdings in *Broadcast Music*, *Rothery Storage*, and *Northwest Stationers*, do not throw the "rule of reason" out the window merely because one establishes that a given practice among joint venture participants is ancillary to legitimate and efficient activity -- the injury to competition must still be weighed against the purported benefits under the rule of reason. See, e.g., *Broadcast Music*, 441 U.S. at 24 (holding only that a particular ancillary restraint did not constitute a *per se* violation of the Sherman Act and remanding for a determination of the case under a rule of reason analysis); *Northwest Stationers*, 472 U.S. at 293-98 [**32] (same); cf. *SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 36 F.3d 958, 1994 U.S. App. LEXIS 26849 *19, (10th Cir. Sept. 23, 1994) (rejecting arguments that joint [*1103] ventures require a "special" rule of reason review, but finding no violation of Section 1 on the specific facts of the case).

HN6 [↑] One basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint. *L.A. Coliseum*, 726 F.2d at 1396. The record contains evidence of a less restrictive alternative to the NFL's ownership policy that may yield the same benefits as the current policy. Sullivan points to one proposal to amend the current ownership policy by allowing for the sale of minority, nonvoting shares of team stock to the public with restrictions on the size of the holdings by any one individual. Dividend payments, if any, would be within the firm control of the NFL majority owner. Under such a policy, it would be reasonable for a jury to conclude that private control of member clubs is maintained, [**33] conflicts of interest are avoided, and all the other "benefits" of the NFL's joint venture arrangement are preserved while at the same time teams would have access to the market for public investment capital through the sale of ownership interests. Whether this proposed amendment is indeed a less restrictive, equally beneficial policy, is a jury question we need not reach here. We merely point to it as one factor a jury may consider in its rule of reason analysis. Whether this proposed amendment is indeed a less restrictive, equally beneficial policy, is a jury question we need not reach here. We merely point to it as one factor a jury may consider in its rule of reason analysis.

C. Causation of Injury in Fact

The NFL next argues that Sullivan did not present sufficient evidence to support a finding by the jury that the NFL's public ownership policy caused injury in fact to Sullivan. An antitrust plaintiff must prove that he or she suffered damages from an antitrust violation and that there is a causal connection between the illegal practice and the injury. *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 532-33 & n.26, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-78, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 13 (1st Cir. 1979), cert. denied, 446 U.S. 983, 64 L. Ed. 2d 839, 100 S. Ct. 2964 (1980). [**34] "Plaintiffs need not prove that the antitrust violation was the sole cause of their injury, but only that it was a material cause." *Engine Specialties*, 605 F.2d at 14.

Sullivan asserted at trial that the NFL's ownership policy forced him to sell the Patriots at a depressed price, far below what the team would have been worth in a market that included public ownership of the team. "But for" the NFL's policy, Sullivan claims, he would have been able to offer 49% of the Patriots to the public for \$ 70 million, pay off his debts, and retained ownership of a much more valuable and profitable team.

The NFL contends that Sullivan failed to establish a causal connection between his "forced" sale of the Patriots and the NFL's ownership policy because (1) Sullivan never officially requested a vote on his proposals to amend or waive the policy so there is no way of knowing whether the policy would have prevented a public offering in the first place; and (2) Sullivan never established that the public stock sale was feasible or potentially successful and thus an alternative to what ultimately happened (i.e., even if the NFL did not have a policy against public ownership, [**35] Sullivan would still have had to sell his team because the Patriots stock sale would not have happened or would not have raised enough money to pay off Sullivan's debts and prevent a fire sale of the team). Although the evidence of causation is not overwhelming, it is nevertheless sufficient to support the verdict.

Regarding the NFL's first claim that Sullivan never called for a vote from the owners to change or waive the ownership policy, Sullivan presented sufficient evidence to show that the NFL essentially rejected Sullivan's request, even though no official vote was taken. [HN7](#) Under certain circumstances, an antitrust plaintiff must make a demand on the defendant to allow the plaintiff to take some action or obtain some benefit, which the defendant's challenged practice is allegedly preventing the plaintiff from taking or obtaining, in order to prove that the practice caused injury in fact to the plaintiff. See [*Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 816 \(1st Cir.\)](#), cert. denied, 488 U.S. 955, 102 L. Ed. 2d 381, 109 S. Ct. 392 (1988); [*Out Front Productions, Inc. v. Magid*, 748 F.2d 166, 170 \(3d Cir. 1984\)](#). [**36] Such a requirement only applies, however, where the plaintiff cannot otherwise prove that the illegal practice exists or that [**1104] the practice is preventing the plaintiff from competing in the relevant market; in such cases, a refused demand is the only reliable evidence of causation. [*Out Front*, 748 F.2d at 169-70](#). In cases like the present one, an official request and official refusal is not necessary to establish causality because there is other evidence showing that defendant's practice caused injury in fact to the plaintiff. [*Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 120 n.15, 23 L. Ed. 2d 129, 89 S. Ct. 1562 \(1969\)](#); [*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699-702, 8 L. Ed. 2d 777, 82 S. Ct. 1404 \(1962\)](#). There is certainly no blanket requirement, as the NFL maintains, in *Wells* or any other case, that Sullivan must call for a vote and obtain an official refusal from the NFL, even if such a request would be futile. See, e.g., [*Wells*, 850 F.2d at 816](#) [**37] (finding failure to request access to multiple listing service was critical because "there was no evidence of a group boycott;" although court noted request "may have been futile," there was no evidence to indicate that it would have been, so an actual request was required); [*Chicago Ridge Theatre Ltd. Partnership v. M & R Amusement Corp.*, 855 F.2d 465, 470 \(7th Cir. 1988\)](#) (futility obviates the need for a demand). Certainly, if Sullivan can prove futility independent of any official request, he need not show that he actually called for a vote and received a denial from the other NFL owners.

The jury in this case heard evidence that would allow it to conclude that the NFL effectively denied Sullivan's request for a waiver or amendment of the public ownership policy, and that an official vote would indeed have been futile. The NFL's policy against public ownership was long-standing, and the policy withheld several efforts to change it over the years as proffered amendment proposals were never brought to a vote. Sullivan requested a waiver of, or amendment to, the policy at a meeting of the owners on October 27, 1987. His request was tabled. After [**38] further discussions, then-Commissioner Pete Rozelle said that he opposed the proposal and that the chances for league approval were "very dubious." Although Sullivan was only four votes shy of winning a vote, with seven votes still undecided, the jury could reasonably conclude that, in light of the Commissioner's statement, Sullivan tried but failed to convince those undecided owners to vote in his favor and that an actual vote would have been futile. The evidence is thus sufficient to support a finding that the NFL's policy was effectively enforced against Sullivan and that the policy did in fact, when considered with the evidence discussed below, prevent Sullivan from making his public offering of 49% of the Patriots.

Sullivan also presented sufficient evidence to support a finding that the Patriots stock sale was both feasible and potentially successful. Sullivan met with Stephens, Inc., an investment banking firm, to discuss a deal whereby Stephens would arrange for a loan of \$ 80 million to Sullivan and his son, half of which would be paid back out of

the proceeds of the Patriots stock offering, which Stephens would also arrange. In a subsequent letter, Stephens stated that it [**39] had been retained to assist in the "private placement of \$ 80 million of debt" and set out some preliminary terms and conditions. Although specifics of the public offering were not discussed, and Stephens did not determine whether the stock offering was ultimately feasible, Stephens repeatedly made it clear to Sullivan that NFL approval was required -- indeed Stephens specifically singled out NFL approval as *the* prerequisite -- before Stephens could proceed any further with efforts to prepare for the placement of Patriots stock.

As discussed above, NFL approval was never obtained. Therefore, the jury could conclude that lack of approval was the reason Stephens was unwilling to proceed with the deal, even though Stephens also expressed some concern about Sullivan's financial and legal troubles. The jury also heard testimony that Charles Allen, a prominent investment banker in New York, thought the Patriots public offering was feasible and that he was potentially interested in arranging the deal. Sullivan himself testified that the stock sale was feasible based on his experience with the previous public offering of Patriots stock in 1960, and based on the public offering of the [**40] Boston Celtics. Finally, one of Sullivan's experts, Patrick Brake, testified that the public offering would have been feasible had the NFL not blocked it.

In addition, despite significant financial and legal problems with the Patriots, the [*1105] evidence is sufficient to support a finding that Sullivan could have solved these problems in the course of the public offering and, further, that he could have brought off a successful stock sale that would have raised at least \$ 70 million.

The NFL focusses its challenge to the potential success of Sullivan's offering on the testimony of Patrick Brake, who provided the \$ 70 million figure as the value for the stock sale. According to the NFL, Brake's testimony could not support the jury's finding on causation because it was not supported by any facts, it was not grounded in any rational methodology, and it ignored important factors indicating that the Patriots offering would not be a success. The NFL does not challenge the admissibility of Brake's opinion but, instead, claims that his opinion cannot support the jury's finding that the Patriots stock sale would have been a success if the NFL had allowed it to happen.

HN8 [↑] "When an expert opinion is [**41] not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2589 (1993); accord *Price v. General Motors Corp.*, 931 F.2d 162, 165 (1st Cir. 1991); *Richardson v. Richardson-Merrell, Inc.*, 273 U.S. App. D.C. 32, 857 F.2d 823, 829 (D.C. Cir. 1988), cert. denied, 493 U.S. 882, 107 L. Ed. 2d 171, 110 S. Ct. 218 (1989). A jury verdict cannot rest solely on an expert's "bottom line" conclusion, without some underlying facts and reasons, or a logical inferential process to support the expert's opinion. *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989).

We agree that the facts and reasoning underlying Brake's opinions and testimony leave much to be desired from the standpoint of a factfinder charged [**42] with determining the facts. As a matter of law, however, Brake provided enough of a basis for his opinions and had sufficient facts to back his opinions up, to support, in combination with the evidence from other sources, a jury finding of potential success of the Patriots stock sale venture. To begin with, Brake stated in his testimony that his opinion was based on a review of documents and depositions in the case, a review of the prospectus for the Boston Celtics public offering, the fact that future television revenues for the Patriots were likely to increase due to the Patriots' appearance in the Super Bowl, and the fact that the public stock for NFL teams, like the Patriots, would trade at a premium value over what the club would otherwise be worth. Brake also stated that he looked at a financial statement of the Patriots and was apprised of some of the debt and loss history of the club. Other testimony and evidence at trial supported the claim that stock of NFL teams would sell for a premium above the club's private sale value and the claim that TV revenues to the NFL teams would increase. Sullivan himself testified that a public offering would be successful based upon the success [**43] of his earlier offering of Patriots stock and on the results of the Celtics public offering. There was also testimony -- highly disputed, but potentially credible testimony nonetheless -- to the effect that the Celtics' stock offering was a success and that the Patriots stock offering could be patterned after the Celtics offering.

As for the source of Brake's specific \$ 70 million figure for the likely proceeds from a sale of 49% of the Patriots, Brake explained a two-step public offering process which, after subtracting underwriting fees, would yield the Sullivan's \$ 70 million. Brake arrived at this figure after starting with a base value of \$ 150 million for the Patriots. Given the \$ 80 million private sale price of the Patriots obtained by Sullivan when he actually sold the team, and given the testimony by Brake and others that public stock of NFL teams would sell at a premium, we cannot say that the opinion by Brake, an investment banking expert, was unreasonable or "not supported by sufficient facts to validate it in the eyes of the law." [Brooke Group, 113 S. Ct. at 2589.](#)

Brake's testimony was not merely conclusory. Rather, it was [**44](#) embellished by various explanations and justifications. His testimony was also not overwhelmingly contradicted by the weight of the evidence or inherently [**1106](#) contradictory, unreasonable or irrational. Brake did overlook some important factors that contradicted his opinion, but he was questioned about these factors on cross-examination and the NFL argued them before the jury. The factors do not invalidate Brake's opinion as a matter of law; rather, they merely go to the weight and credibility of his opinions which are matters for the jury to consider. The basis of the opinion regarding the success of the Patriots public offering may be flimsy, but it is not nonexistent or irrational as a matter of law.

Although we share the NFL's skepticism that Sullivan would have succeeded in his public offering if the NFL had allowed him to try it, we cannot say that, as a matter of law, the evidence was so overwhelming that no reasonable jury could find that the NFL's policy harmed Sullivan by preventing him from doing something he would otherwise have been able to do. We therefore reject the NFL's claim that it is entitled to a judgment in its favor on the basis that Sullivan failed to prove his [**45](#) injury was caused by the alleged antitrust violation.

D. Assignment of Antitrust Claim

The NFL argues that Sullivan cannot bring this lawsuit because he sold his antitrust claim when he sold the Patriots. The sale contract between Sullivan and KMS Patriots, L.P., provided that Sullivan transferred to the buyers "all other assets" of the Patriots' and its holding company,⁵ besides those specifically listed and those specifically excluded. None of the listed or excluded assets include an antitrust claim. According to the NFL, the term "all other assets" should be interpreted broadly to include the present antitrust cause of action. We disagree. Absent some express language to the effect that Sullivan was selling his football related "antitrust claims" or, at the very least, "causes of action," we cannot find that Sullivan assigned the present antitrust claim to the buyers of the Patriots. [Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 437-40 \(3d Cir. 1993\)](#); see also [Lerman v. Joyce Int'l, Inc., 10 F.3d 106, 112 \(3d Cir. 1993\)](#) (affirming requirement in *Gulfstream* that assignment [**46](#) of claim must be "express" but expanding definition of "express" language to include a grant of "all causes of action, claims and demands of whatsoever nature"). As no such express language appears in the contract for the sale of the Patriots, Sullivan did not transfer his interest in the present lawsuit to KMS Patriots when he sold the team.

The NFL's arguments concerning the application of [§ 1](#) of the Sherman Act to the facts of this case raise a substantial challenge to the jury verdict and are certainly weighty enough to give us pause. Upon careful consideration of the issues, however, we find Sullivan's [**47](#) theory of the case to be a plausible one and ultimately find the evidence sufficient to support it. For the foregoing reasons, therefore, we see no justification, as a matter of law, for ringing the death knell on this litigation.

IV. TRIAL ERRORS

Having reviewed those issues which would have warranted a judgment in favor of the NFL, had we decided any of those issues in the NFL's favor, we now turn to the NFL's claim that it is entitled to a new trial because of allegedly erroneous jury instructions and other trial errors. In particular, the NFL asserts that the district court failed to provide the jury with several crucial jury instructions that were required in order to present to the jury certain legal theories

⁵ The language of the contract actually states "all other assets of Selling Group," which includes Sullivan himself. However, neither party asserts that Sullivan intended to transfer all his personal assets with this clause and, anyway, the "all other assets" clause is number seventeen on a list of items referred to by the contract as "the following assets of the Club and Holdco [the Patriots' holding company]."

that were potentially dispositive of the verdict. The NFL argues that the court's failure to give the instructions was prejudicial error requiring a new trial.

Determining whether the failure to give proffered jury instructions is error depends on whether the instructions actually given to the jury, taken as a whole, adequately explained the law or whether they tended [*1107] to confuse or mislead the jury on the controlling issues of the case. *Davet v. Maccarone*, 973 F.2d 22, 26 (1st Cir. 1992); [**48\] Transnational Corp. v. Rodio & Ursillo, Ltd.](#), 920 F.2d 1066, 1070 (1st Cir. 1990); see also *L.A. Coliseum*, 726 F.2d at 1398 ("The question, then, is whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to insure that the jury fully understood the issues."). We must also consider whether the NFL's proposed instructions are accurate or misleading. *Shane v. Shane*, 891 F.2d 976, 987 (1st Cir. 1989). **HN9** "As long as the judge's instruction properly apprises the jury of the applicable law, failure to give the exact instruction requested does not prejudice the objecting party." *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 354 (1st Cir. 1989), cert. denied, 496 U.S. 937, 110 L. Ed. 2d 664, 110 S. Ct. 3217 (1990) (internal quotations omitted). A party, however, is entitled to have its legal theories on controlling issues, which are supported by the law and by the evidence, presented to the jury. *Jerlyn Yacht Sales, Inc. v. Roman Yacht Brokerage*, 950 F.2d 60, 68 (1st Cir. 1991); [**49\] L.A. Coliseum, 726 F.2d at 1398. An error in the jury instructions will warrant the reversal of the judgment and a new trial only if, upon review of the record as a whole, the error is determined to be prejudicial. *Davet*, 973 F.2d at 26; *Jerlyn Yacht Sales*, 950 at 69; *Transnational Corp.*, 920 F.2d at 1070.](#)

In this case, we find that the failure to give certain instructions was prejudicial error⁶ and we therefore vacate the judgment and order a new trial.

A. Equal Involvement Defense

The NFL argued before the district court that Sullivan was a complete and substantially equal participant in the NFL's ownership [**50](#) policy which he now challenges in the present lawsuit. As a result of Sullivan's involvement, the NFL claimed, Sullivan was barred from bringing a damages action under the antitrust laws pursuant to the "equal involvement defense" doctrine. The district court denied motions for summary judgment and a directed verdict on this issue and, further, refused to instruct the jury on the availability of the defense because it found that the evidence showed that Sullivan "had very little, if any, involvement in the formulation of [the public ownership] rule," and because the rule "was imposed on [Sullivan] by a preexisting National Football League rule." This ruling constituted prejudicial error because the "equal involvement defense" is an absolute defense to an antitrust claim and because the evidence warranted sending the issue to the jury.

A plaintiff's "complete, voluntary, and substantially equal participation" in an illegal practice under the antitrust laws precludes recovery for that antitrust violation. *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 856 (1st Cir. 1985), cert. denied, 475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1198 (1986); [**51\] General Leaseways, Inc. v. National Truck Leasing Ass'n, 830 F.2d 716, 720-23 \(7th Cir. 1987\); *THI-Hawaii, Inc. v. First Commerce Financial Corp.*, 627 F.2d 991, 995 \(9th Cir. 1980\); see also *Bateman Eichler, Hill, Richards, Inc. v. Berner*, 472 U.S. 299, 310-11, 86 L. Ed. 2d 215, 105 S. Ct. 2622 \(1985\) \(applying equal involvement defense in securities law context\). In order to establish an "equal involvement" defense, an antitrust defendant must prove, by a preponderance of the evidence, that the plaintiff bears at least substantially equal responsibility for an anticompetitive restriction by creating, approving, maintaining, continually and actively supporting, relying upon, or otherwise utilizing and implementing, that restriction to his or her benefit.⁷ \[**53\\] General\]\(#\) \[*1108\\] Leaseways\]\(#\), 830 F.2d at 720-26; *CVD*, 769 F.2d at 856. It](#)

⁶The court's failure to instruct on the complete involvement defense was prejudicial error and, by itself, sufficient grounds for reversal and a new trial. We do not decide whether any of the other errors, standing alone, are prejudicial. We do hold, however, that all the errors taken together are prejudicial.

⁷The Supreme Court in *Bateman* added an additional requirement to the "equal involvement" defense: that "preclusion of suit would not significantly interfere with the effective enforcement of" the antitrust laws. *Bateman*, 472 U.S. at 311. We do not see a preclusion of Sullivan's damages action as presenting any significant interference with antitrust law enforcement. The NFL's policy is still subject to challenge under the antitrust laws. Because the equal involvement defense only precludes a damages

is not essential to the defense that the plaintiff actually helped author or create the policy, although such facts would be highly probative, as long as the plaintiff was [**52] substantially responsible for maintaining and otherwise effectuating the policy. See, e.g., [General Leaseways, 830 F.2d at 723](#) (applying equal involvement defense in case where plaintiff did not participate in the actual adoption of the policy although plaintiff was substantially involved in supporting, enforcing and maintaining the policy).⁸ On the other hand, proof that the plaintiff benefitted from the challenged policy or failed to object to the policy, without more, is not sufficient to show "substantially equal participation." See *id.*, [830 F.2d at 725](#) (noting that "mere participation" in the challenged policy is not enough). Moreover, proof that the plaintiff was coerced ("economically" or otherwise) into supporting the policy, that the plaintiff attempted to oppose the illegal conduct, or that the plaintiff's participation was otherwise not voluntary, is highly probative of the absence of complete and equal involvement by the plaintiff in an antitrust violation. E.g., [CVD, 769 F.2d at 856](#).

In this case, the evidence in the record was sufficient to support a jury instruction on the equal involvement defense. Sullivan was one of the three AFL members on the Joint Committee that established the policies, including the ownership policies, that were to govern the new expanded NFL. That Committee agreed, in a merger agreement signed by Sullivan, to adopt the NFL's policy against public [**54] ownership for the new NFL. Sullivan's son, Chuck, stated that Sullivan was the central figure in the merger negotiations. Sullivan subsequently relied on the NFL's public ownership policy to justify his purchase, through the merger of his team into a wholly owned company, of the outstanding stock of the Patriots in 1976. In the proxy statement for that transaction, Sullivan listed the NFL's policy against public ownership as one of the "Reasons for the Merger", and he attached a letter from the NFL justifying the public ownership policy and explaining that the continued presence of public stockholders conflicted with the interests of the league. Sullivan also affirmatively supported the policy in sworn testimony during the litigation with his former shareholders following the Patriots merger. Sullivan stated that the NFL's public ownership policy, and the justifications underlying the policy, were the reasons for his desire to purchase all outstanding shares of the team. There is no evidence that Sullivan ever opposed or objected to the ownership policy prior to the circumstances surrounding this case.

Taken together, this evidence is sufficient for a reasonable jury to conclude [**55] that Sullivan bears substantially equal responsibility for the NFL's public ownership policy because Sullivan helped adopt the policy, he relied upon it, and he actively supported it. The jury, however, was never given an opportunity to consider this evidence in light of the equal involvement defense.

Sullivan claims that he was not at the meetings in which Lamar Hunt, the chairman of the AFL committee, agreed to the NFL's public ownership policy, and that he did not know in advance that the old NFL's public ownership rule would be adopted by the new NFL. Mr. Hunt himself testified, however, that he always spoke for the entire AFL committee at his various meetings with NFL owners, and that he discussed various [*1109] negotiating points with the other AFL owners, including Sullivan, before any decisions were made. Moreover, Sullivan's own team obtained a specific waiver from the ownership policy, which, a reasonably jury could infer, indicates that Sullivan was involved in the decision to adopt the policy. In any event, it is the jury's responsibility to weigh the evidence and make a choice in circumstances like this where the same evidence supports two different yet reasonable conclusions.

[**56] The district court erred by failing to give the jury the opportunity to choose between these versions of the facts. The court's "finding" that Sullivan's involvement in the public ownership policy was minimal ignores evidence

action, Sullivan could have requested injunctive relief when the public ownership policy was allegedly preventing him from selling 49% of his team. In addition, other owners who were not involved in the adoption or support of the policy may still bring suit should they desire to sell ownership interests in their team to the public.

⁸ To the extent this conflicts with the "but for" standard applied in [THI-Hawaii, 627 F.2d at 995](#) (finding that "a plaintiff's recovery is not barred unless the illegal conspiracy would not have been formed *but for* its participation"), we decline to follow that portion of the case. There is no evidence of such a rigid "but for" requirement in the Supreme Court's formulation of the equal involvement defense in [Bateman, 472 U.S. at 310-11](#) (finding the defense applies where "as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress").

in the record. The court's view that the NFL imposed the ownership policy on the AFL owners, rendering their participation involuntary, is largely unsupported by the record. Ultimately, however, these are factual questions for the jury and none of the instructions provided by the district court served to adequately instruct the jury on this issue or send the issue to the jury. Therefore, the district court erred in refusing to give the NFL's proffered instruction on the "equal involvement" defense.

The error was prejudicial. By refusing to instruct the jury on the equal involvement defense, the district court deprived the NFL of a complete defense from Sullivan's lawsuit. The NFL presented facts that could have led to a dismissal of the case if they were believed by a properly instructed jury. While the NFL could have highlighted, and in fact did highlight, some of the facts concerning Sullivan's support of, and reliance upon, the ownership policy in its closing [**57] argument before the jury, this effort was limited to the argument that the NFL's policy was "reasonable" for purposes of the rule of reason analysis. The NFL did not, and could not, argue to the jury that it should rule in favor of the NFL because Sullivan's participation in the adoption and maintenance of the public ownership policy was complete, voluntary and substantially equal. Without the proffered instruction, the jury had no occasion to consider whether Sullivan should be deprived of a damages remedy because of his involvement in the policy he now challenges. As a result, the district court's refusal to send the equal involvement defense to the jury was prejudicial error requiring a new trial.

B. Failure to Request an Official Vote of the Owners

As discussed in Section II.C. above, in order to establish that the policy actually caused injury to himself, Sullivan must prove that the NFL effectively denied his request to waive or amend its policy against public ownership. While there is evidence that supports a finding that the NFL's policy effectively blocked Sullivan from pursuing his public offering, there is also sufficient evidence to support a contrary finding. [**58] Sullivan's failure to request a vote from the owners after he discovered that he was four votes shy of obtaining a waiver with seven owners still undecided, combined with former Commissioner Rozelle's testimony that he told Sullivan that Rozelle would put to the owners any plan that Sullivan wished, could support a finding that Sullivan was a "dormant plaintiff" who did not "spring into action" until it was "time to file suit." *Out Front, 748 F.2d at 170*. As such, a jury could conclude that the NFL did not prevent Sullivan from pursuing his stock sale, but instead, Sullivan simply dropped the idea for reasons unrelated to the NFL's policy. If the jury had reached such a conclusion, Sullivan would have failed to prove that his injury was caused by the antitrust policy, and judgment for the NFL would be required.

The NFL proposed instructions concerning Sullivan's failure to ask for a vote essentially stating that such a failure would result in judgment for the NFL if it was reasonable to require Sullivan to make such a request. The court refused to give the instruction because it felt that to do so would be to comment on the evidence, and the court did [**59] not want to comment on any of the evidence presented at trial. We understand the court's concern but believe that, under the facts of this case, there is a crucial point of law contained in the NFL's instruction that was not otherwise provided to the jury.

The jury was instructed generally on the issue of causation, but it was not told that it [*1110] had to determine whether the NFL's policy against public ownership was actually enforced against Sullivan; that is, whether the policy, the alleged antitrust restraint, actually restrained Sullivan in any way from making a 49% public offering of his team. Although the NFL could, and did, argue that Sullivan's failure to ask for a vote was evidence that the policy did not cause injury to Sullivan, there was no legal hook upon which the jury could hang the NFL's argument. The failure of Sullivan to request a vote is a critical and potentially dispositive issue in this case. If the alleged restraint of trade does not even exist in practice, the whole case essentially disappears. Therefore, the jury should have been directed to make a specific finding as to whether the public ownership policy was enforced against Sullivan.

If the jury is instructed [**60] that Sullivan must prove that the NFL's policy was enforced against him, the jury will have cause to consider the crucial matter of whether the NFL actually enforced its policy against Sullivan or rather, whether the NFL never had the chance to enforce its policy because Sullivan was never prepared to pursue his public offering. The instructions as proffered by the NFL may need to be tailored to avoid commenting on the evidence surrounding the "missing" vote by the NFL owners, but that does not excuse the court from giving no

instruction at all on the issue. The failure to give some instruction concerning the failure of Sullivan to request a vote was error.

C. The Murray Option

In 1986, prior to Sullivan's decision to sell Patriots stock to the public, Sullivan sold Fran Murray an option to buy the entire club. The NFL took the position that the Murray option would have been an absolute bar to any public sale of Patriots stock and that Sullivan therefore could not prove causation. The NFL's position was supported by evidence introduced at trial. Sullivan proffered evidence that the option was not a bar to sale because the option could be bought out and because it could not [**61] be legally enforced. The issue of whether Murray could have, or would have, blocked a public offering by the Patriots was ultimately disputed.

The option agreement and Murray's deposition testimony were received into evidence. The district court, however, refused to admit Murray's statement that he would indeed have stopped any public stock sale of the Patriots from going forward if he had been told about it. The court found the testimony to be too speculative to be admissible. While the court's decision to exclude Murray's "speculative" testimony is well within the court's wide latitude of discretion in making such evidentiary rulings, [United States v. Abel, 469 U.S. 45, 54, 83 L. Ed. 2d 450, 105 S. Ct. 465 \(1984\)](#); [Doty v. Sewall, 908 F.2d 1053, 1058 \(1st Cir. 1990\)](#), we note that Sullivan's entire case as to the causation of injury was equally speculative. Whether Sullivan's proposed stock sale could have proceeded and would have been successful in the absence of the NFL's public ownership policy was a matter of considerable conjecture. Fairness would seem to militate towards allowing [**62] the NFL to present its own version of the probable course of future events to counter Sullivans' theorizing.

In any event, the court's subsequent refusal to give the NFL's proffered jury instruction on the law of options, specifically the legal consequences of options under Massachusetts law, erroneously removed another crucial issue from the jury's purview. The Murray option was a key defense for the NFL, because if Sullivan did not have a legal right to sell Patriots stock to the public, he did not suffer any harm from the NFL's ownership policy and the NFL would have been entitled to judgment in its favor. Again, the NFL could make this argument to the jury, but the jury would still lack crucial information concerning the legal underpinnings of a crucial defense for the NFL.

Sullivan argues that the NFL's proposed instruction would have singled out one factual issue related to causation for the jury's special attention, something that would have unfairly prejudiced Sullivan. Sullivan adds that allowing the instruction would have generated countering instructions on other legal facets of option law that were relevant to Sullivan's position on the option issue and ultimately would [**63] have confused the jury. These arguments notwithstanding, we feel [*1111] that, as long as suitable instructions are provided covering the basic legal points relevant to each party's arguments, the jury would not be unduly confused. Furthermore, the risk of prejudice from the instruction -- due to the added attention afforded one of the NFL's defenses -- is not sufficient to justify effectively depriving the NFL of a crucial defense. Ultimately, it was for the jury to decide whether the Murray option constituted an insurmountable obstacle to Sullivan's case on causation, and the district court's refusal to instruct on the law of options virtually removed this issue from consideration by the jury.

D. Balancing Procompetitive and Anticompetitive Effects

in the Relevant Market

As we noted above, the rule of reason analysis requires a weighing of the injury and the benefits to competition attributable to a practice that allegedly violates the antitrust laws. [Monahan's Marine, 866 F.2d at 526](#). The district court instructed the jury on its verdict form to balance the injury to competition in the relevant market with the benefits to competition in that same [**64] relevant market. The NFL protested, claiming that all procompetitive effects of its policy, even those in a market different from that in which the alleged restraint operated, should be considered. The NFL's case was premised on the claim that its policy against public ownership was an important part of the effective functioning of the league as a joint venture. Although it was not readily apparent that this

beneficial effect applied to the market for ownership interests in NFL teams, the relevant market found by the jury, the NFL argued that its justification should necessarily be weighed by the jury under the rule of reason analysis. Sullivan responded, and the district court agreed, that a jury cannot be asked to compare what are essentially apples and oranges, and that it is impossible to conduct a balancing of alleged anticompetitive and procompetitive effects of a challenged practice in every definable market.

The issue of defining the proper scope of a rule of reason analysis is a deceptive body of water, containing unforeseen currents and turbulence lying just below the surface of an otherwise calm and peaceful ocean. The waters are muddied by the Supreme Court's decision [\[**65\]](#) in *NCAA* -- one of the more extensive examples of the Court performing a rule of reason analysis -- where the Court considered the value of certain procompetitive effects that existed outside of the relevant market in which the restraint operated. *NCAA*, 468 U.S. at 115-20 (considering the NCAA's interest in protecting live attendance at untelevised games and the NCAA's "legitimate and important" interest in maintaining competitive balance between amateur athletic teams as a justification for a restraint that operated in a completely different market, the market for the telecasting of collegiate football games).⁹ Other courts have demonstrated similar confusion. See, e.g., [L.A. Coliseum, 726 F.2d at 1381, 1392, 1397, 1399](#) (stating that the "relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue" but then considering a wide variety of alleged benefits, and then directing the finder of fact to "balance the gain to interbrand competition against the loss of intrabrand competition", where the two types of competition operated in [\[**66\]](#) different markets).

To our knowledge, no authority has squarely addressed this issue. On the one hand, several courts have expressed concern over the use of wide ranging interests to justify an otherwise anticompetitive practice, and others have found particular justifications to be incomparable and not in correlation with the alleged restraint of trade. [Smith v. Pro Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173, 1186 \(D.C. Cir. 1978\)](#); [\[**67\] Brown v. Pro Football, Inc., 812 F. Supp. 237, 238 \(D.D.C. 1992\)](#); [Chicago Pro. Sports Ltd. Partnership v. National \[*1112\] Basketball Ass'n, 754 F. Supp. 1336, 1358 \(N.D.Ill. 1991\)](#). We agree that the ultimate question under the rule of reason is whether a challenged practice promotes or suppresses competition. Thus, it seems improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market.

On the other hand, several courts, including this Circuit, have found it appropriate in some cases to balance the anticompetitive effects on competition in one market with certain procompetitive benefits in other markets. See, e.g., *NCAA*, 468 U.S. at 115-20; [Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 799 \(1st Cir. 1988\)](#); [M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 986 \(1st Cir. 1984\)](#); [L.A. Coliseum, 726 F.2d at 1381, 1392, 1397, 1399](#). Moreover, [\[**68\]](#) the district court's argument that it would be impossible to compare the procompetitive effects of the NFL's policy in the *interbrand* market of competition between the NFL and other forms of entertainment, with the anticompetitive effects of the *intrabrand* market of competition between NFL teams for the sale of their ownership interests, is arguably refuted by the Supreme Court's holding in [Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). *Continental T.V.* explicitly recognized that positive effects on *interbrand* competition can justify anticompetitive effects on *intrabrand* competition. [Id. at 51-59](#). Although *Continental T.V.* can reasonably be interpreted as referring only to interbrand and intrabrand components of the *same relevant market*, [Hornsby Oil Co., Inc. v. Champion Spark Plug Co., 714 F.2d 1384, 1394 \(5th Cir. 1983\)](#), there is also some indication that interbrand and intrabrand competition necessarily refer to distinct, yet related, markets. [\[**69\] Continental T.V., 433 U.S. at 52 n.19](#) ("The degree of intrabrand competition is wholly independent of the level of interbrand competition."). Arguably, the market put forward by the NFL -- that is the market for NFL football in competition with other forms of entertainment -- is closely related to the relevant market found by the jury such that the procompetitive benefits in one can be compared to the anticompetitive harms in the

⁹ The Supreme Court did not expressly consider the issue presented here. Therefore, it is impossible to tell whether the Court was consciously applying the rule of reason to include a broad area of procompetitive benefits in a variety of markets, or whether the Court was simply not being very careful and inadvertently extended the rule of reason past its proper scope. There is certainly no language, as Sullivan suggests, indicating that the Court was considering the alleged benefit of "competitive balance" only to the extent that it had procompetitive effects in the market for televised football games.

other. Clearly this question can only be answered upon a much more in-depth inquiry that we need not, nor find it appropriate to, embark upon at this time.

Finally, we note that although balancing harms and benefits in different markets may be unwieldy and confusing, such is the case with a number of balancing tests that a court or jury is expected to apply all the time. Indeed, Justice Brandeis' famous formulation of the rule of reason seems to contemplate the balancing of a wide variety of factors and considerations, many of which are not necessarily comparable or correlative:

HN10[[↑]] The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes [*70] 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.

[Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 \(1918\).](#)

Although the issue of the proper scope of the rule of reason analysis is more appropriately resolved in a case where it is dispositive and more fully briefed, we can draw at least one general conclusion from the caselaw at this point:

HN11[[↑]] courts should generally give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices; however, courts should also maintain some vigilance by excluding justifications that are so unrelated to the [*71] challenged practice that they amount to a collateral attempt to salvage a practice that is decidedly in restraint of trade.

In any event, we need not enter these dangerous waters to resolve the instant dispute. The NFL wanted the jury to consider its proffered justifications for the public [*1113] ownership policy -- namely that the policy enhanced the NFL's ability to effectively produce and present a popular entertainment product unimpaired by the conflicting interests that public ownership would cause. These procompetitive justifications should have been considered by the jury, even under Sullivan's theory of the proper scope of the rule of reason analysis. As we point out in note [4] above, and as Sullivan himself points out, to the extent the NFL's policy strengthens and improves the league, resulting in increased competition in the market for ownership interests in NFL clubs through, for example, more valuable teams, the jury may consider the NFL's justifications as relevant factors in its rule of reason analysis. The danger of the proffered instructions on the verdict form is that they may have mislead the jury into thinking that it was precluded from considering the NFL's justifications [*72] for its ownership policy. Therefore, the relevant market language on the verdict form should be removed, or else the jury should be informed that evidence of benefits to competition in the relevant market can include evidence of benefits flowing indirectly from the public ownership policy that ultimately have a beneficial impact on competition in the relevant market itself.

E. References to Prior Antitrust Cases Against the NFL

Despite a pretrial motion *in limine* and repeated objections by the NFL, the district court allowed the jury to hear numerous references to prior antitrust cases against the NFL. Evidence about prior antitrust violations by the defendant may, in appropriate cases, be admissible to show things like market power, intent to monopolize, motive, or method of conspiracy. [United States Football League v. National Football League, 842 F.2d 1335, 1371 \(2d Cir. 1988\)](#) (hereinafter "USFL"). Because of the inherently prejudicial nature of such evidence, however, evidence of prior antitrust cases involving the NFL are only admissible if Sullivan can demonstrate that the conduct underlying those prior judgments had a direct, [*73] logical relationship to the conduct at issue in the present case. *USFL*, 842 F.2d at 1371; [International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 454 \(1st Cir.\), cert. denied, 375 U.S. 820, 11 L. Ed. 2d 54, 84 S. Ct. 56 \(1963\)](#) (plaintiff must show "that his claimed injury stemmed directly and proximately from the same type of practice condemned in the prior Government action"); see also [Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1351 \(3d Cir. 1975\)](#). In many of the instances where Sullivan or his counsel made references to prior antitrust cases at trial, Sullivan failed to satisfy this burden.

Sullivan argues that the prior cases were relevant either to certain testimony regarding the reasonableness of the NFL's ownership policy and voting requirements or to the issue of defining the relevant market. Because none of the cases mentioned at trial concerned the NFL's ownership policy at issue here, evidence of those prior cases is not relevant to the reasonableness of the NFL's policy against public [**74] ownership. The general voting requirements are not in dispute, so cases touching solely upon them are also not relevant. Certain limited portions of some prior antitrust decisions are relevant to the issue of defining the relevant market. The testimony and commentary at trial concerning these prior cases, however, was not limited to the relevant market portions of these cases and, on the contrary, focussed primarily on the issue of whether the NFL's public ownership policy was unreasonable. As such, that evidence was prejudicial, without any balancing relevance to justify its admission into evidence.

The references to prior NFL cases were made in a number of different contexts during the trial (including during direct examination, cross-examination, and at closing argument), and they contained a variety of different information. These references are not likely to be repeated in precisely the same context upon a new trial. Therefore, instead of identifying which particular pieces of evidence were inadmissible, we think it would be more useful to point out more generally that references to prior NFL cases are not relevant to the issue of the reasonableness of the NFL's public ownership [**75] policy and such references should be excluded if they contain information about the unreasonableness of other policies of the NFL which were at issue in the other cases.

Reversed and remanded.

End of Document

D'Last Corp. v. Ugent

United States District Court for the Northern District of Illinois, Eastern Division

September 19, 1994, Decided ; September 22, 1994, Docketed

No. 94 C 1035

Reporter

863 F. Supp. 763 *; 1994 U.S. Dist. LEXIS 13450 **; 1994-2 Trade Cas. (CCH) P70,773

D'LAST CORPORATION, Plaintiff, v. AVERY A. UGENT; THE BRADLEY ADAM CORPORATION; AMERICAN INTERNATIONAL IMMIGRATION AGENCY, INC.; PAN AMERICAN PHOTOGRAPHIC SUPPLY CORPORATION; AVALUG-CONCORDIA CORPORATION; AIIP, INC.;¹ and US PASSPORT PHOTO SERVICE, INC., Defendants.

Subsequent History: [**1] Supplemental Opinion of September 20, 1994, Reported at: [1994 U.S. Dist. LEXIS 13408](#).

Core Terms

enterprise, conspiracy, employees, allegations, customers, pattern of racketeering activity, defendants', Passport, entities

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 12(b)(6) principles require the district court to accept as true all of plaintiff's well-pleaded factual allegations, drawing all reasonable inferences in plaintiff's favor. No motion to dismiss should be granted unless the court concludes that no relief could be granted under any set of facts that could be proved consistent with those well-pleaded allegations.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN2[Private Actions, Racketeer Influenced & Corrupt Organizations

¹ This is the corporate name listed in the caption of the Complaint. As the text reflects, the actual name is AIPP, Inc.

In a Racketeer Influenced and Corrupt Organizations Act claim, a plaintiff must sufficiently allege a defendants' (1) conduct (2) of an enterprise (3) through a pattern (4) 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

HN3 **Private Actions, Racketeer Influenced & Corrupt Organizations**

An "association in fact," which is a permissible "enterprise" under [18 U.S.C.S. § 1961\(4\)](#), is viewed as sufficiently separable from the individual members of that association so as to allow those members to be sued as Racketeer Influenced and Corrupt Organizations Act-violating "persons."

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**

While the hallmark of conspiracy under the Racketeer Influenced and Corrupt Organizations Act is agreement, the central element of an enterprise is structure. An enterprise must be more than a group of people who get together to commit a "pattern of racketeering activity." Congress intends the phrase a group of individuals associated in fact although not a legal entity, as used in its definition of the term "enterprise" in [18 U.S.C.S. § 1961\(4\)](#), to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity."

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5 **Private Actions, Racketeer Influenced & Corrupt Organizations**

The illegality of purpose of a combination--a conspiracy--does not as such disqualify the combination for association-in-fact status under the Racketeer Influenced and Corrupt Organizations Act. But where that illegality indeed consists of carrying on a pattern of racketeering activity, such disqualification follows for there was no independent "structure," no enterprise distinct, separate, and apart from a pattern of racketeering activity.

863 F. Supp. 763, *763A994 U.S. Dist. LEXIS 13450, **1

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[HN6](#) [blue download icon] Antitrust & Trade Law, Sherman Act

Act [§ 1](#) of the Sherman Act prohibits unreasonable restraints of trade effected by contract, combination, or conspiracy between separate entities.

Antitrust & Trade Law > Sherman Act > General Overview

[HN7](#) [blue download icon] Antitrust & Trade Law, Sherman Act

Courts, in determining whether a conspiracy may exist among related defendants, should consider whether affiliated corporate entities have a complete unity of interest, rather than focusing on mere corporate form. The Sherman Act does not reach conduct that is "wholly unilateral."

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

[HN8](#) [blue download icon] Conspiracy to Monopolize, Elements

[Section 1](#) of the Sherman Act and the conspiracy-to-monopolize provision of [§ 2](#) of the Sherman Act require the same threshold showing: the existence of an agreement to restrain trade. Claims under the two sections differ primarily in that [§ 2](#) of the Sherman Act has the added requirement of specific intent to monopolize--they do not differ as to the nature of the conspiracy.

Counsel: For Plaintiff: Rodney F. Reeves, Chicago, IL.

For Defendants: Robert A. Filpi, Stack, Filpi, & Kakacek Chtd., Chicago, IL.

Judges: Shadur

Opinion by: MILTON I. SHADUR

Opinion

[*764] MEMORANDUM OPINION AND ORDER

D'Last Corporation ("D'Last") has filed a seven-count Complaint against a number of defendants, asserting claims grounded in the Racketeer Influenced and Corrupt Organizations Act ("RICO") (Count I), the Sherman Act (Count II), the Illinois Consumer Fraud and Deceptive Practices Act (Count III), tortious [\[*765\]](#) interference with contracts and prospective contracts (Count IV), trade slander and libel (Count V), piercing the corporate veil (Count VI) and

conspiracy (Count VII). As to all but the first two counts D'Last invokes the supplemental jurisdiction concept of [28 U.S.C. § 1337\(a\)](#).

All of the corporate defendants have moved for dismissal pursuant to [Fed. R. Civ. P. \("Rule"\) 9\(b\), 12\(b\)\(1\)](#) and [12\(b\)\(6\)](#), and the fully-briefed motions have been transferred from the calendar of this Court's colleague Honorable [**2] James Alesia to this Court for disposition. For the reasons stated in this memorandum opinion and order, the motions to dismiss are granted and this action is dismissed.²

D'Last's Allegations

Familiar [HN1\[!\[\]\(05f3bf778979b4ac63dae073a14b39f4_img.jpg\) Rule 12\(b\)\(6\)\]](#) principles require the district court to accept as true all of plaintiff's well-pleaded factual allegations, drawing all reasonable inferences in plaintiff's favor ([Bowman v. City of Franklin, 980 F.2d 1104, 1107 \(7th Cir. 1992\)](#)). No motion [**3] to dismiss should be granted unless the court concludes that no relief could be granted under any set of facts that could be proved consistent with those well-pleaded allegations ([Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 \(1984\)](#)).

D'Last's grievances stem from a group of assertedly anticompetitive activities intended to harm its business of supplying photograph and fingerprint services used primarily for immigration purposes. D'Last and defendants The Bradley Adam Corporation ("Bradley Adam"), American International Immigration Agency, Inc. d/b/a Private Immigration Agency ("American International") and Pan American Photographic Supply Corporation ("Pan American") operate studios engaged in that business in Chicago. Defendants Avalug-Concordia Corporation ("Avalug") and AIPP, Inc. ("AIPP") operate similar businesses in Houston, Texas, and defendant US Passport Photo Service, Inc. ("US Passport") carries on a like business in Miami, Florida. Defendant Avery Ugent ("Ugent"), a Florida resident, is president and sole or controlling shareholder of each of the corporate defendants (all Florida [**4] corporations).

D'Last alleges that from August 1991 through November 1992 employees of Ugent³ and of Bradley Adam undertook a campaign under Ugent's direction for the purpose of either forcing D'Last out of business or compelling D'Last to sell its business to Ugent at a minimal price (Complaint P21). Among the acts ascribed to those employees were stationing "large and threatening" individuals in front of D'Last's studio to prevent and dissuade customers from entering; stealing a canopy and sign from D'Last's entrance; committing batteries on D'Last's employees and on one of its customers; threatening to commit additional batteries; making a series of false or disparaging statements to potential D'Last customers; filing false criminal complaints against D'Last's employees; harassing D'Last's employees; staging fights with D'Last's employees in front of its entrance; paying D'Last's employees to stay home or "slack off" at work; soliciting "intelligence" from D'Last's employees by cash offers; physically turning away D'Last's customers; paying INS workers to direct immigrants to Bradley Adam or American International and to steal fingerprint forms; suborning perjury in a state court [**5] action brought to restrain the obstruction of [*766] D'Last's customers and employees; obstructing D'Last's entrance; and trespassing on D'Last's premises. D'Last also asserts on information and belief that the same employees repeatedly attempted to solicit hit men to kill D'Last's president and perhaps others of its employees.

² Unfortunately both sides' presentations on the current motions have been extraordinarily shallow, in terms of both the analysis and the authorities cited. Although defendants do prevail, that result cannot really be credited to what their counsel has presented as grist for this Court's mill--virtually all of the controlling authorities cited in this opinion were not mentioned in defendants' memoranda at all (or were advanced in an inaccurate way). And on D'Last's RICO claim, the analysis owes nothing to either side's submissions.

³ This is a confusing characterization in light of what D'Last has alleged as to the parties. Ugent is *not* identified in the Complaint as carrying out any activities in his own name--on the contrary, Count VI seeks to impose personal liability on him on the theory that the several defendant corporations are sham entities (the veil-piercing concept). Thus the Complaint's reference to Ugent's "employees" appears to manifest the imprecision of thought or analysis that marks a material part of that pleading.

D'Last ties the other defendants into the complained-of activity by alleging in general terms that each of them participated to some degree in the charged acts. Ugent is said to have directed [**6] the acts by telephone and by traveling from his home in Florida to Chicago (Complaint P22). Bradley Adam allegedly paid the unnamed individuals who actually performed the acts (Complaint P23). American International assertedly participated in the management of those same employees and "knowingly accepted the benefit" of those acts (Complaint P24). Pan American purportedly "conspired" with Bradley Adam, American International and Ugent to refer customers to Bradley Adam (Complaint P25). Avalug, AIPP and US Passport--though none is located or does business in Chicago--allegedly paid part of the salary of Eugene Dickerson ("Dickerson"), Ugent's national manager who was transferred to Chicago to manage the activities of Bradley Adam and to carry out the pattern of oppressive activity (Complaint PP20, 26).

D'Last's RICO claim also alleges other activity on defendants' part in order to satisfy the "racketeering activity" component of that claim (see [18 U.S.C. §§ 1961\(1\)](#) and [\(5\)](#)⁴). Any discussion of those added allegations will be deferred to the section of this opinion dealing with the RICO claim.

[**7] D'Last's Claims

As already indicated, D'Last advances a veritable host of legal theories. Because this opinion finds both federally-based claims insufficient, it also dismisses all of the state-law claims on a nonsubstantive basis under the teaching of [United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 \(1966\)](#). What follows therefore focuses primarily (though not exclusively) on the RICO and Sherman Act claims.

I. RICO

D'Last seeks to bring Section 1962(c) into play to establish its RICO cause of action. As with every such [HN2](#)⁵ RICO claim, D'Last must sufficiently allege defendants' "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity" ([Vicom, Inc. v. Harbridge Merchant Serv., 20 F.3d 771, 778 \(7th Cir. 1994\)](#), quoting [Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 \(1985\)](#)). Movants (who it will be remembered are all the corporate defendants--all of the defendants save Ugent himself⁵) contend that D'Last's RICO claim fails (1) [**8] because D'Last has named precisely the same entities as the defendant RICO "persons" and as the RICO "enterprise" and (2) because D'Last has failed to show a pattern of racketeering activity. Those contentions will be examined in turn.⁶

A. Enterprise

Complaint P29 says that during the relevant time frame "Ugent, Bradley Adam, Avalug, AIPP, and US Passport were jointly engaged in an enterprise," which D'Last dubs as "Ugent Enterprises."⁷ [**9] Although some confusion is created by the poor drafting of the Complaint,⁸ the required reasonable [[*767](#)] inferences call for Ugent Enterprises (as so defined) to be viewed as the "enterprise" whose affairs were conducted by the defendant "persons" through a "pattern of racketeering activity."

⁴ Further citations to RICO will take the form "Section--," referring to Title 18's numbering.

⁵ It seems that as of the time of the parties' briefing Ugent had not yet been served with process.

⁶ Many of the problems with the RICO claim stem from the disorganized, somewhat jumbled and cursory nature of the predicate act allegations.

⁷ American International and Pan American are thus omitted from the "Ugent Enterprises" grouping.

⁸ For example, Complaint P28 also speaks of each defendant (*including* American International and Pan American) as an "enterprise" as well as a "person" defined in [Section 1961\(4\)](#). Then P. Mem. 2 (blithely ignoring how counsel has drafted the Complaint) says that the "enterprise" is an association (identified as Ugent Enterprises) consisting of all seven corporate defendants and Ugent. For now, to view the Complaint in the light most favorable to D'Last, this opinion will assume that the alleged RICO enterprise is an association of virtually all, if not all, of the defendants.

Defendants point to *Haroco v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 400 (7th Cir. 1984), aff'd per curiam on other grounds, 473 U.S. 606 (1985), as establishing that a liable "person" in RICO action must be distinct from the defined "enterprise." But that proposition, as to which *Haroco* chose to follow the analysis of Section 1962(c) set out by this Court in *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 23-24 (N.D. Ill. 1982), [**10] does not carry the precise consequence that defendants seek to ascribe to it here.

Where defendants' assertion fails in that respect is in their unwillingness to recognize the concept that **HN3**[¹¹] an "association in fact" (which is a permissible "enterprise" under *Section 1961(4)*), such as *Ugent Enterprises* is alleged to be here, is viewed as sufficiently separable from the individual members of that association so as to allow those members to be sued as RICO-violating "persons." Although that issue has not yet been ruled upon by our Court of Appeals, "the vast majority of courts agree that an association in fact enterprise is distinct from each of its members for purposes of the person/enterprise distinction requirement" (2 Arthur Matthews, Andrew Weissman & John Sturc, *Civil Rico Litigation* ["Civil Rico Litigation"] § 6.03[A], at 6-40 & n.88 and numerous cases cited there (2d ed. 1992); accord, *River City Markets, Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1462 (9th Cir. 1992)).

But having said that, this Court finds that defendants prevail nonetheless--not quite despite themselves, but for a reason materially different from the simplistic one that [**11] they attempt to elicit from *Haroco*. D>Last's problem is that the combination of defendants that it lumps together as *Ugent Enterprises* does not qualify as an "association in fact" in the RICO sense. What RICO requires of such a grouping was aptly described by our Court of Appeals in *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986), quoting *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980):

HN4[¹²] While the hallmark of conspiracy is agreement, the central element of an enterprise is structure. An enterprise must be more than a group of people who get together to commit a "pattern of racketeering activity."

We hold that Congress intended the phrase "a group of individual's [sic] associated in fact although not a legal entity," as used in its definition of the term "enterprise" in *section 1961(4)*, to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined a part (sic) from the commission of the predicate acts constituting the "pattern of racketeering activity."

[**12]

That concept has been adhered to in such cases as *Jennings v. Emry*, 910 F.2d 1434, 1440-41 (7th Cir. 1990) and *Hartz v. Friedman*, 919 F.2d 469, 471 (7th Cir. 1990)--and it has not been attenuated, in the context posited by D>Last, by the later dictum in *Burdett v. Miller*, 957 F.2d 1375, 1379-80 (7th Cir. 1992). See also 1 *Civil Rico Litigation* P5.04, and particularly P5.04[B][3] at 5-40 to 5-44 and cases cited there.

Here D>Last's own allegations negate an association in fact in the statutory sense--instead its grievance is that the very purpose for which *Ugent Enterprises* existed was to eliminate D>Last and other competitors in the passport photograph and fingerprint business through unlawful means--that is, through the complained-of pattern of racketeering activity. According to D>Last, each of the individual corporations was engaged in the business of providing photography and fingerprint services to its customers (a perfectly legitimate activity by itself). But the only

identified goal for which defendants [*768] joined forces was the nefarious one of carrying on racketeering activity--that [**13] was the *raison d'être* of the "association" as defined by D'Last itself.⁹

And so it is that D'Last has pleaded itself out of court on its attempted RICO claim. It has sought to sue RICO "persons" who have not conducted a separate RICO "enterprise" through a pattern of racketeering activity--at [**14] least not in the sense that has been prescribed by *Haroco* and like decisions. Count I is dismissed.

B. Pattern of Racketeering That just-stated conclusion makes it unnecessary to parse the Complaint to see whether D'Last has sufficiently alleged a pattern of racketeering activity. Despite the guidance provided by the ultimate authority in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237-43, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989), the contours of such a pattern remain difficult to mark out with any precision. Suffice it to say that this Court's review of the Complaint has disclosed it to be problematic in a number of respects--but again those need not be rehearsed in light of Count I's already-identified deficiency.

II. Antitrust Violations

D'Last claims in Count II that the same actions that formed the gravamen of its unsuccessful RICO claim also constituted a conspiracy in restraint of trade and a conspiracy to monopolize trade in violation of Sherman Act ("Act") §§ 1 and 2, 15 U.S.C. §§ 1 and 2. Defendants move to dismiss that count on the grounds (1) that there [**15] can be no actionable antitrust conspiracy because of the close affiliation among the purported conspirators and (2) that D'Last has failed to allege a sufficient nexus with interstate commerce.¹⁰ Because the first of those reasons compels the dismissal of Count II, once again there is no need to examine defendants' second contention.

[**16] A. Intra-enterprise Conspiracy

HN6 [↑] Act § 1 prohibits "unreasonable restraints of trade effected by 'contract, combination, or . . . conspiracy' between *separate entities*" (*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)) (emphasis in original)). *Copperweld*, *id. at 776-77* held that a parent corporation and its wholly-owned subsidiaries are legally incapable of conspiring with each other in the sense proscribed by Act § 1. While the Court specifically limited its holding to the parent-subsidiary relationship (*id. at 767*), its rationale--essentially that a conspiracy with oneself is conceptually impossible, like the sound of one hand clapping--compels the same result here.

Copperweld, *id. at 771-72* recommended that **HN7** [↑] courts, in determining whether a conspiracy may exist among related defendants, should consider whether affiliated corporate entities have a complete unity of interest, rather [**17] than focusing on mere corporate form. It held that the Act does not reach conduct that is "wholly unilateral" in that sense (*id. at 768*).

[*769] Here D'Last makes numerous allegations that defendants are unified, including these:

⁹ It is no accident that D'Last's Count II incorporates the selfsame substantive allegations, and no more, as the predicate for charging a conspiracy in violation of the antitrust laws. To be sure, **HN5** [↑] the illegality of purpose of a combination--a conspiracy--does not as such disqualify the combination for association-in-fact status under RICO. But where that illegality indeed consists of carrying on a pattern of racketeering activity, such disqualification follows under the teaching of *Neapolitan* and the other cases cited here--for there was no independent "structure," no "enterprise . . . distinct, separate, and apart from a pattern of racketeering activity" (*Jennings*, 910 F.2d at 1440).

¹⁰ There are other critical flaws in D'Last's antitrust count. For one thing, it fails to allege injury to competition rather than merely to competitors (see, e.g., *Car Carriers v. Ford Motor Corp.*, 745 F.2d 1101, 1107 (7th Cir. 1984); *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769, 779 (N.D. Ill. 1993)). For another, D'Last includes no adequate allegations of a specific intent to monopolize--an essential element of *Section 2* conspiracies (*Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1576 (11th Cir. 1991); *Appraisers Coalition v. Appraisal Inst.*, 845 F. Supp. 592, 603 (N.D. Ill. 1994)).

Avery A. Ugent . . . is sole or controlling shareholder of each of the corporate Defendants. (Complaint P6) Defendants Ugent, Bradley Adam, Avalug, AIPP, and US Passport were jointly engaged in an enterprise[.] (Complaint P29)

At all times mentioned . . . Ugent failed to operate the Defendant corporations as legal entities separate from himself and each other[.] (Complaint P55)

The several Defendants acted as agents and principals of each other[.] (Complaint P59)

Such allegations connote a complete unity of interest. This Court finds that the reasoning of *Copperweld* applies and that no conspiracy under the Sherman Act may exist under the circumstances alleged by D'Last.

To date our Court of Appeals has not directly addressed the question whether multiple defendants under the same ownership and control may "conspire" within the meaning of the Act.¹¹ Courts elsewhere, however, have regularly [**18] held that the *Copperweld* rationale applies to such situations (see, e.g., *Guzowski v. Hartman*, 969 F.2d 211, 214 (6th Cir. 1992); *Advanced Health-Care Serv., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 146-47 (4th Cir. 1990) and cases cited there; *H.R.M.. Inc. v. Tele-Communications, Inc.*, 653 F. Supp. 645, 647-48 (D. Colo. 1987)). Professor Areeda agrees (VII Philip Areeda, *Antitrust Law* § 1464f (1986)).

[**19] This opinion's ruling applies to D'Last's conspiracy claims under both Act §§ 1 and 2. Indeed, *HN8*¹ Act § 1 and the conspiracy-to-monopolize provision of *Section 2* "require the same threshold showing: the existence of an agreement to restrain trade" (*Seagood Trading*, 924 F.2d at 1576; see *Appraisers Coalition*, 845 F. Supp. at 603). Claims under the two sections differ primarily in that Act § 2 has the added requirement of specific intent to monopolize--they do not differ as to the nature of the conspiracy (see *Seagood Trading*, 924 F.2d at 1576).

B. Interstate Commerce

As just stated, D'Last has also pleaded itself out of court on its Count II for lack of an actionable conspiracy. Hence this opinion need not address defendants' argument that D'Last has failed to plead a sufficient effect on interstate commerce. This Court's silence on the issue should create no inference in either direction.

III. State Law Claims

With both federal-question claims thus having gone by the boards, nothing remains as a jurisdictional anchor to which D'Last's several state-law claims can moor themselves. *Section I*^{**201} 1367 speaks of "supplemental jurisdiction," and the essential primary jurisdiction is nonexistent. *Wright v. Associated Ins. Cos., No. 93-3619, 29 F.3d 1244, 1994 U.S. App. LEXIS 18302*, at *17-*22 (7th Cir. July 21) is one of several recent decisions reconfirming that where such a determination has been made at the very threshold of a case in the circumstances posed here, the rule of *United Mine Workers v. Gibbs*, 383 U.S. at 726 compels dismissal. Accordingly Counts III through VII are dismissed without prejudice to their reassertion in a court of competent jurisdiction.¹²

Conclusion

Defendants' motions [**21] to dismiss are granted in their entirety. Although Ugent has not joined in the motions, the flaws identified in this opinion are claim-oriented rather than [*770] party-specific and doom both federal claims in their entirety. And because those flaws are substantive rather than mere defects in pleading,¹³ not only the

¹¹ *Fishman v. Wirtz*, 807 F.2d 520, 542 n.19 (7th Cir. 1986) declined to extend the *Copperweld* rationale to a situation having "some overlap" of ownership and control, finding such an extension not warranted under the facts of that case. By contrast, this case involves a *total* overlap--a total unity of interest--among defendants, the same relationship that has led courts in other Circuits to apply the *Copperweld* rationale to find that no antitrust conspiracy may exist in those terms.

¹² This Court has examined all of those counts in detail and has found each of them wanting in different ways. But because anything said in those respects would be not only dictum but also in the nature of an advisory opinion prohibited by Article III, once again silence is the proper course to pursue.

863 F. Supp. 763, *770 (1994 U.S. Dist. LEXIS 13450, **21

Complaint but this action itself are dismissed. Such dismissal is with prejudice as to Counts I and II and without prejudice as to Counts III through VII.

Milton I. Shadur

Senior United States District Judge

Date: September 19, 1994

End of Document

¹³ Nor has D'Last's counsel suggested any prospect of a jurisdictionally curative amendment in its memorandum in opposition to defendants' motions.

Norcen Energy Resource v. Pacific Gas & Elec. Co.

United States District Court for the Northern District of California

September 19, 1994, Filed

No. C-94-0911-VRW

Reporter

1994 U.S. Dist. LEXIS 21347 *; 1994-2 Trade Cas. (CCH) P70,851

NORCEN ENERGY RESOURCE LIMITED and NORCEN MARKETING INCORPORATED, Plaintiffs, v. PACIFIC GAS & ELECTRIC COMPANY, and PACIFIC GAS TRANSMISSION COMPANY and the PG&E/PGT PIPELINE EXPANSION PROJECT, Defendants.

Disposition: [*1] Defendants' motion to dismiss plaintiff's Sherman Act claims based on Noerr-Pennington and the state action doctrine GRANTED. Defendants' motion to dismiss plaintiff's Sherman Act claims based on collateral estoppel and the filed rate doctrine DENIED. Plaintiff's § 2 claims DISMISSED WITHOUT PREJUDICE. Plaintiff's Sherman Act § 1 claim DISMISSED WITHOUT PREJUDICE. All federal antitrust claims DISMISSED. Plaintiff's state law claims DISMISSED WITHOUT PREJUDICED.

Core Terms

defendants', rates, antitrust, ban, transportation, crossover, regulated, natural gas, customers, monopoly, pipeline, squeeze, Sherman Act, immunity, alleges, motion to dismiss, anticompetitive, intrastate, state action doctrine, postage stamp, manipulation, northern, filed rate doctrine, competitors, shippers, cases, antitrust claim, anti trust law, petition for review, state action

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN1 [blue download icon] **Motions to Dismiss, Failure to State Claim**

In considering a motion to dismiss under ed. R. Civ. P. 12(b)(6), a court must determine whether the facts pled in the complaint entitle plaintiff to the relief sought. A court may only consider allegations made in the complaint; extrinsic factual material may not be taken into account. If the allegations in the complaint are contradicted by the attached documents, a court may dismiss the claims under Rule 12(b)(6). The court may also consider records and reports of administrative bodies.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN2 [blue download icon] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine holds that antitrust laws cannot be used to attack legitimate political activity. This is so even if the defendant harbors anticompetitive motives and the activity in question has detrimental effects on a particular industry or group of competitors.

[Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope](#)

[HN3](#)[] Exemptions & Immunities, Parker State Action Doctrine

That a private party's political motives are selfish is irrelevant: the Noerr-Pennington doctrine shields from the Sherman Act a concerted effort to influence public official regardless of intent or purpose.

[Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview](#)

[HN4](#)[] Exemptions & Immunities, Noerr-Pennington Doctrine

The sham exception encompasses situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon.

[Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview](#)

[HN5](#)[] Exemptions & Immunities, Parker State Action Doctrine

The state action doctrine is based on principles of federalism and derives from the Supreme Court's opinion that the antitrust laws were not intended to interfere with states' exercise of their sovereign regulatory powers. Because of federal deference to states' decisions to displace competition with regulation, allegedly anticompetitive restraints become immune to antitrust attack if they are clearly articulated and affirmatively expressed as state policy and the policy in question is "actively supervised" by the state.

[Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > General Overview](#)

[Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes](#)

[HN6](#)[] Exemptions & Immunities, Parker State Action Doctrine

An antitrust challenge directed at the interaction of state and federal rates falls outside of the state action doctrine.

[Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation](#)

[Energy & Utilities Law > Utility Companies > Rates > General Overview](#)

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Utility Companies > General Overview

HN7 Energy & Utilities, State Regulation

The challenged restraint that is clearly articulated and affirmatively expressed as state policy is demonstrated by showing the state's intent to displace competition with a regulatory structure. In the California natural gas industry, the state's intention is made clear by the California Public Utilities Code, which leaves rate determination to California Public Utilities Commission's discretion. The second prong requires that the state "actively supervise" the regulatory program. The purpose of "active supervision" is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention.

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN8 Utility Companies, Rates

See [Cal. Pub. Util. Code § 739.6](#).

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN9 Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine holds that buyers and sellers have no legally cognizable right to pay or receive a rate in a regulated industry other than the rate established by the rate-setting agency.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN10 Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine does not provide antitrust immunity. Rather, the doctrine limits the applicability of treble damage awards when they would have to be measured relative to baseline rates established by regulatory bodies.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Energy & Utilities Law > ... > Public Utility Commissions > Hearings & Orders > Judicial Review

HN11 [blue document icon] **Decisions, Collateral Estoppel**

Under California's statutory scheme for appeal of California Public Utilities Commission (CPUC) decisions, the California Supreme Court reviews CPUC findings to determine whether the commission acted within its authority and obeyed the federal and California Constitutions. [Cal. Pub. Util. Code § 1757](#).

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

HN12 [blue document icon] **US Department of Justice Actions, Civil Actions**

See [Cal. Pub. Util. Code § 1757](#).

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Energy & Utilities Law > Antitrust Issues > Administrative Considerations

Energy & Utilities Law > Administrative Proceedings > Rehearings

Energy & Utilities Law > Antitrust Issues > General Overview

HN13 [blue document icon] **US Department of Justice Actions, Civil Actions**

Regulatory agencies can and do approve actions, which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance. In short, the antitrust laws are merely another tool, which a regulatory agency employs to a greater or lesser degree. The fact that an agency considers antitrust issues does not mean that its findings need be conclusively established.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN14 [blue document icon] **Sherman Act, Claims**

A § 2 violation of the Sherman Act has three elements: (1) monopoly power in a relevant market; (2) willful acquisition and maintenance of that power; and (3) causal antitrust injury. A plaintiff's complaint must state facts that establish all three of these elements to survive a defendant's motion to dismiss.

Antitrust & Trade Law > Sherman Act > General Overview

HN15 [blue document icon] **Antitrust & Trade Law, Sherman Act**

To state a claim under § 2 of the Sherman Act, a plaintiff must allege that its antitrust injury was caused by conduct that can give rise to an antitrust claim. A finding of some slight wrongdoing in certain areas need not by itself add up to an antitrust violation.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN16 [] **Regulated Practices, Monopolies & Monopolization**

The test of willful maintenance or acquisition of monopoly power is whether the acts complained of unreasonably restricted competition.

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

HN17 [] **Energy & Utilities Law, Antitrust Issues**

If a monopolist is charged with refusing to aid a competitor, antitrust liability is determined by asking whether there was a legitimate business justification for the monopolist's conduct. In addition, a plaintiff must demonstrate that the defendant's conduct harmed not only the plaintiff but also competition generally.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN18 [] **Statute of Limitations, Time Limitations**

[15 U.S.C.S. § 15b](#) provides a four-year statute of limitations for antitrust violations. The limitations period begins to run when the defendant commits the acts giving rise to the alleged injury.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN19 [] **Actual Monopolization, Anticompetitive & Predatory Practices**

To demonstrate predatory conduct, the plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation.

Antitrust & Trade Law > Sherman Act > Scope > 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

HN20 [blue icon] Sherman Act, Scope

A tying arrangement can be unlawful either per se or if it unreasonably restrains commerce in the tied product or service. The essential elements of a per se § 1 tying claim are, first, there must be two distinguishable product markets. Second, the seller of one product, the tying product, must, through exercise of control of that product, force the buyer into purchase of the second, or tied product, when the buyer did not wish to purchase it or would have wished to purchase it on different terms. Not every bundling of two products is unlawful. Only if the seller "forces" the buyer into a purchase it would not otherwise make does actionable tying exist. To determine whether a tying arrangement places unreasonable restraints on competition for the tied product, courts must investigate the effect of the alleged unlawful tie on competition for the tied product.

Counsel: For NORCEN ENERGY RESOURCES, NORCEN MARKETING, Plaintiffs: Robert A. Goodin, Goodin MacBride Squeri Schlotz & Ritchie, San Francisco, CA. Joseph L. Alioto, Joseph L. Alioto Law Offices, San Francisco, CA.

For PACIFIC GAS & ELECTRIC COMPANY, defendant: Marie L. Fiala, M. Laurence Popofsky, Heller Ehrman White & McAuliffe, San Francisco, CA.

For PACIFIC GAS TRANSMISSION CO., defendant: Michael D. Stokes, LeBoeuf Lamb Greene & MacRae, San Francisco, CA. Charles B. Renfrew, LeBoeuf Lamb Greene & MacRae, San Francisco, CA.

For PG&E/PGT PIPELINE EXPANSION PROJECT, defendant: Charles B. Renfrew, LeBoeuf Lamb Greene & MacRae, San Francisco, CA.

For PACIFIC GAS TRANSMISSION CO., Counter-claimant: Michael D. Stokes, LeBoeuf Lamb Greene & MacRae, San Francisco, CA. [*2] Charles B. Renfrew, Leboeuf Lamb Greene & Macrae, San Francisco, CA.

For NORCEN ENERGY RESOURCES, NORCEN MARKETING, Counter-defendants: Robert A. Goodin, Goodin MacBride Squeri Schlotz & Ritchie, San Francisco, CA. Joseph L. Alioto, Joseph L. Alioto Law Offices, San Francisco, CA.

Judges: VAUGHN R. WALKER, United States District Judge.

Opinion by: VAUGHN R. WALKER

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS.

Plaintiff Norcen Energy Resources Limited is a Canadian producer of petroleum products, including natural gas. Norcen Marketing Incorporated, the marketing arm of Norcen Energy, is a Delaware corporation and wholly owned subsidiary of Norcen Energy. For the purposes of this order, plaintiffs are treated as one entity.

Defendant Pacific Gas and Electric is a combined electrical and natural gas public utility. Within its service area in California, PG&E is regulated by the California Public Utilities Commission. Pacific Gas Transmission Company is a wholly owned subsidiary of PG&E that operates an interstate natural gas pipeline system and is regulated by the Federal Energy Regulatory Commission. PGT delivers natural gas from Kingsgate, British Columbia, to PG&E's terminal [*3] at Malin, Oregon. From Malin, gas is distributed over PG&E's local pipe to customers within California.

Defendant PG&E/PGT Pipeline Expansion Project is allegedly a partnership or joint venture between PGT and PG&E formed for the purpose of adding pipeline capacity between Kingsgate and various points of delivery within California. Portions of the Expansion Project between Kingsgate and Malin are regulated by FERC; portions from Malin to endpoints within California are regulated by the CPUC.

I

The events leading up to this lawsuit are largely undisputed, although their legal significance is hotly contested. Before 1986, CPUC regulations required large industrial users or natural gas in California to purchase a bundled combination of natural gas plus transportation from PG&E. In December 1986, however, changes to the regulatory framework allowed large customers to purchase transportation-only service from PG&E, enabling those customers to obtain natural gas from suppliers other than the utility. Following the 1986 rule changes, Norcen Marketing's predecessor in interest, Bonus, began marketing natural gas to California customers, transporting gas over interstate pipelines to the [*4] California border, where title would pass to the customers, who would use their own separately purchased transportation rights over PG&E's intrastate pipe to deliver gas to their burner tips.

In May 1987, Bonus obtained authorization from FERC allowing Bonus to ship gas over PGT's Kingsgate-Malin pipeline on an interruptible basis. As its name suggests, interruptible service can be interrupted by the pipeline owner, in this case PGT, to service customers who have noninterruptible, or firm, transportation rights. Bonus requested firm transportation over PGT's pipe, but its request was denied, allegedly because of pressure from PGT's parent, PG&E. Norcen contends that this refusal was motivated by PG&E's interest in keeping competitors out of the northern California market by eliminating reliable alternative sources of supply. Norcen also alleges that PG&E repeatedly informed Bonus' customers that Bonus could not provide reliable supply, and that Bonus' customers should switch back to PG&E. PG&E insists that all of PGT's firm capacity was needed to serve PG&E and that PGT was under no legal obligation to make firm transport available to competitors of PG&E.

In March 1988, PGT announced [*5] a proposed expansion of its Kingsgate-Malin pipeline to serve customers in the Pacific Northwest and southern (but not northern) California. Concurrent with PGT's expansion, PG&E planned to expand its intrastate capacity to bring the additional gas brought by PGT's expansion through California to a delivery point at Kern River Junction in southern California. This combined venture became known as the "Expansion Project." PGT filed for regulatory approval of the interstate portion of the Expansion Project in December 1988. Bonus protested this application before FERC, claiming that PGT's refusal to use the Expansion Project to deliver gas to Malin was an anticompetitive effort to preclude suppliers other than PG&E from selling into the northern California market.

Two days after PGT's Expansion Project announcement, Bonus requested firm transportation rights on the Expansion Project to PG&E's terminal at Malin, Oregon. PGT denied this request, instead offering Bonus delivery to Kern River Junction. Bonus refused. Several months later, Norcen contends, PGT provided PG&E firm transportation over the Expansion Project to Malin for the purpose of serving PG&E's northern California customers. [*6] Bonus then amended its opposition to PGT's application before FERC, protesting what Bonus saw as PGT's discriminatory allocation of capacity in favor of PG&E.

PG&E filed for CPUC approval of the intrastate portions of the Expansion Project in April 1989. *Re Pacific Gas & Elec Co*, [39 CPUC 2d 69, 77 \(1990\)](#). The application for a certificate of public necessity stated that PG&E's proposed new capacity would be used only for shippers on the PGT portion of the Expansion Project and requested "postage stamp" rates. *Id. at 126*. Under postage stamp rates, the shipper is charged a flat rate for delivery, regardless of the actual distance the gas travels. Bonus also opposed this application.

In July 1990, FERC held a conference on PGT's Expansion application, [Re Pacific Gas Transmission Co, 54 F.E.R.C. P61,035, 61,146 \(1991\)](#), at which, Norcen alleges, FERC urged PGT to accommodate Bonus' request for firm transportation on the Expansion Project to Malin, Oregon. Following this meeting, Bonus and PGT executed a "July Letter Agreement," in which Bonus agreed to drop its opposition to the Expansion Project in return for what Norcen now claims was an agreement by PGT to request additional incremental [*7] capacity to allow Bonus firm transport to Malin.

CPUC authorized construction of the PG&E portion of the Expansion Project in December 1990 and specifically approved PG&E's postage stamp rates, finding that this rate structure provided a reasonable means of ensuring that Expansion shippers would bear the costs of the project. *Re Pacific Gas & Elec Co*, [39 CPUC 2d 69, 126, 156 \(1990\)](#). In endorsing the rates, CPUC specifically relied on the assumption that the majority of Expansion shippers would be transporting gas to southern California. Id; see also *Re Pacific Gas & Elec Co*, [40 CPUC 2d 497, 504-05 \(1991\)](#) (reaffirming postage stamp rates based on a finding that the Expansion Project would primarily supply southern California customers).

Concerned that the Expansion Project was excluding competitors from the northern California market, FERC in January 1991 ordered PGT to establish a delivery point for the Expansion Project at Malin and to hold an "open season" auction for Expansion Project capacity to Malin. *Re Pacific Gas Transmission Co*, [54 F.E.R.C. P61,035, 61,156, 61,162 \(1991\)](#). PGT then allegedly repudiated the July Letter Agreement and required that Norcen, which had [^{*8}] acquired Bonus' interests, participate in the auction to obtain firm transportation rights to Malin.

Through the open season auction, Norcen obtained a thirty year firm service agreement (FSA), committing Norcen to purchase approximately \$ 13 million dollars (Cdn) of capacity per year on the Expansion Project to the Malin terminal. Under the terms of the open season auction, FSA commitments were conditioned upon PG&E's construction of its portion of the Expansion Project.

Two days before the end of the open season auction, PG&E filed an application with CPUC to modify the Expansion Project certificate to include a "crossover ban," a declaration that PG&E's portion of the Expansion Project should be the sole means of delivery for gas shipped through PGT's portion of the Expansion to any California customer. In other words, gas shipped to Malin on the Expansion Project could not be delivered to customers over previously existing PG&E capacity. The effect of the crossover ban was to subject gas transported to Malin on the Expansion Project to higher intrastate delivery charges than gas transported to Malin over PGT's old capacity.

Despite Norcen's vigorous opposition to the crossover [^{*9}] ban, CPUC granted PG&E's petition in June 1991. *Re Pacific Gas & Elec Co*, [40 CPUC 2d 628 \(1991\)](#). FERC, however, concerned that PGT Expansion customers would not have nondiscriminatory access to the northern California market, imposed a construction ban on the PGT Expansion in August 1991. *Re Pacific Gas Transmission Co*, [57 F.E.R.C. P61,192 \(1991\)](#). CPUC, PGT and PG&E assured FERC that CPUC would reconsider the crossover ban, and FERC lifted its construction ban in October 1991 but reduced PGT's rate of return by more than two percentage points. *Re Pacific Gas Transmission Co*, [57 F.E.R.C. P61,097 \(1991\)](#). In October 1992, CPUC reaffirmed the crossover ban. *Re Pacific Gas & Elec Co*, [1992 Cal. PUC LEXIS 920, 138](#) P.U.R.4th 105 (1992). A group of "Indicated Expansion Shippers," including Norcen, sought review of the CPUC decision by the California Supreme Court, which denied the petition in May 1993. *Indicated Expansion Shippers v PUC*, [1993 Cal. LEXIS 2541](#), No S031579 (Cal Sup Ct May 13, 1993) (order denying petition for review).

Meanwhile, in October 1991, PG&E went forward with construction its portion of the Expansion Project, triggering the obligations of shippers like Norcen obtained in the open season auction to purchase [^{*10}] capacity on PGT's portion of the Expansion Project. Norcen contends that PG&E's decision to go forward with the Expansion Project was commercially unreasonable, as PG&E had received subscriptions for only 40 percent of the intrastate capacity, and was part of a bad faith effort to ensure that PGT's Expansion would go forward. In September 1991, PG&E had allegedly agreed to grant TransCanada Pipelines a right of first refusal to purchase PGT, and the price PG&E would receive for PGT was related to whether the Expansion Project was built.

The Expansion Project went into service in November 1993. Norcen has been paying all monies invoiced by PGT under protest and has declined to make use of the capacity available to it under its FSA.

II

Norcen brings claims against PGT, PG&E and the alleged joint entity PG&E/PGT Pipeline Expansion Project for monopolization in violation of Sherman Act § 2, restraint of trade in violation of the Cartwright Act, unfair business

practices in violation of the Unfair Practices Act, restraint of trade for allegedly unlawful tying of services in violation of Sherman Act § 1 and the Cartwright Act, fraudulent inducement, breach of contract, breach of the [*11] covenant of good faith and fair dealing for seeking the crossover ban, breach of the covenant of good faith and fair dealing for constructing the PG&E portion of the Expansion Project, promissory estoppel and rescission. Plaintiff seeks treble antitrust damages, contract damages, restitution and rescission of its thirty year FSA.

Defendants move to dismiss all of Norcen's claims under [FRCP 12\(b\)\(6\)](#). They assert that plaintiff's antitrust claims are barred by collateral estoppel, the state action doctrine, the *Noerr-Pennington* doctrine, the filed-rate doctrine and a lack of antitrust injury. Defendant PG&E also asserts that Norcen has no contract claims against it because PG&E was never a party to any of Norcen's purported contracts. Defendant PGT asserts that it had nothing to do with PG&E's decision to construct the PG&E portion of the Expansion Project and that no claims against it can be based on that event.

Finally, defendants argue that the alleged legal entity PG&E/PGT Pipeline Expansion Project is simply a cooperative enterprise of two separate corporations that does not give rise to joint and several liability, and that service on the alleged entity was improper.

III

[*12] [HN1](#)[↑] In considering a motion to dismiss under Rule 12(b)(6), the court must determine whether the facts pled in the complaint entitle plaintiff to the relief sought. [Conley v Gibson, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#). A court may only consider allegations made in the complaint; extrinsic factual material may not be taken into account, [Powe v City of Chicago, 664 F.2d 639, 642 \(7th Cir 1981\)](#), although materials properly attached to a complaint as exhibits may be considered for purposes of Rule 12(b)(6). [Hal Roach Studios v Richard Feiner & Co, 896 F.2d 1542, 1555 n. 19 \(9th Cir 1989\)](#); [Amfac Mortgage Corp v Arizona Mall of Tempe, Inc, 583 F.2d 426, 429 & n. 2 \(9th Cir 1978\)](#); see [FRCP 10\(c\)](#) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). If the allegations in the complaint are contradicted by the attached documents, a court may dismiss the claims under Rule 12(b)(6). See [Nishimatsu Const Co v Houston Nat'l Bank, 515 F.2d 1200, 1206 \(5th Cir 1975\)](#) (dismissing claim under Rule 12(b)(6) where plaintiffs alleged in complaint that corporate officer signed agreement in personal capacity and the attached agreement revealed signature was [*13] made in corporate capacity); [Durning v First Boston Corp, 815 F.2d 1265 \(9th Cir\)](#) ("[Attached] documents are part of the complaint and may be considered in determining whether the plaintiff can prove any set of facts in support of the claim."), cert denied, 488 U.S. 944 (1987). The court may also consider records and reports of administrative bodies. [Mack v South Bay Beer Distrib., Inc, 798 F.2d 1279, 1282 \(9th Cir 1986\)](#). With these standards in mind, the court turns to the doctrinal bars defendants raise to plaintiff's antitrust claims.

A

[HN2](#)[↑] The *Noerr-Pennington* doctrine holds that antitrust laws cannot be used to attack legitimate political activity. This is so even if the defendant harbors anticompetitive motives and the activity in question has detrimental effects on a particular industry or group of competitors. For example, in [City of Columbia v Omni Outdoor Advertising, Inc, 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 \(1991\)](#), plaintiff argued that defendant engaged in an unlawful conspiracy with the local government to cause passage of a zoning ordinance that prevented plaintiff from erecting billboards that would compete with defendant. The Court held that defendant's activities fell [*14] within the *Noerr-Pennington* exception as "activities relating to the enactment of the ordinances," *id at 384*, even though defendant's motive was clearly selfish and its behavior arguably corrupt. [HN3](#)[↑] That a private party's political motives are selfish is irrelevant: 'Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.' *Id at 380* (quoting [United Mine Workers of Am v Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#)); see also [499 U.S. at 382-84](#) (rejecting a "conspiracy exception" to Noerr-Pennington).

Defendants point out that all of the activities they have engaged in required regulatory approval, either by FERC or CPUC. Following the *Noerr-Pennington* line of cases, defendants argue that their efforts to further their own

business interests through regulation are immune from antitrust attack as legitimate efforts to "petition the Government for a redress of grievances." [U.S. Const. amend I; Omni Outdoor Advertising, 499 U.S. at 379.](#)

Plaintiff responds by seeking to invoke a "price squeeze" exception to *Noerr-Pennington*. In [City of Kirkwood v Union Electric Co, 671 F.2d 1173 \(8th Cir 1982\)](#), cert denied, [*15] 459 U.S. 1170, 74 L. Ed. 2d 1013, 103 S. Ct. 814 (1983), and [City of Mishawaka v American Electric Power Co, 616 F.2d 976 \(7th Cir 1980\)](#), cert denied, 449 U.S. 1096, 66 L. Ed. 2d 824, 101 S. Ct. 892 (1981) (*Mishawaka II*), electric utility defendants created a "price squeeze" by raising federally regulated wholesale rates without raising state-regulated retail rates. Plaintiffs, municipalities that bought wholesale power from defendants and competed in retail sales, charged that defendants' rate manipulations were not immunized by *Noerr-Pennington*. The Seventh and Eighth Circuits agreed, holding that the doctrine does not protect use of the political process to achieve an unlawful end. See [Kirkwood, 671 F.2d at 1181](#) ("The right [to Redress grievances] may not be used as a pretext to achieve otherwise unlawful results."); [Mishawaka II, 616 F.2d at 981-83](#). Plaintiff argues that defendants' conduct falls squarely within this exception: defendants pushed their allegedly anticompetitive rate design through CPUC to manipulate and take advantage of the dual federal-state regulatory structure in the natural gas industry, thereby harming competition.

In crafting the price squeeze exception to *Noerr-Pennington*, the Eight Circuit [*16] in *Kirkwood* and the Seventh Circuit in *Mishawaka II* relied heavily on [California Motor Transport Co v Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#), which involved the so-called "sham" exception to *Noerr*. See [Kirkwood, 671 F.2d at 1181; Mishawaka II, 616 F.2d at 982](#). In *Trucking Unlimited*, plaintiff and defendant were competing trucking companies. Plaintiff argued that defendant blocked plaintiff's attempts to secure regulatory approval to enter the California trucking business by repeatedly challenging plaintiff's regulatory petitions, thereby unlawfully monopolizing the industry. The Court held that such abuse of the political system fell within the sham exception to *Noerr* to the extent it precluded plaintiff's access to political bodies.

[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 draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as administrative or judicial [*17] processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'

[404 U.S. at 513](#). The Seventh and Eighth Circuits both viewed *Trucking Unlimited* as signaling a retreat from *Noerr-Pennington*, making possible their finding of a price squeeze exception. [Kirkwood, 671 F.2d at 1181](#) (basing holding on *Trucking Unlimited* and [Cantor v Detroit Edison Co, 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 \(1976\)](#); [Mishawaka II, 616 F.2d at 982-83](#) (comparing defendant's conduct with that in *Trucking Unlimited*)).

The Supreme Court's recent decision in *Omni Outdoor Advertising* reaffirms the vitality and broad scope of *Noerr-Pennington* and clearly limits the reach of *Trucking Unlimited*. The Court emphasized that [HN4](#) the sham exception "encompasses situations in which persons use the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon." [499 U.S. at 380](#) (emphasis in original). For example, a monopolist that seeks to drag out litigation to consume a would-be competitor's resources and drive it out of business could have committed an antitrust violation under the sham exception. [*18] *Omni Outdoor Advertising* makes clear, however, that use of administrative or legislative processes to achieve anticompetitive objectives is not a "sham" merely because the objectives sought are anticompetitive. See [Omni Outdoor Advertising, 499 U.S. at 381](#) (noting that *Noerr-Pennington* applied even though "[defendant] indisputably set out to disrupt [plaintiff]'s business relationships"); see also [id at 380](#) ("That a private party's political motives are selfish is irrelevant.").

Omni Outdoor Advertising must be read as implicitly overruling *Kirkwood* and *Mishawaka II*'s recognition of a price squeeze exception to *Noerr-Pennington*. The presence of only one regulatory body does not render *Omni Outdoor Advertising*'s reasoning inapplicable. A utility that asks a regulatory body for favorable rates against a background that includes a dual federal-state regulatory system is engaging in [First Amendment](#) conduct no less than a billboard company when it lobbies the city council to pass favorable zoning ordinances against a background of

longstanding friendship between the billboard company and town council members. The alleged price squeeze in this case clearly [*19] stems from defendants' use of the regulatory processes. In *Omni* terms, it is an "outcome" that cannot be folded into the sham exception to *Noerr*.

The court, therefore, refuses to find that defendants' alleged manipulation of the dual federal-state regulatory scheme falls outside of the scope of [First Amendment](#) conduct protected from antitrust attack by the *Noerr-Pennington* doctrine.

Even if a price squeeze exception to *Noerr* exists, however, plaintiff's argument fails because *Kirkwood* and *Mishawaka II* are plainly distinguishable. In each, the regulatory allowed defendants to increase wholesale rates more rapidly than retail rates. The former went into effect automatically, subject to refund, thirty days after filing or after a limited suspension period imposed by FERC, whereas the latter went into effect only following state rate setting. [Kirkwood, 671 F.2d at 1176](#); [Mishawaka II, 616 F.2d at 980](#). This timing differential made possible the "manipulations" challenged in each case. As the Seventh Circuit described it, the *Mishawaka II* defendant "was able to set its own wholesale rates for lengthy periods of time without regulatory interference. * [*20] ** When federal regulation actually occurs, the abuse is mildly remedied by refunds." [Id. at 982](#). This is in contrast to the instant case, in which defendants were subject to regulatory preapproval for all of their actions. Defendants could not have manipulated the regulatory process in the same manner. See, e.g., Complaint PP 45 (defendants sought FERC approval for the Expansion Project), 71 (FERC ordered defendants to establish a delivery point at Malin and hold an open season auction for capacity to Malin), 93 (FERC temporarily refused to issue defendants' certificate of public convenience and necessity for the Expansion Project).

Both because the price squeeze exception to *Noerr* appears inconsistent with the Supreme Court's recent decision in *Omni Outdoor Advertising* and because the cases upon which plaintiff relies are distinguishable on their facts, the court holds that defendants' conduct before either CPUC or FERC is protected from antitrust attack by the *Noerr-Pennington* doctrine. Accordingly, the court **GRANTS** defendants' motion and **DISMISSES WITH PREJUDICE** plaintiff's federal antitrust claims to the extent they are based on defendants' actions before [*21] either CPUC or FERC.

B

Defendants' second argument for dismissal of plaintiff' complaint is that defendants' actions are protected by [HN5](#)[] the state action doctrine. This doctrine is based on principles of federalism and derives from the Supreme Court's opinion in [Parker v Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#), which held that the antitrust laws were not intended to interfere with states' exercise of their sovereign regulatory powers. Because of federal deference to states' decisions to displace competition with regulation, allegedly anticompetitive restraints become immune to antitrust attack if they are "clearly articulated and affirmatively expressed as state policy" and the policy in question is "actively supervised" by the state. [California Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc, 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)](#).

Plaintiff responds to this argument by again invoking a "price squeeze" exception. Relying on the same set of cases used to defend their claims against *Noerr-Pennington* immunity, plaintiff claims that state action does not protect anticompetitive manipulation of state and federal regulatory systems. For example, in *Kirkwood*, the Eighth Circuit held that [HN6](#)[] an antitrust [*22] challenge directed at that interaction of state and federal rates falls outside of the state action doctrine. [671 F.2d at 1180](#).

Other circuits, including the Ninth, have found a price squeeze exception to state action when the alleged competitive harm is caused by a regulatory "gap" created by federal regulation of wholesale rates and state regulation of retail rates. See [City of Anaheim v Southern Cal Edison, 955 F.2d 1373 \(9th Cir 1992\)](#); [Mishawaka II, 616 F.2d at 981](#). The Ninth Circuit in *Anaheim* accepted that a price squeeze can create antitrust liability, [955 F.2d at 1377](#), notwithstanding criticism of the doctrine by the First Circuit in [Town of Concord v Boston Edison Co, 915 F.2d 17 \(1st Cir 1990\)](#) (Breyer, J), cert denied, 499 U.S. 931, 113 L. Ed. 2d 268, 111 S. Ct. 1337 (1991). Recognizing the need to "tread carefully" in the area of regulated industries, where monopoly activity is often

legalized, however, the Ninth Circuit limited application of this theory by instituting a "specific intent" requirement. [955 F.2d at 1378](#).

All of the price squeeze cases concerned challenges to defendants' manipulations of rate-setting mechanisms in the electricity industry. Plaintiffs accused defendants [*23] of jacking up the price of wholesale power, regulated by the federal government, without pursuing accompanying rate increases for retail rates, which were controlled by state regulations. In none of these cases did plaintiffs challenge a state's own regulatory program. Rather, defendants' alleged manipulations involved *federally* regulated rates. Not surprisingly, the Seventh, Eighth and Ninth Circuits held that such manipulation is not immunized by the state action doctrine.

In the case at bar, however, plaintiff directly challenges defendants' alleged manipulation of state regulated intrastate gas rates. This challenge is materially different from the rate manipulation challenges of the price squeeze cases. Plaintiff directly puts at issue the state's sovereign power to regulate intrastate rates for natural gas, a power that the state action doctrine seeks to protect from federal **antitrust law**. While manipulation of federally regulated rates in the price squeeze cases did not give rise to the federalism concerns that motivate the state action doctrine, CPUC activity that meets the *Midcal* test for state action certainly does.

The crossover ban and postage stamp rates clearly [*24] satisfy [HN7](#)  *Midcal*'s requirements. The first requirement, that the challenged restraint be one "clearly articulated and affirmatively expressed as state policy," [445 U.S. at 105](#), is demonstrated by showing the state's intent to "displace competition * * * with a regulatory structure." [Southern Motor Carriers Rate Conference, Inc v United States, 471 U.S. 48, 64, 85 L. Ed. 2d 36, 105 S. Ct. 1721 \(1985\)](#). In the California natural gas industry, the state's intention is made clear by the California Public Utilities Code, which leaves rate determination to CPUC discretion.¹

Midcal's second prong requires that the state "actively supervise" the regulatory program. [445 U.S. at 105](#). As the Supreme Court wrote in [FTC v. ^{\[*25\]} Ticor Title Insurance Co, 504 U.S. 621, 112 S. Ct. 2169, 119 L. Ed. 2d 410 \(1992\)](#), the purpose of "active supervision" is "to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention." [112 S. Ct. at 2177](#).

CPUC's thorough consideration and reconsideration of the crossover ban and postage stamp rates amply demonstrates the state's active role in regulating defendant PG&E's conduct in this case. See *Re Pacific Gas & Elec Co, 39 CPUC 2d 69 (1990)* (approving postage stamp rates for the intrastate Expansion Project); *Re Pacific Gas & Elec Co, 40 CPUC 2d 497 (1991)* (reaffirming postage stamp rates); *Re Pacific Gas & Elec Co, 40 CPUC 2d 628 (1991)* (approving the crossover ban); *Re Pacific Gas & Elec Co, 1992 Cal. PUC LEXIS 920, 138 P.U.R.4th 105 (1992)* (affirming the crossover ban and postage stamp rates).

The court therefore finds that the crossover ban and postage stamp rates are the product of the state's policy of displacing competition in the natural gas industry with regulation. Because this state policy is implemented pursuant to the state's sovereign regulatory powers and is part of the state's [*26] active regulation of the industry, it is immunized from attack by federal **antitrust law** under the state action doctrine.

Accordingly, the court **GRANTS** defendants' motion and **DISMISSES WITH PREJUDICE** plaintiff's federal antitrust claims to the extent they are based on the crossover ban and postage stamp rates approved by CPUC.

C

¹ [HN8](#)  *California Public Utilities Code § 739.6* provides:

The [CPUC] shall establish rates using cost allocation principles that fairly and reasonably assign to different customer classes the costs of providing service to those customer classes, consistent with the policies of affordability and conservation.

Defendants also assert that adjudicating plaintiff's antitrust claims would require the court to assess damages in violation of [HN9](#)[↑] the filed rate doctrine. This doctrine holds that buyers and sellers have no legally cognizable right to pay or receive a rate in a regulated industry other than the rate established by the rate-setting agency. [Square D Co v Niagara Frontier Tariff Bureau, Inc, 476 U.S. 409, 90 L. Ed. 2d 413, 106 S. Ct. 1922 \(1986\)](#); [Keogh v Chicago & Northwestern Ry Co, 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 \(1922\)](#).

Plaintiff's response to this argument is similar to its responses to the state action and *Noerr* claims, namely, the filed rate doctrine does not apply to harms created by the unlawful interaction of different rates. As the Eighth Circuit wrote in *Kirkwood*,

An award of antitrust damages for a price squeeze would not conflict with the [filed rate] doctrine's [*27] purpose, which is to ensure rate uniformity by confining the authority to oversee the reasonableness of rates to a single regulatory agency. * * * [Plaintiff] does not quarrel with the reasonableness determinations of the FERC and PSC as to any individual wholesale or retail rate. Instead, Kirkwood complains of anti-competitive effects resulting from the interaction of rates which, taken separately, may be reasonable. Thus, neither an award of antitrust damages nor the granting of properly conditioned injunctive relief for the price squeeze would interfere with either commission's regulatory authority.

[671 F.2d at 1179](#) (citations omitted).

In addition, plaintiff urges this court to follow the Eighth Circuit's rule that the filed rate doctrine applies to rate-related claims by customers, not competitors, [Kirkwood, 671 F.2d at 1179](#), and points out that the doctrine limits only damages awards, not the remedy of rescission. [Square D, 476 U.S. at 422](#) ("Keogh simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation. Such a holding is [*28] far different from the creation of an antitrust immunity * * *").

In *Square D*, the Supreme Court emphasized [HN10](#)[↑] that the filed rate doctrine does not provide antitrust immunity. Rather, the doctrine limits the applicability of treble damage awards when they would have to be measured relative to baseline rates established by regulatory bodies. *Id.* Thus, in the instant case it would be inappropriate for the court to dismiss plaintiff's cause of action entirely because of the filed rate doctrine, as that would amount to granting defendants immunity under the antitrust laws merely because they are regulated.

Plaintiff's argument that the filed rate doctrine only prohibits antitrust treble damage awards measured against regulatory rates is well taken. Still, the court is hardpressed to understand how plaintiff can allege any antitrust injury that is not predicated on an argument that it should not be paying the CPUC specified rates for transportation on the Expansion Project. Indeed, plaintiff's prayer for relief for each of its antitrust counts asks the court to award "three times the damages sustained by Plaintiffs" as a result of the particular antitrust violation alleged. Nevertheless, [*29] given the procedural posture of the case and the possibility that plaintiff may articulate a remedy available to it under antitrust laws that does not run afoul of the filed rate doctrine, see, e.g., [Kirkwood, 671 F.2d at 1179](#) (noting that "properly conditioned injunctive relief" circumvents the filed rate doctrine), defendants' motion to dismiss plaintiff's federal antitrust claims based on the filed rate doctrine is DENIED WITHOUT PREJUDICE.

D

Defendants argue that plaintiff previously litigated before CPUC all of the antitrust issues that it now brings to court and that prior factual determinations from those CPUC proceedings are entitled to preclusive effect. In support of this argument, defendants cite [Pacific Tel & Tel Co v CPUC, 600 F.2d 1309](#) (9th Cir), *cert denied*, 444 U.S. 920, 62 L. Ed. 2d 176, 100 S. Ct. 239, 100 S. Ct. 240 (1979), in which plaintiffs sought a preliminary injunction in district court to enjoin implementation of a CPUC order following the California Supreme Court's denial of plaintiffs' petition to review the same order. The district court denied the request, and the Ninth Circuit affirmed, holding that the California Supreme Court's denial of plaintiffs' petition for review constituted [*30] a final judgment on the merits entitled to res judicata effect. *Pacific Telephone* was followed by Judge Patel in [United Parcel Service v CPUC, 839](#)

F. Supp. 702 (1993), which held that UPS could not challenge a CPUC decision regarding its rate changing procedures after the California Supreme Court denied UPS' petition for review.

Based on these cases, defendants would have this court accept as true CPUC findings that the "old" PG&E pipeline had insufficient capacity to transport gas shipped over the PGT Expansion, the crossover ban is "just and reasonable," and the crossover ban "is not an unlawful tying arrangement." Def PG&E's Mtn to Dismiss at 8. While acknowledging that the CPUC proceedings at issue here were legislative rather than judicial, defendants contend that the CPUC's findings of fact were reviewable *de novo* by the California Supreme Court, and that the court's refusal to grant Norcen's petition gives those findings collateral estoppel effect in this court. Def PG&E's Reply at 16 n. 30.

Defendants give undue import to CPUC findings and the California Supreme Court's denial of review. Collateral estoppel generally bars relitigation only of factual issues that were [*31] actually litigated and essential to a judgment. Wright, Miller & Cooper, *Federal Practice and Procedure* § 4421 ("Issue preclusion attaches only to determinations that were necessary to support the judgment entered in the first action."). HN11[ Under California's statutory scheme for appeal of CPUC decisions, the California Supreme Court reviews CPUC findings to determine whether the commission acted within its authority and obeyed the federal and California Constitutions. Cal Pub Util Code § 1757.² Accordingly, all that the California Supreme Court had to determine to deny Norcen's petition for review of CPUC findings was that the commission acted constitutionally and within its authority. The only factual determinations from these proceedings that can be established by collateral estoppel are those necessary to demonstrate these conclusions.

[*32] All of the cases defendants cite in support of their broad collateral estoppel argument are consistent with this narrow interpretation of the preclusive effects of the prior litigation in this case. In *Pacific Telephone*, the Ninth Circuit simply reaffirmed the doctrine of Napa Valley Electric Co v California Railroad Comm'n, 251 U.S. 366, 64 L. Ed. 310, 40 S. Ct. 174 (1920), in which the Supreme Court held that commission findings could be given preclusive effect following the state supreme court's denial of a petition for review. *Napa Valley* made clear, however, that the state supreme court's denial of review was "tantamount [only] to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the State of California." Id at 372. The claims in *Napa Valley* were held constitutional in nature. Id at 368.

While *Pacific Telephone* did concern nonconstitutional challenges to CPUC decisions, the case is properly read as limited solely to the res judicata effects of a decision by the California Supreme Court to deny plaintiffs' petition to review CPUC decisions, [*33] not as establishing that factual determinations of the earlier proceedings must be given preclusive effect in separate proceedings that raise different issues from those raised earlier. Plaintiffs in *Pacific Telephone* sought an injunction in federal court to prevent implementation of a CPUC rate order after the CPUC had denied plaintiffs' request for a rehearing and the California Supreme Court had denied plaintiffs' petition for review. 600 F.2d at 1311. The district court determined that because plaintiffs had already challenged the rate order before the California Supreme Court, plaintiffs' suit for an injunction was precluded by the doctrine of res judicata. The Ninth Circuit affirmed this determination. *Id*. Nowhere in *Pacific Telephone* did the Ninth Circuit rely on particular findings of fact established in CPUC proceedings.

Defendants also cite People v Western Air Lines, Inc, 42 Cal. 2d 621, 268 P.2d 723 (1954), in which the California Supreme Court gave collateral estoppel effect to CPUC findings of fact after denying a petition for review of a CPUC order. Again, however, the issues presented in the petition for review were solely constitutional. 42 Cal. 2d at

² HN12[ Section 1757 provides:

The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.

[629-30](#); see also *United* [*34] [Parcel Service, 839 F. Supp. at 707-08](#) (following *Pacific Telephone and Napa Valley* to bar relitigation of equal protection claim).

Defendants have provided no legal authority to support their claim that CPUC findings of fact should be given preclusive effect when the California Supreme Court did not need to consider those findings in denying plaintiff's petition for review. In this case, it is entirely possible, if not likely, that the California Supreme Court was able to find that the CPUC acted constitutionally and within its authority without ever deciding any of the facts that defendants would have this court take as conclusively established by prior judicial procedures. These issues were simply not before the California Supreme Court, which did not even have before it a full record of the CPUC proceedings. See [Cal Pub Util Code § 1756](#) (requiring a writ to the commission to certify its record for review).

Nor is it clear to the court that CPUC factual findings should have preclusive effect following denial of rehearing by the California Supreme Court. The attention paid to antitrust issues by the CPUC is different from that provided by the federal courts. As Judge [*35] Skelly Wright wrote in an opinion overturning a regulatory agency finding that a natural gas merger did not violate § 7 of the Clayton Act, [HN13](#) regulatory agencies "can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance. In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree * * *." [Northern Natural Gas Co v Federal Power Comm'n, 130 U.S. App. D.C. 220, 399 F.2d 953, 961 \(DC Cir 1968\)](#). The fact that an agency considers antitrust issues does not mean that its findings need be conclusively established.

Accordingly, defendants' motion to dismiss plaintiff's complaint based on either res judicata or collateral estoppel is **DENIED**.

IV

Plaintiff offers several theories to support its argument that defendants' conduct violated Sherman Act § 2: defendants engaged in a "monopoly broth" of conduct; defendant PG&E committed anticompetitive fraud in not disclosing its intention to seek the crossover ban to open season auction bidders; defendants engaged in predatory expansion to preclude competition; defendants denied plaintiff access to essential [*36] facilities; and defendants engaged in monopoly leveraging.

[HN14](#) A section 2 violation of the Sherman Act has three elements: (1) monopoly power in a relevant market; (2) willful acquisition and maintenance of that power; and (3) causal antitrust injury. [City of Anaheim v Southern Cal Edison Co, 955 F.2d 1373, 1376 \(9th Cir 1992\)](#). Plaintiff's complaint must state facts that establish all three of these elements to survive defendants' motion to dismiss.

A

Plaintiff argues that its antitrust claims are directed at a "monopoly broth" of anticompetitive conduct designed to preserve unlawfully PG&E's monopoly on the supply of natural gas to industrial customers in northern California, violating § 2 of the Sherman Act. Ingredients in the alleged broth include: fighting requests for transportation services and opposing new interstate pipelines; making public statements that PG&E wanted to remain the preferred supplier in the northern California industrial market; telling Norcen's customers that Norcen was unreliable; denying Norcen's request for firm transportation on PGT's pipeline to Malin; subscribing PGT capacity to northern California while rejecting Norcen's requests; designing the [*37] Expansion Project to preclude access to the northern California market; allegedly coercing Norcen and others into signing onto the Expansion Project through false misrepresentations; obtaining the crossover ban so as to disadvantage Norcen competitively; and unreasonably building the intrastate portion of the Expansion Project despite the lack of adequate subscriptions in order to increase the value of PGT, which PG&E intended to sell. Pl's Opp to PG&E's Mtn to Dismiss at 5-7.

Plaintiff urges this court to follow [Continental Oil Co v Union Carbide & Carbon Corp, 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 \(1962\)](#), which stated that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." [Id at 699](#).

Still, [HN15](#) to state a § 2 claim, plaintiff must allege that its antitrust injury was caused by conduct that can give rise to an antitrust claim. As the Ninth Circuit has noted, "a finding of some slight wrongdoing in certain areas need not by itself add up to an antitrust violation." [Anaheim, 955 F.2d at 1376](#).

As discussed in Parts IIIA and IIIB of this order, *Noerr-Pennington* prevents plaintiff [*38] from concocting a monopoly broth out of defendants' requests of CPUC or FERC, and state action eliminates as ingredients the crossover ban and postage stamp rates approved by CPUC. Furthermore, for the reasons stated in Part IIIB, any of defendants' other actions approved by CPUC pursuant to its statutory regulatory authority are immunized by the state action doctrine. In oral argument, plaintiff's counsel suggested that all of defendants' activities between 1986 and 1990 were not subject to regulatory approval, placing defendants' conduct in that time period outside of the reach of *Noerr-Pennington* and state action. This contention is contradicted by plaintiff's complaint, however, which points to several instances in which defendants' conduct between 1986 and 1990 was subject to regulatory approval. Complaint PP 36 ("In May, 1987, Bonus was able to secure * * * an authorization by the FERC allowing Bonus to ship up to 30 MMcf/day on an interruptible basis to specified end users within PG&E's service territory."), 45 (PGT filed an application with FERC for the Expansion Project in 1988), 52 (PG&E filed for CPUC approval of the Expansion Project in 1989).

Moreover, plaintiff's [*39] complaint fails to specify acts by defendants in the 1986-1990 time period that demonstrate unlawful monopolization. [HN16](#) "The test of willful maintenance or acquisition of monopoly power is whether the acts complained of unreasonably restricted competition." [Oahu Gas Serv, Inc v Pacific Resources, Inc, 838 F.2d 360 \(9th Cir\), cert denied, 488 U.S. 870, 102 L. Ed. 2d 149, 109 S. Ct. 180 \(1988\)](#) (quoting [Drinkwine v Federated Publications, Inc, 780 F.2d 735 \(9th Cir 1985\)](#), cert denied, 475 U.S. 1087, 89 L. Ed. 2d 727, 106 S. Ct. 1471 (1986)). The sum of plaintiff's argument is that defendants refused plaintiff's requests for firm transportation service to deliver Canadian natural gas to Malin, Oregon. in cases such as this, [HN17](#) if a monopolist is charged with refusing to aid a competitor, antitrust liability is determined by asking "whether there was a legitimate business justification for the monopolist's conduct." [Oahu, 838 F.2d at 368](#). In addition, plaintiff must demonstrate that defendant's conduct harmed not only the plaintiff but also competition generally. [838 F.2d at 370](#) ("The goal of antitrust laws * * * is to safeguard general competitive conditions, rather than to protect specific competitor.").

Plaintiff's complaint fails to allege defendants' [*40] conduct harmed competition and was not justified by legitimate business reasons. For example, plaintiff contends that its interruptible service on PGT's old pipeline was "interrupted with great frequency," Complaint P 38, but this only shows that defendants were acting within their rights. Similarly, plaintiff's contention that PG&E perceived plaintiff's request for firm transportation on PGT's old pipeline was "contrary to its interests," [id P 40](#), merely shows that defendants saw plaintiff as a potential competitor.

Paragraph 63 of plaintiff's complaint alleges defendants acted without business justification:

On or about January 8, 1990, the Expansion Project rejected * * * Bonus['] request for firm capacity, asserting that available capacity was fully subscribed. This refusal constituted a discriminatory and anticompetitive refusal to provide for Bonus an accommodation for additional capacity that was provided instead to other shippers, including PG&E itself. * * * On information and belief, [defendants] in fact had and continue to have no business justification for their refusal to provide Bonus with service provided to other shippers.

But even this paragraph [*41] merely states that defendants refused to deal with plaintiff's predecessor in interest on the same terms with which it dealt with other shippers. At most, this paragraph alleges harm to plaintiff, but it does not allege harm to competition.

Furthermore, even if some harm to competition could be found. plaintiff's cause of action based on the events in this paragraph is now time barred. [HN18](#) [15 USC § 15b](#) provides a four year statute of limitations for antitrust violations. The limitations period begins to run when the defendant commits the acts giving rise to the alleged injury. [Mir v Little Co of Mary Hosp, 844 F.2d 646 \(9th Cir 1988\)](#). Thus, the limitations period for plaintiff's antitrust action based on the events described in paragraph 63 of plaintiff's complaint expired on or about January 8, 1994. Plaintiff's complaint, filed March 16, 1994, was too late.

Only allegations related to defendant PGT's repudiation of its July 1990 agreement with Norcen's predecessor in interest are neither time barred nor subject to antitrust immunity under *Noerr-Pennington* or the state action doctrine. See Complaint P 72. All these allegations amount to, however, is a claim that defendant [*42] PGT breached a contract. Nothing suggests that the breach caused an injury to competition. As such, this paragraph cannot support a monopolization claim.

In sum, plaintiff's monopoly broth lacks the necessary ingredients. Plaintiff's complaint fails to allege that plaintiff suffered an antitrust injury as a result of activities that are neither time barred nor protected by *Noerr-Pennington* or state action. Defendants' motion to dismiss plaintiff's § 2 claims based on a monopoly broth of unlawful conduct is therefore **GRANTED**. Plaintiff's § 2 claims are **DISMISSED WITHOUT PREJUDICE** to give plaintiff the opportunity to amend its complaint to conform to the requirements of this order if it can do so.

B

Plaintiff contends that allegations that PG&E "embarked on the Expansion project both with a subscription level so low as to be unprecedented in the North American gas industry and with unreasonable estimates of demand are sufficient" to make out a § 2 claim based on predatory investment. Pl's Reply to Def PG&E's Mtn to Dismiss at 11.

This contention is plainly wrong. As the Supreme Court recently noted in *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 U.S. 209, 113 [*431] S. Ct. 2578, 2589, 125 L. Ed. 2d 168, HN19 [↑] to demonstrate predatory conduct, "the plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation * * *."

Here, plaintiff has pled just the opposite. It claims that PG&E's Expansion Project was undersubscribed when built and remains so today. Complaint P 101. Undersubscribed capacity is likely to cause downward rather than upward pressure on prices. Thus, plaintiff has failed to allege facts that suggest a likely increase in price.

Furthermore, defendant PG&E could not have gone forward with the Expansion Project without CPUC approval. For the reasons stated in Part IIIB of this order, CPUC approval of defendant PG&E's actions protects those actions from antitrust attack under the state action doctrine.

Defendants' motion to dismiss plaintiff's Sherman Act § 2 claims based on a predatory investment theory is therefore **GRANTED**, and plaintiff's predatory investment claim is **DISMISSED WITH PREJUDICE**.

C

Plaintiff alleges that defendants engaged in actionable "monopoly leveraging" by abusing [*44] their monopoly power in transportation to secure a competitive advantage in the downstream sales market. Pl's Opp to Def PG&E's Mtn to Dismiss at 12-13. The Ninth Circuit has specifically rejected monopoly leveraging as a basis for liability under § 2 of the Sherman Act independent of either monopolization or attempted monopolization. *Alaska Airlines, Inc v United Airlines, Inc*, 948 F.2d 536, 547 (9th Cir 1991), cert denied, 503 U.S. 977, 112 S. Ct. 1603, 118 L. Ed. 2d 316 (1992). For the reasons stated in part IVA of this order, plaintiff's complaint fails adequately to allege a monopolization claim under § 2 of the Sherman Act. Nor does plaintiff argue that its complaint can be interpreted as making out an attempted monopolization claim. Accordingly, defendants' motion to dismiss plaintiff's § 2 claims based on a theory of "monopoly leveraging" is **GRANTED**, and plaintiff's Sherman Act § 2 claim based on monopoly leveraging is **DISMISSED WITH PREJUDICE**.

D

Plaintiff alleges that it has stated a Sherman Act § 2 claim based on denial of access to two "essential facilities," PG&E's non-Expansion intrastate distribution system and firm transportation on PGT's old Kingsgate-Malin pipe.

The [*45] first of these claims can be dismissed under the state action doctrine. Plaintiff contends that defendants' engaged in exclusionary conduct by refusing to allow gas brought to Malin on the PGT Expansion to be distributed

over PG&E's pre-Expansion capacity. This allegedly exclusionary behavior is the result of the crossover ban, however, which was adopted by CPUC as part of its exercise of sovereign regulatory powers. For the reasons stated in part IIIB of this order, the crossover ban is immune from antitrust challenge.

In *Alaska Airlines*, the Ninth Circuit sought to determine when a facility controlled by one competitor is "essential" such that denial of access constitutes an antitrust injury. After thoroughly reviewing the essential facilities case law, the court concluded that a facility controlled by one firm is essential "only if control of the facility carries with it the power to *eliminate* competition in the downstream market." [948 F.2d at 544](#) (emphasis in original).

This rule bars plaintiff's essential facilities claim based on a denial of access to PGT's pre-Expansion Kingsgate-Malin pipe. By plaintiff's own admission, it has the ability to compete with defendant [*46] PG&E in sales of natural gas to industrial customers in northern California, albeit at a lower rate of return than plaintiff expected. See Complaint, P 104 (noting that plaintiff has "declined to make any use" of its transportation entitlements). Accordingly, the court concludes that plaintiff has failed to state an essential facilities claim. Defendants' motion to dismiss plaintiff's § 2 claim based on denial of access to essential facilities is therefore **GRANTED** and plaintiff's essential facilities claim is **DISMISSED WITHOUT PREJUDICE**.

E

Plaintiff's fourth cause of action alleges that defendants unlawfully tied intrastate distribution on defendant PG&E's Expansion capacity to the purchase of capacity on PGT's Expansion pipe in violation of Sherman Act § 1. [HN20](#) A tying arrangement can be unlawful either per se or if it unreasonably restrains commerce in the tied product or service. In [Jefferson Parish Hospital District No 2 v Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#), the Supreme Court specified the essential elements of a per se § 1 tying claim. First, there must be two distinguishable product markets. [Id at 21](#). Second, the seller of one product, the tying product, must, through [*47] exercise of control of that product, force the buyer into purchase of the second, or tied product, when the buyer did not wish to purchase it or would have wished to purchase it on different terms. [Id at 12](#) Not every bundling of two products is unlawful. Only if the seller "forces" the buyer into a purchase it would not otherwise make does actionable tying exist. *Id*; see also [Robert's Waikiki U-Drive, Inc v Budget Rent-a-Car Sys, Inc, 732 F.2d 1403, 1407 \(9th Cir 1984\)](#). To determine whether a tying arrangement places unreasonable restraints on competition for the tied product, courts must investigate the effect of the alleged unlawful tie on competition for the tied product. [Jefferson Parish, 466 U.S. at 29](#).

Plaintiff's per se tying argument fails as a matter of law because, as plaintiff alleges, it has never purchased any of the allegedly tied product, intrastate natural gas distribution on PG&E's Expansion Project. Complain P 96.

Plaintiff also has failed to state a tying argument based on an unreasonable restriction on commerce in the tied product. The mechanism that creates the alleged tie between intrastate Expansion capacity and interstate Expansion capacity is the [*48] CPUC's crossover ban, which was adopted by CPUC after careful consideration of the policies underlying state regulation of the natural gas industry. Plaintiff's tying theory would require this court to use the antitrust laws to invalidate this state action. As the court discussed in part IIIB of this order, however, the crossover ban is entitled to antitrust immunity. Furthermore, plaintiff's complaint makes no allegations that the crossover ban has adversely affected competition in the sale of natural gas in northern California. Accordingly, defendants' motion to dismiss plaintiff's fourth cause of action based on Sherman Act § 1 is **GRANTED** and plaintiff's tying claim is **DISMISSED WITHOUT PREJUDICE**.

V

In summary, defendants' motion to dismiss plaintiff's Sherman Act claims based on *Noerr-Pennington* and the state action doctrine is **GRANTED**. Defendants' motion to dismiss plaintiff's Sherman Act claims based on collateral estoppel and the filed rate doctrine is **DENIED**. Plaintiff's § 2 claims based on a "monopoly broth" of anticompetitive conduct and denial of access to essential facilities are **DISMISSED WITHOUT PREJUDICE**. Plaintiff's § 2 claims [*49] based on predatory investment and monopoly leveraging are **DISMISSED WITH PREJUDICE**. Plaintiff's Sherman Act § 1 claim based on unlawful tying is **DISMISSED WITHOUT PREJUDICE**. For the reasons

discussed in this order, all federal antitrust claims against the alleged joint entity PG&E/PGT Pipeline Expansion Project are also **DISMISSED**. Plaintiff may refile these claims based on any theories available to it consistent with this order.

Because the complaint fails to state any federal claim, the court finds itself without jurisdiction over plaintiff's state law claims, which are hereby **DISMISSED WITHOUT PREJUDICE**. [28 USC § 1331](#).

Plaintiff may refile any claims dismissed without prejudice within thirty days of this order.

IT IS SO ORDERED.

VAUGHN R. WALKER

United States District Judge

End of Document



Valley Drive Sys. v. EMPI, Inc.

United States District Court for the Northern District of Illinois, Western Division

September 19, 1994, Decided

No. 94 C 50118

Reporter

1994 U.S. Dist. LEXIS 13233 *; 1994-2 Trade Cas. (CCH) P70,819

VALLEY DRIVE SYSTEMS, INC., Plaintiff, v. EMPI, INC., Defendant.

Notice: [*1] NOT FOR PUBLICATION

Core Terms

venue, convenience, factors, cages, judicial district, witnesses, reside, district court, antitrust, customers, parties, interest of justice, warehouse, lawsuit

LexisNexis® Headnotes

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

HN1 [down arrow] Federal Venue Transfers, Convenience Transfers

28 U.S.C.S. § 1404(a) provides that for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. District courts have broad discretion to grant or deny a motion to transfer under § 1404(a). Additionally, the moving party has the burden of showing that the transferee forum is clearly more convenient.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN2 [down arrow] Venue, Federal Venue Transfers

While courts have generally reduced the analysis of a venue question to the balancing of three factors: the convenience of parties, the convenience of non-party witnesses, and the interest of justice, the court must first determine whether venue is proper in each district.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN3 [down] Procedural Matters, Jurisdiction

In an antitrust action, a corporate defendant may be sued in any judicial district where it is an inhabitant, where it may be found or where it transacts business. [15 U.S.C.S. § 22](#). This venue provision is viewed together with the general venue provisions of [28 U.S.C.S. § 1391](#), and venue is proper if either statutory provision is satisfied. Under [15 U.S.C.S. § 22](#), a corporation transacts business in a judicial district if its business therein is of a substantial character.

Civil Procedure > ... > Jurisdiction > Diversity Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN4 [down] Jurisdiction, Diversity Jurisdiction

[28 U.S.C.S. § 1391\(a\)](#) states:(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN5 [down] Venue, Corporations

[28 U.S.C.S. § 1391\(c\)](#) provides: (c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a state which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that state within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

Counsel: FOR PLAINTIFF: Gregory E. Barrett, John L. Olson, Schlueter, Ecklund, Olson, Barrett & Moor, Rockford, IL.

FOR DEFENDANT: Michael C. Cook, Robert C. Johnson, McCullough, Campbell & Lane, Chicago, IL.

Judges: REINHARD

Opinion by: PHILIP G. REINHARD

Opinion

MEMORANDUM OPINION AND ORDER

INTRODUCTION

Plaintiff, Valley Drive Systems, Inc., filed a complaint in the Circuit Court of Winnebago County, Illinois seeking \$266,764 from defendant, EMPI, Inc., allegedly due and owing for the sale of certain products by plaintiff to defendant. Defendant removed the circuit court action to this court on April 15, 1994.¹ On April 14, 1994, defendant filed a three-count complaint against plaintiff in the United States District Court for the Central District of California alleging causes of action under [section 2\(a\)](#) of the Robinson-Putman Act, [15 U.S.C. § 13\(a\)](#), and under [section 2](#) of the Sherman Anti-Trust Act, [15 U.S.C. § 2](#). Defendant also answered the complaint herein and raised several affirmative defenses, one of which incorporated the allegations of the complaint filed by defendant in the California district court. Defendant [***2**] has moved in this court, pursuant to [28 U.S.C. § 1404\(a\)](#), for a transfer of venue to the Central District of California or, alternatively, for a stay of the proceedings here pending resolution of the litigation in the California court. Plaintiff has also moved in the California court to dismiss the action there under [Fed.R.Civ.P. 12\(b\)](#) or to stay it because of alleged forum shopping by defendant and because of an alleged attempt by defendant to avoid the scrutiny of a motion for transfer under [28 U.S.C. 1404\(a\)](#) or under the doctrine of *forum non conveniens*.

FACTS

Defendant is a California corporation that distributes automotive replacement parts, including constant velocity joint (CV joint) races and cages. Races and cages are used in the rebuilding of CV joints [***3**] for sale as replacement parts. Plaintiff, an Illinois corporation, is a manufacturer of races and cages used in the rebuilding of CV joints.

According to Daniel Welden, defendant's president, he was involved in 1992 in negotiations with plaintiff regarding the possibility of defendant becoming a distributor for plaintiff's races and cages. He went to Rockford, Illinois to visit plaintiff but made no commitments at that time. In approximately March 1993, Welden met with two representatives of plaintiff in California and placed his first purchase order with plaintiff. One of the representatives, Scott Gompper, was based in Los Angeles and acted as the West Coast sales representative for plaintiff.

Defendant continued to place orders with plaintiff through January 1994. Following the last order placed, which is the subject of this lawsuit, Welden learned that races and cages were being sold to non-distributors (defendant's actual and potential customers) at prices which make it impossible for defendant to sell the races and cages from plaintiff except at a loss. Plaintiff has also recently established a warehouse in Orange County, California, which is within in defendant's sales territory.

[***4**] Welden also asserts in his affidavit as factors favoring transfer of this cause to California: that Welden himself, Todd Piper, who was the representative of plaintiff involved in the initial deal between plaintiff and defendant and

¹ While defendant states in its motion to transfer venue that the notice of removal was filed in this court on April 14, 1994, the file stamp on the notice is dated April 15, 1994.

who is now defendant's employee, and Gompper, who resides in southern California, will probably be witnesses; that defendant's first order was negotiated for and placed in southern California; that plaintiff now has a warehouse in Orange County; that all parts purchased from plaintiff were shipped to southern California and the inventory remains there; and that a number of present and former customers of plaintiff and defendant are in California and will be witnesses.

According to Piper, a former representative of plaintiff and present employee of defendant, he convinced Welden in about December 1991 to come to Rockford to visit plaintiff's facility and inspect its products. Welden made no commitments to plaintiff during his Rockford visit. He, Gompper and Welden met in Los Angeles, and Welden placed his first order at that time.

Plaintiff has submitted the declaration of its president, Don DiGiovanni, in opposition to the motion to transfer. According [*5] to DiGiovanni, he, plaintiff's vice-president, plaintiff's technical manager and plaintiff's head machinist would be required to testify. Each of the persons resides in the Rockford area and none of them are scheduled to travel to California in the next year. While Piper initially contacted Welden and generated orders for plaintiff, the orders which are the subject of the lawsuit were negotiated by DiGiovanni by telephone. Also, while Piper spends a portion of his time in California, he maintains a residence in Illinois, and his family lives in Rockford. All of the parts which are the subject of the lawsuit were manufactured in Rockford and all records regarding the parts are located here. According to DiGiovanni, plaintiff's principal customers, other than defendants, are located in Wisconsin, Pennsylvania and Florida. Plaintiff's principal competitors are located in Texas and Illinois. Approximately twenty percent of plaintiff's races and cages market is in California. In May 1994, plaintiff opened a 1,600 square foot warehouse in California maintained by a single employee who has no connection with the present dispute.

CONTENTIONS

Defendant contends that this cause should be [*6] transferred to the Central District of California because the factors set forth in [28 U.S.C. § 1404\(a\)](#) weigh in favor of such transfer. Plaintiff responds that these factors compel denial of the motion to transfer.

DISCUSSION

HN1 [↑] [Section 1404\(a\)](#) provides that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." District courts have broad discretion to grant or deny a motion to transfer under [section 1404\(a\). Heller Financial, Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1293 \(7th Cir. 1989\)](#). Additionally, the moving party has the burden of showing that the transferee forum is clearly more convenient. *Id.*

HN2 [↑] While courts have generally reduced the analysis of a venue question to the balancing of three factors: the convenience of parties, the convenience of non-party witnesses, and the interest of justice, [Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219 \(7th Cir. 1986\)](#); the court must first determine whether venue is proper in each district, [Vanguard Financial Serv. Corp. v. Johnson, 736 F. Supp. 832, 837 \(N.D. Ill. 1990\)](#). [*7] Consequently, this court must decide whether venue properly lies in both the Central District of California and the Northern District of Illinois.

Turning first to the question of whether venue is proper in the Central District of California, the court notes that the cause of action brought there is at least, in part, an antitrust claim. **HN3** [↑] In an antitrust action, a corporate defendant may be sued in any judicial district where it is an inhabitant, where it may be found or where it transacts business. [15 U.S.C. § 22; International Communications, Inc. v. Rates Technology, Inc., 694 F. Supp. 1347, 1352 \(E.D. Wisc. 1988\)](#). This venue provision is viewed together with the general venue provisions of [28 U.S.C. § 1331](#), and venue is proper if either statutory provision is satisfied. [International Communications, 694 F. Supp. at 1352; Sportmart, Inc. v. Frisch, 537 F. Supp. 1254, 1257 \(N.D. Ill. 1982\); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 429 F. Supp. 139, 141 \(N.D. Ill. 1977\)](#). Under [15 U.S.C. § 22](#), [*8] a corporation transacts business in a judicial district if its

business therein is of a substantial character. *Armco Steel Co. v. CSX Corp.*, 790 F. Supp. 311, 319-20 (D.D.C. 1991); *Amateur-Wholesale Elec. v. R.L. Drake Co.*, 515 F. Supp. 580, 584 (S.D. Fla. 1981).

In the present case, defendant was, according to DiGiovanni, a principal customer of plaintiff. Additionally, plaintiff sold several hundred thousand dollars of goods to defendant and delivered them to its facilities in the Central District of California.² Moreover, approximately twenty percent of plaintiff's race and cage market is in California, at least some of which is in the Central District. Based on these undisputed facts, the court finds that plaintiff transacted business in the Central District of California and that venue properly lies in that judicial district under [15 U.S.C. § 22](#).

[*9] As to the propriety of venue in this district, the court relies on the general venue provisions under [28 U.S.C. § 1331\(a\)](#), as the matter here is one solely premised on diversity of citizenship.

HN4 [↑] [Section 1331\(a\)](#) states:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

HN5 [↑] [Section 1331\(c\)](#) provides:

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which [*10] a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

Under the facts of this case, the court finds venue to be proper here under [section 1331\(a\)\(2\)](#) as a substantial part of the events or omissions giving rise to the claim occurred in this district. The claim in this court is essentially one for breach of a sales contract. The sale which is the subject of this lawsuit was negotiated by DiGiovanni by telephone from Illinois. Presumably the decision as to the price of the races and cages was also arrived at at least in part by DiGiovanni here in Illinois. Also, the parts were manufactured here and shipped from here to California. These facts support venue in this district under [section 1331\(a\)\(2\)](#).

Having concluded that venue properly lies in both this district and the Central District of California, [*11] the court must next decide whether the cause filed here is better heard here or in California. As noted above, the court must balance the three factors of convenience of the parties, convenience of non-party witnesses and the interest of justice, in determining which venue is most appropriate. See *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986). In doing so, the court must consider these statutory factors in light of all the circumstances of the case. *Id.* The weighing of these factors necessarily involves a large degree of subtlety and latitude. *Id.*

In looking at the evidence submitted by the parties relevant to these three factors, the court reiterates that it is defendant's burden, as the party seeking the transfer, to show that the Central District of California is clearly more convenient than the district chosen by plaintiff. See *Coffey*, 796 F.2d at 219-20. First, regarding the convenience of the parties, this factor does not weigh in favor of either party. Defendant has its corporate offices in California, and plaintiff has its facilities here. While defendant points to the existence of plaintiff's [*12] warehouse in California as evidence that a lawsuit there will not inconvenience plaintiff, the warehouse is relatively small and employs only one

² The court takes judicial notice of the fact that defendant is located within the Central District of California.

person. Such a minor presence does not make litigation in California any less inconvenient for plaintiff. Furthermore, several employees of defendant will have to travel here if the case proceeds in this district and several of plaintiff's employees will have to go to California should the court transfer this matter.

Second, the only evidence as to non-party witnesses is offered by plaintiff. According to DiGiovanni, plaintiff's principal customers, other than defendant, are located in Wisconsin, Pennsylvania and Florida. Its principal competitors are in Texas and Illinois. To the extent witnesses from plaintiff's customers and competitors will be needed at trial, it would be generally less inconvenient for them to travel here than to California.

Lastly, the interest of justice includes such concerns as ensuring speedy trials, trying related litigation together and having a judge who is familiar with the applicable law try the case. [Heller Financial, 883 F.2d at 1293](#). The interest of justice analysis relates [*13] to the efficient functioning of the courts. [Coffey, 796 F.2d at 221](#).

In the present case, defendant has offered no evidence to show that the parties would receive a speedier trial in the Central District of California than here. While it is generally more efficient to try related litigation together, defendant has not specifically identified how in this case it will be less efficient to try a breach of contract claim here and an antitrust case in California. Furthermore, there is a pending motion to dismiss the California litigation which may be granted, as the district court there is holding that motion in abeyance pending the outcome of the present motion. Additionally, defendant has suggested no reason why it could not bring its antitrust claims as counterclaims in this action. Finally, as to the court's familiarity with the applicable law, the action here is for breach of a sales contract. The court does not consider the applicable law, whether California's or Illinois', to be particularly difficult of application. Furthermore, to the extent the case raises [antitrust law](#) by way of affirmative defense, that is a matter of federal law which this and [*14] the California court are equally capable of applying.

After considering the evidence bearing on the three factors, the court finds that defendant has not demonstrated that the Central District of California is clearly a more convenient forum than this court. Therefore, the court denies defendant's motion to transfer. The court further denies the alternative motion to stay as defendant had not offered, nor is this court aware of any, reason to stay this proceeding.

CONCLUSION

For the foregoing reasons, the court denies defendant's motion to transfer venue and motion to stay these proceedings pending disposition of the litigation in the Central District of California.

ENTER:

PHILIP G. REINHARD, JUDGE

UNITED STATES DISTRICT COURT

DATED: September 19, 1994